From:	Chye-Ching Huang
To:	Bowdler, Janis; Somani, Aditi; TACRE
Cc:	Samuel Knowles
Subject:	Audits below $400k, Tax Law Center recommendations, and equity implications
Date:	Wednesday, April 26, 2023 1:42:00 PM
Attachments:	Examining IRS Commissioner Werfel"s remarks on audit rates_04.26.2023.pdf

Dear Janis, Aditi, and TACRE team,

I wanted to flag for you this Tax Law Center piece containing our recommendations for how the IRS should operationalize the Administration's pledge about audit rates for filers with incomes below $400k. As the piece explains, there are significant racial equity implications for some of the choices that the IRS must make about how to do so, including how to allocate audits below the $400,000 threshold.

I hope this is helpful, and we are happy to discuss if useful.

Kind regards,

Chye-Ching

--

Chye-Ching Huang

Executive Director

The Tax Law Center at NYU Law

Website | Mailing list

Twitter @TaxLawCenterNYU and @dashching

The Tax Law Center NYU LAW

April 26th, 2023

Examining IRS Commissioner Werfel's remarks on audit rates -- and what the IRS should do next

By: Chye-Ching Huang and Kathleen Bryant

The Inflation Reduction Act (IRA) provides $80 billion to rebuild and improve the tax system after more than a decade of deep cuts to the IRS budget. Treasury Secretary Janet Yellen and IRS Commissioner Daniel Werfel have pledged that the IRA's funding stream will "not be used to increase the share of small businesses or households below the $400,000 threshold that are audited *relative to historical levels*." The Administration has understandably made that pledge to help assure Americans that the investment in tax enforcement will be focused on "high-income and high-wealth individuals, complex partnerships, and large corporations that are not paying the taxes they owe."

In a hearing on April 19th before the Senate Finance Committee, Commissioner Werfel provided additional detail on audit rates for those making less than $400,000 as the IRS puts the funding to use. While he indicated that the IRS might eventually bring audit rates for that group toward historical levels, he suggested that, as an operational matter and "for the next number of years" the IRS is "going to be so focused on increasing capacity for high wealth taxpayers, individuals, corporations, and partnerships" that, for tax filers falling below the threshold, there will be "no change […] to the most recent audit rate," which is for tax year 2018 since that is the last year with complete data available.

Werfel's remarks indicate that in the near term and as an operational matter, the IRS will maintain audit rates on filers with incomes below $400,000 at 2018 levels. Commissioner Werfel and Deputy Treasury Secretary Adeyemo describe this as a practical constraint, noting the primary immediate enforcement focus on high-income, high-wealth taxpayers, along with the fact that "it takes time to train a good auditor." But audit rates for 2018 tax returns are a bad guide for what fair, effective tax enforcement should look like given the effects of IRS underfunding and an unprecedented global pandemic. Instead, the IRS should aim to return to *representative* historical levels of audit rates as quickly as possible. This would be entirely consistent with the administration's pledge and its goal of focusing enforcement efforts from the new funding on high-income Americans and large, complex business entities.

Below we explain why this is the case and the steps that the IRS should take next.

Audit rates for 2018 tax returns were exceptionally low due to a decade of budget cuts and a pandemic

Audit rates in tax year 2018 are abnormally low. The overall audit rate for individual income tax returns is almost 30 percent lower than for just the previous year of 2017. In fact, the overall audit rate for 2018 is more than 50 percent lower than the average from 2010 to 2017. The very low audit rates for 2018 likely reflect the combined effects of years of funding cuts as well as the significant effects of the pandemic on IRS operations.

Funding cuts led to a substantial reduction in audit rates after 2010. Between fiscal years 2010 and 2021, the IRS's overall budget was cut by about a fifth and the part of the budget dedicated to tax enforcement was cut by about 23%, after adjusting for inflation. Over the same time frame, the number of tax enforcement staff declined by about 30%. These resource constraints caused the overall audit rate for individual income tax returns to fall from 1.0% in tax year 2010 to 0.5% in tax year 2017. The overall audit rate fell even further to just 0.3% in tax year 2018. Audit rates have fallen most steeply for filers with very high incomes, but they also dropped sharply for upper-middle income tax filers. The audit rate on tax filers reporting incomes between $100,000 and $500,000 fell from 1.2% in 2010 to 0.4% in 2017, and plummeted to just 0.2% in 2018.

Low audit rates in 2018 reflect, at least in part, the cumulative damage of more than a decade of IRS budget cuts. However, dramatic changes in audit rates between 2017 and 2018 cannot be explained by the effects of IRS funding cuts alone.

The audit rate for tax year 2018 is also likely "artificially depressed" because of the effects of the COVID-19 pandemic, as we have previously noted. Tax returns for 2018 were typically filed in 2019, and then would have been processed and audited in subsequent years. But the IRS suspended virtually all compliance activities between March and July 2020, and even once enforcement programs resumed, the agency faced significant backlogs of correspondence and staffing shortages that delayed opening new cases. Since the IRS generally has a three-year statute of limitations for audits and assessment after a tax return is filed, the suspension of compliance activity fell squarely during the audit period for the 2018 tax year. Moreover, throughout the pandemic, the IRS had to reshuffle staff and resources to meet other urgent needs, including delivering economic impact payments, advance child tax credit payments, and more. This may have also reduced audit rates in subsequent tax years, although complete audit data for tax years 2019 and beyond are not yet available.

As a result, 2018 is an outlier year in terms of audit rates and sustaining such low audit rates for those with incomes below $400,000 may have several undesirable consequences. Taxes that are owed but not paid will not be discovered and recovered. Furthermore, audits encourage voluntary compliance among filers more generally, and to the extent that unscrupulous actors – including certain paid tax preparers and other would-be tax cheats – start to expect that the extremely low audit rates of 2018 are the "new normal," they may be more willing to cheat and play the "audit lottery" by underreporting income to fall below the $400,000 threshold. This risk is particularly acute for those filers – often with higher incomes – who, unlike typical wage earners, are not subject to substantial third-party reporting that makes it easier for the IRS to double check that income is reported correctly without conducting an audit.

To be fair, the IRS is so depleted after a decade of funding cuts that increasing audit rates on tax filers making below $400,000 to representative historical levels would be impossible in the short term, and Commissioner Werfel's comments may, in part, reflect this. The IRS faces serious practical limits on how many replacement enforcement staff it can hire in the near-term, especially given that the IRS faces other immediate priorities for hiring in other areas like taxpayer services, IT modernization, and more. Furthermore, it will take some time to train new

enforcement staff, and any time that existing revenue agents must spend onboarding new hires will likely reduce some of their time spent auditing returns and on other compliance activities. These types of constraints are reflected in official estimates from the Congressional Budget Office, which projected that it would take about three years for staff to "become trained and fully productive" and for the IRS to generate "peak return-on-investment" in terms of tax revenue collected per dollar of enforcement funding from the IRA.

However, as an operational matter and even as new hiring is focused on building capacity to audit high-income tax filers, it is possible that audit rates would – absent artificial constraints – rise above abnormally low 2018 levels as IRS operations normalize in the wake of the pandemic. That would still leave audit rates at or below representative historical levels as the Administration pledged.

What the IRS should do now

Looking ahead, we have several recommendations for the IRS as it operationalizes the pledge to not increase audit rates below $400,000 above historical levels:

1. **Set a quick path to an appropriate and more representative historical average.**

The IRS should allow enforcement operations to immediately normalize as the agency recovers from the effects of the pandemic. That would likely still leave audit rates well below their historical levels, and the IRS should then move to restore audit rates for filers with income below $400,000 to levels that better represent historical trends, even as they immediately focus on expanding enforcement for those with the highest incomes and for complex business entities.

In normalizing operations and then returning audit rates to historical levels, the administration will likely need to choose a specific benchmark that represents "historical levels." There are several reasonable options but using 2018 as a benchmark is not one of them. For example, the IRS could set historical levels based on audit rates from 2010, which is the most recent year before its budget began declining in inflation-adjusted terms. Another option is to use a multi-year historical average spanning the 2000s, or potentially going back even further.

The IRS should also commit to a specific timeline for adopting this more representative historical benchmark. The agency has set detailed goals, timelines, and initiatives for many other difficult operational challenges in its Strategic Operating Plan (SOP), and should do so with respect to these audit rates. In any event, the IRS should not maintain 2018 audit rates any longer than is necessary to address immediate limitations around hiring and training.

Such an approach would:

- Be consistent with the IRA's goals to *rebuild and improve* the IRS after a decade of disinvestment.
- Build trust in IRS stewardship of the $80 billion funding. The IRS should not set goals that require "bare minimum" effort to achieve, and nothing in the IRA's statutory text or prior Administration commitments (including Commissioner Werfel's statements during his nomination hearing) require audit rates to be held to artificial lows for any group of filers.

- Further the IRS's duty to faithfully apply the law and ensure that *all* filers follow the law. The SOP lays out several laudable goals to improve tax compliance across the income distribution by ensuring that more filers have access to "front end" assistance with filing and guidance that will help them comply with their tax obligations. The SOP also reflects that the IRS will concentrate on increasing audit rates and compliance activity for the high-income filers and large businesses that contribute the most to the tax gap.

  These are sound decisions, but they are not inconsistent with allowing audit rates for filers with incomes below $400,000 to reach levels that are more representative of historical trends than 2018.

It is important to understand that, by the terms of the Administration's own pledge, the historical audit rates for filers below $400,000 are a *ceiling*. If the IRS can show through the research and evaluation efforts promised in the SOP that maintaining low audit rates on filers earning less than $400,000 is the most effective and efficient way to reduce the tax gap because enforcement resources are better used elsewhere, it will remain free to continue doing so.

But the IRS should not prematurely and unnecessarily constrain itself now to a 2018 audit rate ceiling for longer than is needed, because doing so could lead to inefficient use of the $80 billion and a failure to faithfully ensure tax compliance across the income spectrum.

2. Change how audits are distributed under the $400,000 threshold to advance equity and shrink the tax gap.

Regardless of how the IRS chooses to approach setting an overall audit rate for those earning less than $400,000, it should take immediate steps to examine and rebalance audit rates *within* the income groups falling below that threshold. The IRS should do so in ways that further its goals of both addressing the tax gap efficiently and taking swift action to address the stark racial disparities in audit rates revealed by recent work from academic and Treasury researchers. As we have previously explained, a recent working paper found that Black tax filers are 2.9 to 4.7 times more likely to be selected for audits than non-Black tax filers and provided some possible explanations for these disparities (which exist even after controlling for factors like income and household composition).

For instance, the IRS should consider rebalancing the following:

- *Audits rates on tax filers claiming the Earned Income Tax Credit (EITC) versus those who do not.* Currently, EITC claimants are audited at about four times the rate of certain upper-middle-income tax filers, even though the latter group is responsible for a higher share of unpaid taxes. In tax year 2018, low-income tax filers claiming the EITC were audited at a rate of 0.9%, while tax filers with incomes between $100,000 and $500,000 were audited at a rate of 0.2%. The IRS has estimated that EITC filers account for 10% of the individual income tax under-reporting gap. There is no official estimate of the tax gap share for filers earning between $100,000 and $500,000, but research finds that a roughly comparable group of tax filers (those falling into the 80th to 98th percentiles of the income distribution) accounts for about 44% of that gap (when filers are ranked by their "true" incomes rather than reported incomes).

There was not always such a stark disparity in audit rates between EITC filers and upper-middle income tax filers. In tax year 2010, the audit rate on EITC filers was 1.8% and the audit rate on filers earning between $100,000 and $500,000 was 1.2%. As audit rates have fallen across the board over the last decade, audits on EITC filers have fallen by much less than audits on higher-income filers, largely because audits of EITC claims are generally cheaper and faster for the IRS to conduct. The IRS should not continue to subject EITC filers to harsher scrutiny than upper-middle income tax filers that are responsible for a substantially larger share of tax non-compliance.

Furthermore, the working paper by Treasury and academic experts found that disparate audit rates between EITC and non-EITC filers are responsible for about a fifth of the overall audit rate disparity between Black and non-Black filers, so raising audit rates on non-EITC returns relative to EITC returns is likely one necessary (though not sufficient) step for addressing racial audit disparities.

- *Audit rates on tax filers reporting business income versus those without it.* Within the population of tax filers making less than $400,000, the IRS should reallocate tax enforcement resources to the higher-income tax filers and business entities that contribute substantially to the tax gap. Pass-through business income and other types of income earned by more affluent tax filers are often not subject to significant third-party information reporting requirements, and income without information reporting tends to have higher rates of false or erroneous reporting.

  The recent working paper by Treasury and academic researchers explained that returns with business income require more expertise and cost more for the IRS to conduct than returns that do not report business income. For example, audits on EITC claimants reporting business income cost nearly $400 per audit to complete while audits on EITC claimants without business income only cost about $30 per audit. The paper suggests that given the potentially higher dollar amounts of non-compliance among returns with business income, increasing audits on such returns may both be efficient and reduce racial audit disparities (because non-Black EITC claimants are more likely to have substantial business income on their returns than Black EITC claimants).

  Shifting focus towards partnerships and S-corporations for filers across the income spectrum is especially important because these entities are audited at rates that are now dramatically out of step with their contributions to the tax gap. Pass-through businesses currently account for about half of individual income tax under-reporting, but in tax year 2018, only 0.1% of partnerships and S-corporations were selected for audits. While the IRS should rightly focus tax enforcement resources and attention on the highest-income partnership and S-corporation owners, it should also consider addressing audits on such businesses across the income distribution.

In a previous report, we set out steps that the IRS should take to examine its audit selection processes across the income distribution to address racial audit disparities. For example, targeting *large dollar amounts* of under-reported tax when selecting tax filers for audits (instead of targeting the mere presence of *any* under-reported tax) may be able to improve the efficiency

of enforcement activity and reduce racial audit disparities. Such steps would help the Administration to deliver on President Biden's recent Executive Order (released on February 16, 2023) that directs federal agencies to "prevent and remedy discrimination, including by protecting the public from algorithmic discrimination" and with implementation of the Executive Order (released on December 13, 2021) requiring federal agencies to "transform federal customer experience and service delivery to rebuild trust in government."

3. **Follow through on the Administration's commitments to implement the pledge based on actual income.**

The Treasury Department has suggested repeatedly that the pledge will only apply to filers with less than $400,000 in *actual income,* or income that has been adjusted for under-reporting.

Coming out of the hearing, there has been some confusion around whether the Treasury Department will follow through on the approach of using actual income. That is because Commissioner Werfel referred to "total positive income" in the hearing, which is based on reported income. It is possible he did so only because audit rates are currently reported using that approach, and that he did not intend to imply that the IRS will use this measure of income going forward. In any case, it is critical that the IRS follow through on implementing the pledge using actual income, rather than reported income.

Using true or real income to implement the pledge will mean that the IRS will be able to ensure that tax cheats falsely reporting they earned less than $400,000 on their tax returns, even though their actual incomes exceeded that threshold, are not protected from increased audit risk and from their existing legal obligations to pay tax. Previous research indicates that many high-income filers substantially underreport their incomes on their tax returns. When tax filers are ranked based on their reported income, filers in the top 1% of the income distribution appear to be responsible for only about 6% of income tax under-reporting. But when they are ranked based on their true incomes, filers in the highest-income 1% account for about 28% of income tax under-reporting.

Of course, operationalizing this definition of income is a challenge because the IRS only knows the real incomes of tax filers selected for audits after those audits have been closed (which, as described above, can take several years given the IRS's statute of limitations). But the IRS should take on this analytical challenge to make the pledge meaningful and consistent with the agency's obligations under the IRA and the tax code.

For instance, the IRS should be able to estimate, based on its audit selection algorithms and historical audit results, how many filers that it chooses to audit with *reported* income below $400,000 will in fact turn out to have *true* income above that level. Those filers – including deliberate tax cheats that are underreporting their true incomes to falsely state on their tax returns that they earned less than $400,000 – should not be counted towards the audit rate ceiling for those falling below that threshold. Eventually, as early audits for any tax year are closed and audit results come in, the IRS may also be able to adjust how many further filers it selects for audit – and which types of filers to prioritize – based on those results (taking into account how audits closed earlier in the statute of limitations period may differ systematically from those closed later).

The IRS could aim to refine these analyses over time. As the Tax Policy Center has noted, the IRS can invest in improving its data analytics and evaluation of the effectiveness of different compliance activities. We have previously explained why IRS investment in reviewing and evaluating audit selection processes should be a priority, and the SOP commits to improving IRS research and evaluation capacity.

From: Jimmy Pan (Charter)
To: TACRE
Subject: TACRE Meeting Recordings
Date: Tuesday, April 18, 2023 2:29:55 PM

Good afternoon,

Are there plans to make recordings of the TACRE meetings available?

Also, we've just launched an advisory board on implementation of racial justice ballot measures here in NYC, and we are honored to count Michael Nutter and Michael McAfee among the members.

Best,
Jimmy

Jimmy Pan (pronouns: he/him/his)
Policy Director & Special Counsel, (former) Racial Justice Commission
C: 347-374-0729 **|** nyc.gov/racialjustice

Congress of the United States
Washington, DC 20515

March 8, 2023

Mr. Michael Nutter
Chair
Treasury Advisory Committee on Racial Equity
U.S. Department of the Treasury

Ms. Felicia Wong
Vice-Chair
Treasury Advisory Committee on Racial Equity
U.S. Department of the Treasury

Dear Chairman Nutter and Vice-Chair Wong,

Congratulations on your appointments to the inaugural Treasury Advisory Committee on Racial Equity (TACRE). This is a first-of-its-kind committee, representing a historic opportunity to center racial equity in our nation's economic agenda. As you consider the advice and recommendations the committee will provide to Secretary Janet Yellen and Deputy Secretary Wally Adeyemo on efforts to advance racial equity in the economy and address acute disparities for communities of color, we urge you to support "Baby Bonds," a bold vision for racial and economic justice. This policy would provide every child in America with unprecedented opportunity for financial security.

The last three years of the COVID-19 pandemic have only further exposed vast economic inequities along racial lines. Today, the median white family has eight times the wealth held by Black families, and the 400 wealthiest Americans hold more wealth than all Black families in the U.S. combined.[1] To be clear, these disparities are the result of intentional policymaking. For generations, federal, state, and local policy stripped wealth and opportunity from Black and Brown people while embedding bias in our tax code to reward the affluent families over working class and poor people. We have an opportunity to ensure an economic recovery that addresses the injustices of the past and present and moves us towards an economic future that leaves no family behind.

The *American Opportunity Accounts Act* would address these wrongs by establishing a national "Baby Bonds" program, providing a federally-funded savings account to every American child. This proposal, crafted in partnership with leading academics, researchers, and policymakers, represents a once-in-a-generation opportunity to close the racial wealth gap and unleash economic opportunity for every American.

The *American Opportunity Accounts Act* would represent the most ambitious federal effort to directly

---

[1] *Members Of The Forbes 400 Hold More Wealth Than All U.S. Black Families Combined, Study Finds*, Forbes (2019, January 14) https://www.forbes.com/sites/noahkirsch/2019/01/14/members-of-forbes-400-hold-more-wealth-than-all-us-black-families-combined-study-finds/?sh=192b31b46771

combat wealth inequality. At birth, every child would be given an "American Opportunity Account" seeded with $1,000. Every year thereafter, children would receive between a $0 and $2,000 deposit, depending on family income, with funds sitting in a low-risk account managed by the Treasury Department. Beginning at age 18, account holders would be able to access and utilize the funds for wealth-building activities including homeownership, higher and continuing education, and entrepreneurship—the kind of investments that change life trajectories and break generational cycles of poverty.

The impact would be transformative: at a cost of approximately $60 billion annually, less than 10 percent of what we currently spend to subsidize wealth-building through the tax code, we can give every American a stake in our economy and agency over their future. We can also begin to address persistent inequities: recent studies by Columbia University[2] and Morningstar[3] have found that Baby Bonds would substantially close the racial wealth gap.

In several states and localities, including Connecticut, District of Columbia, California, and New York, legislative proposals inspired by Baby Bonds have passed or are pending.[4] While some details vary, each proposal ensures that money would go into an account and gain returns for 18 years before an individual can access the funds for a specified purchase, such as college tuition or a down payment on a home. These proposals by cities and states highlight the growing momentum and support for this legislative proposal across the country, paving the way for eventual federal passage.

As TACRE begins its tenure, we urge you to study the merits of this legislative proposal and consider including it in your reports to the Department of Treasury. When it comes to racial justice, we cannot afford to wait. Baby Bonds is exactly the type of bold, comprehensive program necessary to advance racial equity in the economy and address acute disparities for communities of color.

Sincerely,

Cory A. Booker
United States Senator

Ayanna Pressley
United States Representative

[2] *Universal Baby Bonds Reduce Black- White Wealth Inequality, Progressively Raise Net Worth of all Young Adults*, The Review of Black Political Economy (2019, November 6) https://doi.org/10.1177/0034644619885321

[3] *Baby Bonds: Income-Based Program Designs Show Promise for Closing the Racial Wealth Gap*, Morningstar, (September 2020) https://www.morningstar.com/content/dam/marketing/shared/pdfs/Research/wp_Policy_Baby_Bonds_final.pdf?utm_source=eloqua&utm_medium=email&utm_campaign=&utm_content=25079

[4] *Baby bonds: States plan their own 'trampoline into the middle class'*, Yahoo Finance (2022, February 4) https://news.yahoo.com/baby-bonds-states-enact-their-own-trampoline-into-the-middle-class-153138941.html

From: Jo Lowrey
To: TACRE
Subject: Baby bonds
Date: Wednesday, April 5, 2023 9:19:18 PM

Dear Ms. Bowdle,

Please support the Baby Bonds legislation.

Best Regards,

Josephine Lowrey

From: Jo Lowrey
To: TACRE
Subject: Baby Bonds
Date: Monday, April 24, 2023 2:18:48 PM

Please support the Baby Bonds legislation.

Thank you,

Joséphine Lowrey
26 Marvin Street
Monpelier, VT 05602

From: Jones, Darryll K.
To: TACRE; db609@georgetown.edu
Subject: Tax Exempt Hate Groups
Date: Tuesday, May 9, 2023 12:08:01 PM
Attachments: StochasticTerrorismandTaxExemptionfinalfirstdraft.docx

Dear Counselor Bowdler and Member Brown:

I write to suggest an important topic of discussion for the Treasury Advisory Committee on Racial Equity. As you are no doubt aware, a gunman killed 8 people in a Texas mall last weekend. Today, the NY Times reports that the gunman maintained a white supremacist social media presence. Without having yet seen the online pages the Times reports about, I can almost certainly predict the gunman will have referenced "educational" materials distributed by a tax exempt hate group somewhere in his online rants. He will have been influenced to hate by educational organizations subsidized by tax exemption. Scientists describe what those groups "teach" as "stochastic terrorism." The same was true when a gunman attended Bible study in 2015 at Mother Emanuel Church and killed 9 African American worshippers. That gunman's manifesto relied on "educational" materials distributed by a tax exempt organization. Likewise, the 2017 killing of Heather Heyer in Charlottesville Virginia was precipitated and facilitated by tax exempt organizations advocating that Jews seek world domination via the Replacement Theory, and shouting "Jews will not replace us." The Southern Poverty Law Center reports there are about 60 tax exempt hate groups. CBS stated there were approximately 90 tax exempt hate groups. Nobody disputes that the tax code should not subsidize stochastic terrorism. Some assert, though, the government may not deny tax exemption because to do so would be to violate the groups' right to free speech.

I propose that the Committee study the issue. I have obsessed about it, quite frankly, for about 6 years and my article on the topic will be published this fall in the New Mexico Law Review. I am attaching a working draft in hopes your Committee might take an interest. You can download an earlier version from SSRN here. I become more passionate about the topic every time another mass shooting happens. I know almost instinctively, having immersed myself for so long, whether the shooter had a racial, gender, orientation, or religious animus and whether that animus was stoked by an tax exempt "educational" organization. I don't make the assertion until I see the proof, but increasingly the proof is as inevitable as the next mass shooting. The Texas shooter a few days ago was stoked by at least one tax exempt hate group, masquerading as "educational."

I understand, as well, the First Amendment implications. People have a right to hate speech, and even to associate with haters; Treasury should be reluctant to tread on First Amendment rights, but then, people are dying at the hands of "students" taught by tax exempt "educational" organizations. Regardless, the right to hate speech does not require the government subsidize those groups

through tax exemption, as a few well known constitutional scholars have asserted. Justice Stevens and Scalia, from opposite corners, have both said so in passing dicta.

Did I mention that I've obsessed over this topic for years? I would suggest a subcommittee address this topic, meet, and public hearings with tax and constitutional law specialists. The late civil rights warrior John Lewis held hearings on this very topic in 2019. You can watch the hearings from my blog post here. Though I applaud the initiative, I was disappointed in the outcome. The hearing was unproductive as a legal matter because the witnesses hardly put forth an effort to find the legal basis for denying tax exemption to hate groups. They were lazy and sanguine; staff who organized the hearings did the issue a disservice by allowing the unchallenged assertion that government must subsidize hate groups. Staff should have sought more experts, though I would not have been of use at that time. It was only after I watched the hearing that I evolved into the obsessed creature that I am now about the issue. There is no doubt that government must tolerate (so far) hate speech, but it most certainly need not subsidize it and indeed is constitutionally prohibited from doing so (I am now working on the secondary issue of standing and will publish on that next spring in the Pittsburgh Tax Review). I prove my assertions in the attached article.

Your committee could revise the issue and, having found a legal basis, advise Treasury accordingly. I would love to be a worker bee in that effort and though I am biased, I would be willing to let the chips fall. If the truth is that government must subsidize stochastic terrorists than let the truth prevail. I challenge someone to prove that to me. I am including my friend Dorothy Brown in this email because she might confirm that while I might be "different," (let's say), this is not a phishing email. I really really really hope to hear from you.

Haver a great day, both of you!

Darryll

Darryll K. Jones
Professor of Law
Florida A&M University College of Law
201 Beggs Avenue
Orlando, Florida 32825

Office: 407.254.3236

STOCHASTIC TERRORISM, SPEECH INCANTATIONS AND FEDERAL TAX EXEMPTION

Darryll K. Jones

Stochastic terrorists demonize and dehumanize groups of people through propaganda to incite "lone wolf" violence against those groups.[1] Their demonization and dehumanization is explicit, but their solicitation of murder is implicit and sufficiently ambiguous that most listeners will not perceive their call. But a few will perceive, fewer still will act.[2] The resulting murder, legally attributable to the killer but not

[1] Molly Amman and J. Reid Meloy, *Stochastic Terrorism*, 15 PERSPECTIVES ON TERRORISM 2 (2021); G2geek, *Stochastic Terrorism: Triggering the Shooters*, https://www.dailykos.com/stories/2011/1/10/934890/- (Jan 10, 2011 · 8:37 p.m.).

1. A leader or organization uses rhetoric in the mass media against a group of people.
2. This rhetoric, while hostile or hateful, doesn't explicitly tell someone to carry out an act of violence against that group, but a person, feeling threatened, is motivated to do so as a result.
3. That individual act of political violence can't be predicted as such, but that violence will happen is much more probable thanks to the rhetoric.
4. This rhetoric is thus called *stochastic terrorism* because of the way it incites random violence.

What is Stochastic Terrorism and Why it is it trending? https://www.dictionary.com/e/what-is-stochastic-terrorism/ (Aug. 8, 2019).

> Public speech that may incite violence, even without that specific intent, has been given a name: stochastic terrorism, for a pattern that can't be predicted precisely but can be analyzed statistically. It is the demonization of groups through mass media and other propaganda that can result in a violent act because listeners interpret it as promoting targeted violence — terrorism. And the language is vague enough that it leaves room for plausible deniability and outraged, how-could-you-say-that attacks on critics of the rhetoric.

Juliette Kayamm, *There are no lone wolves,* WASH. POST, https://www.washingtonpost.com/opinions/2019/08/04/there-are-no-lone-wolves/ (Apr. 4, 2019 at 1:48 pm).

[2] The novelist Greg Olear describes stochastic terrorism with appropriately dystopian darkness:

> Violent rhetoric is pumped into the discourse by cynical politicians, conservative influencers, retrograde church leaders, and far-right provocateurs. The ugly, mendacious narratives saturate the airwaves, the social networks, the fringe channels. Over and over and over, the hate speech is repeated. And someone, somewhere, snaps. *Enough is enough,* he decides. (It's almost always a "he.") He picks up his gun—there are always plenty of guns lying around—and takes action.

Greg Olear, *Death Groomers*, PREVAIL, Nov. 29, 2022, https://gregolear.substack.com/p/death-groomers. Of course, the phrase, "lone wolf," is precisely the characterization the phrase, "stochastic terrorism," disputes. Implicit in the latter is that the perpetrator is not acting alone, but in concert with those using their platform to dehumanize and demonize. "The 'lone wolf' metaphor is based on the image of a wolf alone in the wild. But this is incorrect, as my studies on terrorists reveal. Wolves never hunt alone — in nature or in terrorism." Gabriel Weimann, There's no such thing as a lone wolf in cyberspace, REUTERS, June 25, 2015, https://www.reuters.com/article/idIN14450041820150625.

the stochastic terrorist, is random and unpredictable by time, place, or manner.[3] Researchers theorize that stochastic terrorism is nevertheless capable of statistical analysis, the results of which show positive correlation between stochastic speech and violence;[4] murders increase even if it cannot be determined when, where or how a particular murder will occur.[5] Hate groups are definable by stochastic terrorism. It is their *raison d'etre.*

Stochastic terrorism[6] is protected speech so far; it does not constitute fighting words, incite imminent lawlessness, or provoke a stampede to the exits. The law is not yet enlightened. I accept but do not rely on the inevitability of murder in my analysis. Whether stochastic terrorists are successful is not essential to my conclusion. Nevertheless, we should be explicit about what hate groups seek and the murders they incite before discussing their claim to tax exemption under IRC 501(c)(3).[7] It diminishes the analysis not to be explicit. I do not allow for any other possibility than that hate groups seek the death of those they

[3] Indeed, scientist have shown that stochastic actors find "randomization [of otherwise predictable outcomes] desirable since it reduces responsibility and regret after the state of uncertainty [regarding when and where violence will occur, for example, not whether] is resolved." Pedram Heydari, *Regret, Responsibility, and Randomization: A Theory of Stochastic Choice*, (January 30, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4343566.

[4] Philosophical and Public Security Law Implications of 'Stochastic Terrorism,' Max Planck Institute for the Study of Crime, Security, and Law, https://csl.mpg.de/en/projects/philosophical-and-public-security-law-implications-of-stochastic-terrorism?c=204475

[5]

> In recent years, a term has begun to circulate to capture this phenomenon — "stochastic terrorism," in which mass communications, including social media, inspire random acts of violence that according to one description are statistically predictable but individually unpredictable. In other words, every act and actor is different, and no one knows by whom or where an act will happen — but it's a good bet that something will.

Eyal Press, *This Week's Mail Bombs Are No Surprise*, N.Y. Times (Oct. 25, 2018), https://www.nytimes.com/2018/10/25/opinion/terrorism-bombs-democrats-deniro-biden-soros.html

[6] For an excellent analysis of stochastic terrorism as a linguistic and psychological construct, see Molly Amman and J. Reid Meloy, Stochastic Terrorism: A Linguistic and Psychological Analysis, 15 Perspectives on Terrorism, https://www.universiteitleiden.nl/binaries/content/assets/customsites/perspectives-on-terrorism/2021/issue-5/amman-and-meloy.pdf.

[7] IRC 501(c)(3) exempts from corporate tax:

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

hate.[8] Stochastic terrorists are genocidal;[9] they would neither settle for subjugation or forced expatriation, nor concede reparations even if those were acceptable alternatives. I disprove the argument that because their speech is protected, stochastic terrorists are entitled, as an exercise of their free speech, to tax exemption under IRC 501(c)(3). The opposite is true. Government is required to deny tax exemption to stochastic terrorists.

Prologue

At 8:16 pm on June 17, 2015, 21-year-old Dylann Roof entered the Emanuel African Methodist Episcopal Church (known locally as "Mother Emanuel") in Charleston, South Carolina.[10] For 45 minutes, he read and discussed the Bible with 12 African American church members.[11] As the participants bowed their heads for closing prayer, Roof brandished a Glock 45 caliber pistol he carried in a fanny pack and began shooting.[12] The pistol held 11 of the 88 hollow point bullets Roof had purchased in preparation.[13] The worshippers tried to dissuade

[8] Stochastic terrorism is not just associated with hate groups. Although the term is of recent vintage, it has been used to explain murders committed by anti-abortionists during the 1990s. Eyal Press, *This Week's Mail Bombs Are No Surprise*, N.Y. Times (Oct. 25, 2018), https://www.nytimes.com/2018/10/25/opinion/terrorism-bombs-democrats-deniro-biden-soros.html (discussing the role of stochastic terrorism in the murder of a doctor who provided abortion services).

[9] "Facebook's inability to police hate speech from Myanmar military officials is likely a primary inciting factor in the Myanmar genocide against the country's Muslim minority Rohingya. This included false stories of rape perpetrated by Muslim men against Buddhist women, a common propaganda tactic to demonize minorities and justify genocide. The social media campaign against the Rohingya should bring to mind similar radio campaigns against Tutsis in the lead up to the Rwandan genocide. Andrew Moshirnia, *Countering Pernicious Images: Memetic Visual Propaganda and the 2018 Elections,* 50 SETON HALL L. REV. 79, 96 (2019)

[10] United States of America v. Dylann Storm Roof, 10 F.4th 314, 332 (4th Cir. 2021).

[11] Roof actively participated in the discussion, at times disagreeing with others who commented on Biblical scripture. Nick Corasaniti, Richard Perez-Pena and Lizette Alvarez, Church Massacre Suspect Held as Charleston Grieves, N.Y. TIMES, June 18, 2015, https://www.nytimes.com/2015/06/19/us/charleston-church-shooting.html.

[12] Kevin Sack and Alan Blinder, Heart-Rending Testimony as Dylann Roof Trial Opens, N.Y. TIMES, DEC. 7, 2016, HTTPS://WWW.NYTIMES.COM/2016/12/07/US/DYLANN-ROOF-TRIAL.HTML. Although described as a "fanny pack" in the popular media, the container was a 5.11 Tactical Pouch, often used by police and the military. *See* Bill of Particulars, United States of America v. Dylann Storm Roof, No. 2:15-cr-00472-RMG, 2016 WL 4011126 (D. S.C. July 25, 2016).

[13] Roof "had loaded eight clips of hollow-point ammunition for his Glock .45 semiautomatic handgun because, [Assistant U.S. Attorney] Richardson implied, he wanted to have eighty-eight bullets; the number is white-nationalist code for "Heil Hitler" [because "H" is the 8th letter in the English alphabet]. Jelani Cobb, *Inside the Trial of Dylann Roof,* THE NEW YORKER, Feb. 6, 2017, HTTPS://WWW.NEWYORKER.COM/MAGAZINE/2017/02/06/INSIDE-THE-TRIAL-OF-DYLANN-ROOF.

him,[14] but Roof declared that he "had to do it. You rape our women, and you are taking over our country. And you have to go."[15] Roof shouted racial slurs as he continued firing.[16] "Y'all want something to pray about? I'll give you something to pray about!"[17] Over the next six minutes, Roof reloaded his pistol five times, ultimately killing 9 church members.[18] At his federal trial, a forensic pathologist testified that Roof shot the victims at least 60 times altogether;[19] he shot the oldest victim, 87-year-old Susie Jackson, 11 times – emptying an entire magazine of bullets into her body.[20] He then told another member, 72-year-old Polly Shepard – lying in the fetal position, still praying aloud – to "shut up," and that he would spare her life because he wanted her to "tell the story."[21] He put the gun to his head and pulled the trigger.[22] But there were no more bullets so Roof survived.[23] He left the church and police apprehended him the next morning as he was driving to Nashville, Tennessee.[24]

[14] Sari Horwitz, Chico Harlan, Peter Holley and William Wan, *What we know so far about Charleston church shooting suspect Dylann Roof,* WASH. POST, June 20, 2015, https://www.washingtonpost.com/news/post-nation/wp/2015/06/20/what-we-know-so-far-about-charleston-church-shooting-suspect-dylann-roof/.
[15] *Id.*
[16] Kurt Braddock, WEAPONIZED WORDS 35 (Cambridge Univ. Press 2020)
[17] Sari Horwitz, Chico Harlan, Peter Holley and William Wan, supra note 12.
[18] *Id*.
[19] Alan Blinder and Kevin Sack, *Dylann Roof Found Guilty in Charleston Church Massacre,* N.Y. TIMES, Dec. 15, 2016, https://www.nytimes.com/2016/12/15/us/dylann-roof-trial.html.
[20] Dustin Waters and Kevin Sullivan, *Dylann Roof guilty on 33 counts of federal hate crimes for Charleston church shootings*, WASH. POST, Dec. 15, 2016, https://www.washingtonpost.com/national/dylann-roof-guilty-on-33-counts-of-federal-hate-crimes-for-charleston-church-shooting/2016/12/15/0bfad9e4-c2ea-11e6-9578-0054287507db_story.html.
[21] Rachel Kaadzi Ghansah, *A Most American Terrorist: The Making of Dylann Roof,* GQ, Aug. 21, 2017, https://www.gq.com/story/dylann-roof-making-of-an-american-terrorist.
[22] Timothy M. Phelps, *Dylann Roof tried to kill himself during attack, victim's son says,* L.A. TIMES, June 20, 2015, https://www.latimes.com/nation/nationnow/la-na-dylann-roof-suicide-attempt-20150620-story.html.
[23] *Id.*
[24] "At the time of his arrest, Defendant was using the GPS device to navigate to Nashville, Tennessee." Bill of Particulars, United States of America v. Dylann Storm Roof, No. 2:15-cr-00472-RMG, 2016 WL 4011126 (D. S.C. July 25, 2016).

Days later, investigators found a website registered under Roof's name.[25] The website contained Roof's "manifesto."[26] The manifesto relates Roof's discovery of a web page owned and published by the Council of Conservative Citizens (CCC), an organization exempt from federal taxation under IRC 501(c)(4).[27] Roof describes his outrage that white people were, according to statements made on the CCC website, increasingly the victims of violent crimes at the hands of African Americans. "There were pages upon pages of these brutal black on White murders. I was in disbelief. At this moment I realized that something was very wrong."[28] The "brutal black on White murders" Roof referred to were detailed in a pseudo-scientific report prepared by another

[25] "Defendant also used the internet to describe his motivation for his offenses. Defendant posted a manifesto online, via a web site that was hosted by a Russian webhost company." *Id.* at 2.
[26] *Id.* What purports to be Roof's manifesto can be found via the Internet Archive ("Wayback Machine") at https://web.archive.org/web/20150623162250/http://lastrhodesian.com/data/documents/rtf88.txt. (hereinafter "Roof Manifesto"). An easier-read version can be found at http://media.thestate.com/static/roofmanifesto.pdf.
[27] IRC 501(c)(4). I.R.S. Publication 78, https://apps.irs.gov/app/eos/detailsPage?ein=363354434&name=COUNCIL%20OF%20CONSERVATIVE%20CITIZENS%20INC&city=Blackwell&state=MO&countryAbbr=US&dba=&type=EPOSTCARD,%20COPYOFRETURNS&orgTags=EPOSTCARD&orgTags=COPYOFRETURNS.
[28] Roof Manifesto, http://media.thestate.com/static/roofmanifesto.pdf.

501(c)(3) organization known as the New Century Foundation.[29] Roof embarked on his rampage after reading a CCC webpage based on that report.[30]

The Council of Conservative Citizens (CCC) was founded in 1985 by former members of the White Citizens Council (WCC),[31] a federally tax-exempt organization founded by white

---

[29] Alex Kotch, *Nation's Biggest Charity Is Funding Influential White Nationalist Group,* SLUDGE, https://readsludge.com/2019/11/22/nations-biggest-charity-is-funding-influential-white-nationalist-group/.

> But it wasn't the Council of Conservative Citizens that birthed the black-on-white crime myth. It was a nonprofit called the New Century Foundation, a hate group founded in 1990, along with its American Renaissance magazine, by the prominent white nationalist Jared Taylor. On the pages of his magazine and those of the conservative National Review, Taylor laid out his false argument: "The United States has neither a unique 'culture of violence' nor inadequate gun laws. It has a high rate of violent crime because it has a large number of violent black criminals." Other white nationalist groups pounced at Taylor's racist propaganda, including the Council of Conservative Citizens, which has had a long and collaborative relationship with Taylor and his organization.

Id. The Sludge article goes on to report that the New Century Foundation received substantial funding from a tax-exempt Donor Advised Fund (DAF), contributions to which are deductible:

> Soon after the Roof massacre, the largest charitable nonprofit in the United States began funding the New Century Foundation, Sludge has discovered. Fidelity Investments Charitable Gift Fund, a donor-advised fund sponsor and the philanthropic arm of financial giant Fidelity Investments, gave increasing amounts to the New Century Foundation from the 2016-18 fiscal years. In FY2016 (July 2015 through June 2016), it gave $13,000. In FY2017, $31,000. In FY2018, its giving rose to $56,350. In total, it gave over $100,000 to the New Century Foundation.

Id. *See* New Century Foundation, THE COLOR OF CRIME (1999). For a report exposing the myths espoused by the New Century Foundation and CCC regarding black on white crime see Southern Poverty Law Center, *The Biggest Lie in the White Supremacist Propaganda Playbook: Unraveling the Truth About 'Black-on-White Crime'* *https://www.splcenter.org/20180614/biggest-lie-white-supremacist-propaganda-playbook-unraveling-truth-about-%E2%80%98black-white-crime#4*.

[30] Roof Manifesto *supra* note 24. Alex Kotch, *Nation's Biggest Charity Is Funding Influential White Nationalist Group,* Sludge, https://readsludge.com/2019/11/22/nations-biggest-charity-is-funding-influential-white-nationalist-group/.

[31] Josh Sanburn, Inside the White Supremacist Group that Influenced Charleston Shooting Suspect, TIME, June 22, 2015, https://time.com/3930993/dylann-roof-council-of-conservative-citizens-charleston/. ("For years, CCC was one of the most prominent white supremacist organizations in the U.S. Today, however, the group exists primarily online. CCC started in the 1950s in Mississippi as the Citizens' Councils of America (also known as White Citizens' Councils), which formed to fight against the integration of public schools following the Brown v. Board of Education ruling."). The White Citizens Council formed on July 11, 1954, almost two months after the Supreme Court issued its opinion in *Brown v. Board of Education*, 347 U.S. 483 (1954). Association of Citizen's Councils of Mississippi, *4th Annual Report July 1958.* https://egrove.olemiss.edu/cgi/viewcontent.cgi?article=1006&context=citizens_pamph at 1. ("The fourth anniversary of the birth of your Citizens' Council movement was quietly observed on July 11, 1958.").

Mississippians in response to the Supreme Court's opinion in *Brown v. Board of Education*.[32] The WCC is sometimes described as a refined version of the Ku Klux Klan,[33] the most famous hate group in American history. The WCC reportedly disdained outright violence in favor of economic oppression and disenfranchisement of African Americans. Nevertheless, WCC publications attributed all manner of rape, murder, and other violence to African American men.[34] Before the

[32] 347 U.S 483 (1945) (declaring segregation in public education unconstitutional). Prior to the enactment of IRC 508 in 1969, organizations claiming tax exemption were not required to apply for official recognition from the government. David Brennen, Darryll K. Jones, Beverly I. Moran, and Steven J. Willis, THE TAX LAW OF CHARITIES AND OTHER EXEMPT ORGANIZATIONS 253 (4TH ED. 2021). The White Citizens Council claimed tax exemption since at least November 15, 1956:

> The [White Citizens Council] Education Fund was incorporated November 15, 1956. The reason for the Educational Fund was that we were not sure that contributions to the Citizen's Council were tax exempt. We believe that since the Educational Fund of the NAACP is tax exempt, the Educational Fund of the Citizens' Council is tax exempt. So far the exemption has not gone through, but we have had no kick backs on former deductions. We believe that the Internal Revenue department must declare it tax exempt. We wanted a fund so those people who can contribute in large amounts could get tax exemptions, as this means a great deal to many people. We are very careful how we handle the money in the Educational Fund, and there is simply no way for the government to declare it other than tax exempt.

Association of Citizen's Councils of Mississippi, *4th Annual Report July 1958.* https://egrove.olemiss.edu/cgi/viewcontent.cgi?article=1006&context=citizens_pamph at 1.

[33] David Halberstam, The White Citizens Councils: Respectable Means for Unrespectable Ends, COMMENTARY, October 1956. *https://www.commentary.org/articles/david-halberstam/the-white-citizens-councilsrespectable-means-for-unrespectable-ends/*.

> The [White Citizens] Councils have an almost self-conscious desire for respectability. They struggle to achieve a constitutionally illegal purpose by "all legal means." They shun both the Klans' reputation for violence, and their haberdashery; their members are respectable citizens of the community, the quintessence of the civic luncheon club. At their meetings there is emphasis on speakers from the ministry and the universities.

Id. David A. Graham, *The White-Supremacist Group That Inspired a Racist Manifesto,* THE ATLANTIC, June 22, 2015, https://www.theatlantic.com/politics/archive/2015/06/council-of-conservative-citizens-dylann-roof/396467/. ("The CCC's roots lie in an older, now-defunct organization called the Citizens Councils of America (also known as White Citizens Council), which aimed to be a (somewhat) more respectable alternative to the Ku Klux Klan for white southerners who opposed integration; the group was sometimes called the 'uptown Klan.'")

[34] *See, e.g., American Womanhood Needs Tough U.S. Anti-Rape Law*, THE CLARION-LEDGER AND JACKSON DAILY NEWS, May 3, 1959, https://egrove.olemiss.edu/cgi/viewcontent.cgi?article=1069&context=citizens_clip. (editorial against a proposed federal anti-lynching law stating "The rape rate is soaring and Negroes commit the vast majority of them . . .")

WCC, the Klan also enjoyed federal tax exemption under IRC 501.[35] Today, the CCC demonizes African American no less than either of its predecessors.[36] Like approximately 90[37] other organizations variously described as "hate groups,"[38] the CCC and the New Century Foundation continue to enjoy federal tax exemption to this day.[39]

I. INTRODUCTION

Constitutional law is only occasionally, if not sensationally, concerned with taxation. The daily presence of taxes in the lives of American citizens is even less occasionally troubled by

---

[35] Samuel D. Bronson, *Addressing Hate: Georgia, The IRS, and The Ku Klux Klan,* 41 Va. Tax Rev. 45, 55 - 60 (2021) (asserting that the Ku Klux Klan claimed tax exemption as a charity or a fraternal beneficiary association.)

[36] *Supra* notes 26-27 and accompanying text.

[37] One source estimated that there were about 55 tax exempt hate groups. Eden Stiffman, *Dozens of 'Hate Groups' Have Charity Status, Chronicle Study Finds*, CHRONICLE OF PHILANTHROPY, Dec. 22, 2016, https://www.philanthropy.com/article/dozens-of-hate-groups-have-charity-status-em-chronicle-em-study-finds/. A more recent report estimates that there are 90 tax exempt hate groups. Steve Axelrod, Kristin Steve, and Megan Towey, *Alleged hate groups get tax breaks as registered charities*, Dec. 1, 2020, https://www.cbsnews.com/news/alleged-hate-groups-tax-breaks-registered-charities/

[38] The Southern Poverty Law Center's defines a "hate groups" as:

> An organization or collection of individuals that – based on its official statements or principles, the statements of its leaders, or its activities – has beliefs or practices that attack or malign an entire class of people, typically for their immutable characteristics. An organization does not need to have engaged in criminal conduct or have followed their speech with actual unlawful action to be labeled a hate group.

Southern Policy Law Center, *What is a hate group?* (March 18, 2020) *https://www.splcenter.org/20200318/frequently-asked-questions-about-hate-groups#hate%20group.* The SPLC definition is perhaps broader than the implicit definition of "hate groups" adopted by one donor advised fund to regulate its grant-making decisions:

> Specifically, the Foundation prohibits any support of organizations engaged in "hateful activities" defined to mean activities that incite or engage in violence, intimidation, harassment, threats, or defamation targeting an individual or group based on their actual or perceived race, color, religion, national origin, ethnicity, immigration status, gender, gender identity, sexual orientation, or disability. These activities are contrary to the Foundation's mission and its charitable status.

Amalgamated Foundation, *Special Note: Grants Activity Policy*, https://www.amalgamatedfoundation.org/grants-activity-special-note.

[39] Supra note 25.

constitutional principles present nevertheless, lurking in the dense thicket of overwrought tax statutes and regulations. When an issue arises the resolution of which requires the application of constitutional rules to federal taxes, it is often a momentous occasion.[40] That might be the case regarding the question whether government may deny tax exemption and charitable contributions to hate groups.[41] By "hate group" I mean stochastic terrorist organizations. Those that (1) "attack or malign an entire class of people, based on immutable characteristics"[42] or (2) "incite . . . violence, intimidation, harassment, threats, or defamation targeting an individual or group based on their actual or perceived race, color, religion, national origin, ethnicity, immigration status, gender, gender identity, sexual orientation, or disability."[43] People, especially those targeted by hate groups, might be surprised to know that we all help pay hate groups' costs.[44] We do so indirectly via tax exemption[45] and the charitable contribution deduction,[46] both of which are characterized as public subsidies.[47] Constitutional and tax issues collide at the intersection of free speech and public subsidization of hate groups.

[40] Thus, an early indication that the Constitution mandated equal dignity before the law for LGBTQ persons and same-sex marriages occurred in a case regarding a taxpayer's right to claim an estate tax exemption for surviving spouses. *See* United States v. Windsor, 570 U.S, 744 (2013). Similarly, the nation's tortuous path towards universal health care was greatly assisted by the Supreme Court's reliance on Congress' constitutional taxing power to uphold Obama-care's individual mandate and its related penalty. National Federation of Independent Business v. Sebelius, 567 U.S. 519 (2013). Of course, the Supreme Court is more often called upon to provide definitive interpretations of tax statutes than it is to address the constitutionality of tax statutes or regulations. *See* Jasper I. Cummings, THE SUPREME COURT'S FEDERAL TAX JURISPRUDENCE (2ed. 2016).

[41] Charitable organizations may be granted exemption from tax under IRC §501(c)(3). Organizations exempt under IRC 501(c)(3) may receive contributions generating tax deductions to the donor. IRC §170. Unless otherwise indicated, I refer to those organizations as "exempt" or "tax exempt."

[42] *Supra* note 36.

[43] *Id*.

[44] "When the Government grants [tax] exemptions or allows [charitable contribution] deductions all taxpayers are affected; the very fact of the exemption or deduction for the donor means that other taxpayers can be said to be indirect and vicarious 'donors.'" Bob Jones University v. 461 U.S. 574, 591 (1983).

[45] I.R.C. §501.

[46] I.R.C. §170

[47] Regan v. Taxation With Representation, 461 U.S. 540,544 (1983). ("Both tax exemptions and tax deductibility are a form of subsidy that is administered through the tax system. A tax exemption has much the same effect as a cash

Constitutional scholars blithely assert that the collision is not serious.[48] They point to a doctrine known as "unconstitutional conditions" to conclude that government may not deny tax exemption because it condemns the ideas propagated by hate groups. To do so, the argument goes, would grant the government the right to do indirectly what it may not do directly;[49] government may not punish hate speech directly, and thus may not do so indirectly through discriminatory [by speech content] use of its taxing or spending power. I prove the simple and obvious fallacy.[50] The unconstitutional conditions doctrine, taken to its logical end, must also prohibit the government from indirectly subsidizing stochastic terrorism. Government may not itself engage in hate speech.[51] It follows, so long as that is true, that government may not subsidize hate groups because to do so would accomplish indirectly what may not be accomplished directly. In any event, the unconstitutional conditions doctrine is hardly convincing either way. It is a doctrine comprising situational ethics, and thus neither predictable nor expository.[52] The Supreme Court rather obviously strains credulity to sidestep the doctrine when

---

grant to the organization of the amount of tax it would have to pay on its income. Deductible contributions are similar to cash grants of the amount of a portion of the individual's contributions.")

[48] Professor Eugene Volokh is probably the most prominent first amendment scholar too easily dismissing the notion that government may deny subsidy to hate groups. Eugene Volokh, *No, the IRS may not deny tax exemptions on the grounds that a group is a supposed 'hate group,'* WASH. POST: VOLOKH CONSPIRACY (Dec. 29, 2016, 8:37 a.m.), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/12/29/no-the-irs-may-not-deny-tax-exemptions-on-the-grounds-that-a-group-is-a-supposed-hate-group/. But first amendment jurisprudence is far too "incoherent" to conclude as Volokh does. At the very least, one must address Justice Scalia's sentiment that it is "preposterous to equate the denial of taxpayer subsidy," however much an activity or purpose is imbued with or dependent on speech, with government's direct and unconstitutional prohibition of that same speech. National Endowment for the Arts v. Finely, 524 U.S. 569, 596 (1998).

[49] Kathleen M. Sullivan*, Unconstitutional Conditions,* 102 HARV. L. REV. 1415 (1989) ("The doctrine of unconstitutional conditions . . . reflects the triumph of the view that government may not do indirectly what it may not do directly.")

[50] *Supra* note ____ and accompanying text.

[51] *See supra* note _____ and accompanying text.

[52] *Supra* note ____ and accompanying text. Leading constitutional scholars are perhaps more polite in their description of the unconstitutional conditions doctrine. *See, e.g.,* Cass Sunstein*, Why The Unconstitutional Conditions Doctrine is an Anachronism (With Particular Reference to Religion, Speech, and Abortion)* 70 B.U. L. REV. 593 (1990) (arguing that the doctrine should be abandoned). Louis W. Fisher, *Contracting Around the Constitution:*

to do otherwise would result in an undesirable outcome.[53] After showing that the unconstitutional conditions doctrine cannot and need not require subsidization of hate groups, I consult First Amendment incantations[54] – government speech,[55] private speech,[56] subsidized speech,[57] limited [metaphysical] public fora,[58] unconstitutional speech,[59] and government's right to regulate speech within its "managerial domain."[60] The incantations require tax exemption be granted but also that they be denied to hate groups, ambiguously in either case. They go either way. My bias favors the conclusion that government may and must deny tax exemption to hate groups. After demonstrating that speech incantations are hopelessly indeterminate,[61] I rest that case on constitutional normality.

An Anticommodificationist Perspective on Unconstitutional Conditions, 21 U. PA. J. CONST. L. 1167, 1168 - 69 (2019) ("The doctrine of unconstitutional conditions is notoriously complex, convoluted, and inconsistent.")

[53] *Compare* Rust v. Sullivan, 500 U.S. 17 (1991) (Congress decision to condition federal funding on recipient's refraining from discussing abortion held constitutional) *with* Legal Services Corp. v. Valazquez, 531 U.S. 533 (2001) (Congress's decision to condition federal funding on recipient's refraining from challenging constitutionality of federal statute held unconstitutional).

[54] An incantation is "a written or recited formula of words designed to produce a particular effect." Incantation, Merriam-Webster's Collegiate Dictionary (11th ed. 2022). My intent is to convey that the analytical labels employed to resolve free speech issues are ultimately unhelpful. *See* Robert L. Tsai, *Fire, Metaphor, and Constitutional Myth-Making*, 93 GEO. L.J. 181, 196 (2004) (describing a judicial incantation as a "brief, catchy, jargon-free statement that itself [becomes] a quotable conception of law.").

[55] See, e.g., Pleasant Grove City v. Summum, 555 U.S. 460 (2009); Walker v. Texas Division, Sons of Confederate Veterans, 576 U.S. 200 (2017); Matal v. Tam, 582 U.S. 218 (2017) (all discussing the government's right to engage in content or viewpoint discrimination regarding its own speech). *See generally*, Abner Greene, *Government of the Good,* 53 VAND. L. REV. 1 (2000).

[56] Rosenberg v. Rector and Visitors of the University of Virginia, 515 U.S. 819 (1995); Matal v. Tam, 582. U.S. 218 (2017). Legal Services Corp v. Velazquez, 531 U.S. 533 (2001). (both finding private speech, despite government funding)

[57] *See* generally Robert Post, *Subsidized Speech,* 106 YALE L. J. 151 (2006); Martin H. Redish and Daryl I. Kessler, *New Problems for Subsidized Speech,* 56 WM & MARY L. REV. 1083 (2015).

[58] *See* Rosenberger v. Rector & Visitors of the University of Virginia, 515 U.S. 819 (1995) (forum analysis of university's funding of printing for student publications); Perry Education Ass'n v. Perry Local Educator's Association, 460 U.S. 37 (1983) (forum analysis of school mail system); Cornelius v. NAACP Legal Defense & Education Fund, 473 U.S. 788 (1985) (forum analysis of charitable contribution program).

[59] Richard C. Schragger, Of Crosses and Confederate Monuments: A Theory of Unconstitutional Government Speech, 63 Ariz. L. Rev. 45 (2021).

[60] *See* generally Robert Prost, *Subsidized Speech,* 106 YALE L. J. 151 (2006);

[61] Professor Post's observations almost 20 years ago are still valid today:

The few tax scholars who have defended government's right to deny tax exemption to hate groups are correct,[62] in my view, but insufficiently convincing. If their goal is to convince the tax collector that she may safely deny tax exemption, they have failed only because they do not confront resolvable but nevertheless troubling constitutional issues about which she may harbor significant doubt given an incoherent free speech jurisprudence.[63] The tax collector must be convinced that the Constitution does not prohibit the denial of tax subsidies; she doesn't have the luxury of the moral certitude with which people know that hate is not charitable.[64] Tax scholars prefer instead to simply define "education" for purposes of tax exemption in a way that excludes stochastic terrorism, either by limiting tax exemption to formal education taking place

---

> In recent years something seems to have gone seriously amiss with the Supreme Court's ability doctrinally to elucidate its First Amendment decisions. In fact, its First Amendment doctrine has begun to display an insouciance so pronounced as to mark a virtual divide between the language of doctrine and the resolution of cases. Although the pattern of the Court's recent First Amendment decisions may well be (roughly) defensible, contemporary First Amendment doctrine is nevertheless striking chiefly for its superficiality, its internal incoherence, its distressing failure to facilitate constructive judicial engagement with significant contemporary social issues connected with freedom of speech. Oliver Wendell Holmes once remarked how difficult it was to "think accurately--and think things not words." Our First Amendment jurisprudence has become increasingly a doctrine of words merely, not of things.

Robert Post, *Recuperating First Amendment Doctrine* 47 STAN. L. REV. 1249, 149-50 (1995).

[62] *See* Samuel D. Brunson*, Addressing Hate: Georgia, The IRS, and The Ku Klux Klan*, 41 VA. TAX REV. 45 (2021); Eric Franklin Amarante, *Why Don't Some White Supremacist Groups Pay Taxes?*, 67 EMORY L.J. ONLINE 2045 (2018); Alex Reed, *Subsidizing Hate: A Proposal to Reform The Internal Revenue Service's Methodology Test*, 17 FORDHAM J. CORP. & FIN. L. 823 (2012). All these articles assume the problem solved by better enforcement of current law or restating the tax definition of "education."

[63] Professor Mayer is one of the few tax scholars to address the unconstitutional conditions doctrine with reference to exempt organizations, though he doesn't specifically address tax exemption for hate groups. *See* Lloyd Hitoshi Mayer, *Nonprofits, Speech, and Unconstitutional Conditions*, 46 CONN. L. REV. 1045 (2014)

[64] In 2013, IRS workers found themselves mired in "a firestorm of criticism" when it was alleged that its Exempt Organizations Division sought to suppress speech by targeting conservative social welfare organizations for special enforcement and delaying their applications for tax exempt status. Donald B. Tobin, *The Internal Revenue Service and A Crisis of Confidence: A New Regulatory Approach for a New Era*, 16 FLA. TAX REV. 429, 462 - 466 (2014). The allegation resulted in a Treasury Department report essentially confirming the allegation – though not determining what the motives were. Treasury Inspector General for Tax Administration, 2013-10-053, *Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review* (May 14, 2013), www.treasury.gov/tigta/auditreports/2013reports/201310053fr.pdf [hereinafter Treasury inspector]. The Treasury Report precipitated congressional hearings and several lawsuits. Donald B. Tobin, *infra.*

in schools ("schooling"),[65] or by simply interpreting the term "education" in a manner that excludes teaching hate. [66] The former approach throws the proverbial baby out; much of what is good about education occurs outside schools. Restricting educational exemption to schooling implies that the distinction between education and its denigrated cousin – indoctrination – cannot be articulated in a way that meets constitutional muster. I do not concede that implication. Instead, I rely on epistemology and philosophy to show that education and indoctrination can be distinguished so that the education is subsidized, and indoctrination is not. Just as I believe stochastic terrorists want those they hate never to exist, I also assume that hatred of a people based on an immutable characteristic must be indoctrinated. Adequately defining indoctrination, and then distinguishing indoctrination from education necessarily denies tax exemption to hate groups. The second proposal is the better one, but its proponents thus far rely on a constitutionally suspect (because it is content-based and too subjective) analysis known as the "methodology test." I prove that while government may not prohibit hate speech, it may constitutionally deny exemption for hate groups without dancing around the First Amendment elephant. In other words, exemption for hate groups can be denied not only because hate groups are not charitable, as that term is now adequately defined, or that hate groups indoctrinate instead of educate, but precisely because we hate the ideas they teach.

Tax scholars necessarily agree with the definitional reasons for denying tax exemption to hate groups. They perhaps disagree with denying tax exemption precisely because of hateful

[65] *See* Eric Franklin Amarante, *Why Don't Some White Supremacist Groups Pay Taxes?* 67 EMORY L.J. ONLINE 2045 (2018). (proposing to limit educational tax exemption to formal schools)

[66] *See* Alex Reed, *Subsidizing Hate: A Proposal to Reform The Internal Revenue Service's Methodology Test*, 17 FORDHAM J. CORP. & FIN. L. 823 (2012) (advocating a more "robust" enforcement of current law definition of "educational" organizations).

ideas.[67] The definitional reasons for denying tax exemption remain sorely in need of elaboration, particularly regarding the meaning of "charity," and the epistemology of "education." First, there is a legitimate, if not uneasy, reliance on Supreme Court precedence to the effect that charity excludes racial discrimination,[68] but that precedent is so thoroughly *sui generis* as to almost occupy the status of dicta, inapplicable to all but the context in which it was first articulated.[69] What is lacking is a discussion of the normative basis from which to conclude that hate groups do not pursue charitable purposes, irrespective of whatever words they use for their purpose. I articulate that basis in support of my conclusion that "charity" explicitly excludes stochastic terrorism – not because of their words or sentences, but because hatred is the desired result.

As regards "education," scholars and the IRS have essentially relied on a faulty effort at epistemology, the results of which cannot be confidently applied. The law's current definition of "education" is epistemological to an extent, but it is not entirely without precise reference to particular words - words that "inflame" or "disparage,"[70] for example" - that lack objective meaning. To the extent government is sensitive to free speech concerns, it should rather avoid the issue instead of defending the current definition. The definition needs a deeper and more

[67] Professor Mayer, the only other tax scholar who has addressed free speech in this context, is clearly uncomfortable with the notion that tax exemption can be denied precisely because most people hate stochastic terrorism. Lloyd Hitoshi Mayer, supra note 60.
[68] Bob Jones University v. 461 U.S. 574 (1983).
[69] "In the decades since *Bob Jones*, no additional [fundamental national public policy] . . . has yet emerged, despite advances in civil rights protection, for example, for same-sex marriage under the Fourteenth Amendment, and for transgender rights under Title VII." Lynn D. Lu, *Who's Afraid of Bob Jones? Fundamental National Public Policy' and Critical Race Theory in a Delicate Democracy,*" 25 CUNY L. REV. 93, 103-04 (2022).
[70] See Rev. Rul. Rev. Proc. 86-43, 1986-2 C.B. 729; Supra notes ___ through ___ and accompanying text.

thorough epistemological elaboration so that it lends credence to the notion that "education" excludes methods necessary to teach people to hate other people.

My contention is that teaching hate requires certain techniques collectively described as "indoctrination" and by defunding that technique, hate groups will necessarily be denied tax exemption. Here, I should quickly address a common retort. One that assumes hate groups may easily disguise indoctrination as education by including a few objectively non-biased sources or materials in their "curriculum."[71] I do not dispute the assumption; I object to the assertion's intellectual blindness. The disguise can only be successful, despite the enduring presence of haters in the curriculum, if it adopts objectively non-biased sources sufficient that the process be deemed educational though still biased or delivered by unrepentant haters. The law will never entirely exclude racism or even implicit bias from education; it can only insist that subsidized educators employ a degree of objectivity sufficient that students may come to conclusions different from those held by the educator. So if the only way to avoid the label, "indoctrination," is by adhering to even a minimum level of objectivity, the battle will have been won as a matter of educational tax exemption. That is the best that can be hoped for and indeed the most that ought to be demanded. Throwing up one's hands in realization that people will routinely avoid

[71] Professor Volokh made this thoughtless assertion before a Congressional panel as sort of a last reason (after a faulty free speech analysis) why it is scarcely worth the effort to deny tax exempt status to stochastic terrorist:

> It's also not clear that much would be gained from requiring hate groups to support their views using factual arguments (which could easily be based on pseudoscience) or pressuring them to add the patina of "reasoned development" to their claims. Advocates of any position, however wrong-headed, can always cherry-pick some facts that they could use to buttress their arguments.

The Volokh Conspiracy, Reason, https://reason.com/volokh/2019/09/19/the-first-amendment-and-tax-exemptions-for-hate-groups/. September 19, 2019.

an ideal outcome is to make the perfect the enemy of the good. And without an epistemologically based definition the law does not even achieve the good.[72]

After establishing definitional points and thus the first two bases upon which hate groups should be denied tax exemption, I confront the constitutional concerns, starting with the vagueness doctrine and then addressing speech incantations. I note that government may pick and choose the activities it will fund even if doing so disadvantages speech that government could not directly prohibit.[73] The constitutional problem arises not by the government's selective subsidization of activities or outcomes dependent on speech, but when a subsidized activity or outcome is so inadequately defined that it "chills" speech or allows government discretion to punish speech under the guise of regulating activity.[74] I easily conclude that the terms "charity" and "education" (whether used to denote an activities or outcome) are or can be defined clearly enough to deny exemption to hate groups without chilling speech or leaving government with discretion to deny exemption based on speech.

[72] I dare say that where there is objective debate regarding whether an organization is truly educational or merely a disguised indoctrinator, organizations will be deemed educational for tax exemption purposes. I cannot legitimately demand that government prohibit teaching ideas I hate, but I can legitimately demand that ideas I hate be taught with regard for objective truth if it is to be taught with my subsidy. See Karl Zinsmeiste, Roundtable, *Some People Love to Call Names,* Philanthropy Roundtable, Dec. 23, 2021, https://www.philanthropyroundtable.org/?s=Some+People+Love+to+Call+Names. (taking issue with The Southern Poverty Law Center's labeling of some organizations as "hate groups," and setting forth objective reasons against the designation).

[73] United States v. American Library Association, Inc. 539 U.S. 194 (2003) (conditioning federal funds on libraries' blocking of pornographic internet sites was valid exercise of Congress' power to define the funded activity); Rust v. Sullivan, 500 U.S. 173 (1991) ("But we have here not the case of a general law singling out a disfavored group on the basis of speech content, but a case of the Government refusing to fund activities, including speech, which are specifically excluded from the scope of the project funded.").

[74] Big Mama Rag, Inc. v. United States, 631 F.2d 1030 (DC Cir. 1980) (definition of "education" is unconstitutionally vague).

Speech incantations present the more difficult problems. The incantations do not determine whether government may or must deny tax exemption to hate groups because of their ideas. For every First Amendment incantation supporting government's right and duty to deny exemption to hate groups, there is another that suggests government may not deny tax exemption to hate groups so long as tax exemption is an available benefit. The incantations are guides, but even the most experienced guide can lead followers astray if he gazes only at his feet along their way. This is not to admit of an escape from my conclusion that hate groups must be denied tax exemption. I contend that incantations obscure the resolution not because I cannot articulate them in support of my bias, but because I can articulate them in support of and in opposition to my bias. In the end, I rely on constitutional norms to show that government may and, indeed, must deny tax exemption to hate groups.

II. CHARITY

Scholars confronting whether hate groups qualify for tax exemption pay insufficient attention to a foundational requirement.[75] They blithely agree that teaching and advocating hate is as uncharitable, in the popular and contemporary sense of the word, as can be. Both constitutional and tax scholars, however, dismiss the contemporary notion of charity as if that notion is irrelevant precisely because it is popularly held.[76] Constitutional scholars conflate

[75] Brunson, *supra* note 60 (addressing whether hate groups are educational but not whether they are charitable); Eric Franklin Amarante, *supra* note 60 (analyzing whether hate groups are educational but not whether they are charitable); Alex Reed supra note 60 (addressing whether hate groups are educational but not charitable)

[76] See, e.g., Eugene Volokh, *supra* note 69 (asserting that the IRS may not deny tax exemption to hate groups even though "millions of Americans" find their views abhorrent); Michael Kunzelman, *White nationalists have raised millions thanks to tax-exempt charities*, Salon, (Dec. 23, 2016, 12:46 pm), https://www.salon.com/2016/12/23/white-nationalists-raise-millions-with-tax-exempt-charities/. (quoting various tax scholars, one of whom notes that "it should make people uncomfortable that the government is subsidizing

speech and purpose, causing them to ignore that Congress may define an "activity" to be funded even if enforcing the definition defunds certain opinions[77] For their part, tax scholars analyze the issue with what seems a distinct lack of rigor derived from moral certitude. Instead of explicating hate groups' genocidal purposes vis-à-vis the meaning of charity or education, tax scholars implicitly, if not unknowingly, concede that hate groups are charitable and then address whether hate groups are "educational" within the literal confines of IRC 501(c)(3).[78] This is all well and good, but by forgetting that all exempt organizations must first do no harm – which is to say, their purpose (i.e., their desired outcome) must be "charitable" whatever else organizations claim to be – those scholars render charitable tax exemption an amoral concept, ultimately conceding false equivalence between love and hate.[79] They necessarily render the word "charity" meaningless if even a hate group has the requisite purpose.

We might concede, just for the sake of argument, that hate groups are educational in a very literal sense of the word. They teach *something*, after all. Tax scholars rightly insist, though, that pedagogy is important and that hate groups' pedagogy prove they are merely propagandistic, rather than educational.[80] Something about that assertion is not quite

---

groups that espouse values that are incompatible with most Americans."); Eden Stiffman, *Dozens of 'Hate Gourps' have Charity Status, Study Finds*, THE CHRON. OF PHILANTHROPY., Dec. 22, 2016 at ____, https://www.philanthropy.com/article/dozens-of-hate-groups-have-charity-status-em-chronicle-em-study-finds/?cid2=gen_login_refresh&cid=gen_sign_in ("The idea of tax exempt organizations devoted to hate speech is just corrosive of everything that the tax-exempt sectors says it stands for.").

[77] Eugene Volokh, *No, the IRS may not deny tax exemptions on the grounds that a group is a supposed 'hate group,'* Wash. Post: Volokh Conspiracy (Dec. 29, 2016, 8:37 a.m.), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/12/29/no-the-irs-may-not-deny-tax-exemptions-on-the-grounds-that-a-group-is-a-supposed-hate-group/.

[78] *Supra* note 72.

[79] "This simplistic reading of the statute, however, tears section 501(c)(3) from its [charitable] roots." Bob Jones University vs. U.S. 639 F.2d 147, 151 (4th Cir. 1980), *aff'd* Bob Jones University v. U.S. 461 U.S. 574 (1983).

[80] *Supra* note 60. *See also* Tommy F. Thompson, The Availability of the Federal Educational Tax Exemption for Propaganda Organizations, 18 U.C. Davis L. Rev. 487 (1985) (discussing the IRS's efforts to deny tax exemption to groups whose methods constitute propaganda rather than education).

convincing so long as "education" is stripped of the requirement that all exempt organizations must first meet an evolving definition of charity. That evolution over at least 400 years,[81] it should be noted, has not yet progressed to the point that charity includes outright hatred of certain human people because of their human characteristics. To date, though, tax scholars have ignored the first and overriding requirement that hate groups, even if they might be described as educational, must be charitable in both the popular and legal sense of the word to be tax exempt. Which is to say that the layperson's suspicion that there is something entirely absurd about calling a hate group "charitable," and therefore deserving of tax exemption, is not unworthy of jurisprudential exploration.

The foregoing begs the question, what is "charity?" *Bob Jones University v. Commissioner*[82] is often cited for its discussion of what is not charity. There, the Supreme Court articulated the proposition that racial discrimination violates "established,"[83] "settled,"[84] "fundamental,"[85] or "firm"[86] public policy.[87] But *Bob Jones* is most important for its conclusion that charity and racial discrimination are mutually exclusive, and its conclusion that every educational organization must be charitable to gain tax exemption. The analysis leading to that

[81] The meaning of charity in American law is derived from the English Statute of Charitable Uses. Charitable Uses, 1601, 43 Eliz., ch. 4 (Eng.). Bob Jones v. United States, 461 U.S. 574 (1983).
[82] 461 U.S. 574 (1983).
[83] *Id.* at 591 ("A corollary to the public benefit principle is the requirement, long recognized in the law of trusts, that the purpose of a charitable trust may not be illegal or violate established public policy.")
[84] *Id* at 585 ("to qualify for a tax exemption pursuant to 501(c)(3), an institution must show, first, that it falls within one of the eight categories expressly set forth in that section, and second, that its activity is not contrary to settled public policy.")
[85] *Id*. at 592 ("a declaration that a given institution is not "charitable" should be made only where there can be no doubt that the activity involved is contrary to a fundamental public policy.")
[86] *Id*. at 598 ("Indeed, it would be anomalous for the Executive, Legislative and Judicial Branches to reach conclusions that add up to a firm public policy on racial discrimination, and at the same time have the IRS blissfully ignore what all three branches of the Federal Government had declared.")
[87] That the required "public policy" is explained with at least four different modifiers – established, settled, fundamental, and firm – only adds uncertainty to an already imprecise phrase – "public policy."

conclusion is useful for present purposes. First, *Bob Jones* makes public morality an entirely relevant and appropriate barometer by which to determine whether an activity is charitable.[88] The meaning of charity is infused, though perhaps not thoroughly prescribed by prevailing societal consensus.[89] And even though tax exemption encourages pluralism[90] in the delivery of public goods and services, *Bob Jones* teaches that charity is not so pluralistic that even an extremely minoritarian concept of charity demands tax exemption. Second, *Bob Jones* reasoned that an organization explicitly enumerated in IRC 501(c)(3) – educational or scientific, for example – must nonetheless be charitable within contemporary meaning to be tax exempt, else tax exemption would be divorced from charity.[91] Third, *Bob Jones* reasoned that charity gathers its continuous meaning from the law of charitable trusts established in and inherited from the

[88] *Id*. at 593 n. 20 ("Yet contemporary standards must be considered in determining whether given activities provide a public benefit and are entitled to the charitable tax exemption. Charitable trust law also makes clear that the definition of "charity" depends upon contemporary standards.").
[89] Hence *Bob Jones*'s admission that discrimination was at one time thought not inconsistent with charity. *Id*.
[90] In his concurrence in *Bob Jones*, Justice Powell worried that the majority's insistence that charities comply with established, settled, fundamental and firm public policy worked against the idea of pluralism underlying tax exemption:

> Even more troubling to me is the element of conformity that appears to inform the Court's analysis. The Court asserts that an exempt organization must "demonstrably serve and be in harmony with the public interest," must have a purpose that comports with "the common community conscience," and must not act in a manner "affirmatively at odds with [the] declared position of the whole government." Taken together, these passages suggest that the primary function of a tax-exempt organization is to act on behalf of the Government in carrying out governmentally approved policies. In my opinion, such a view of 501(c)(3) ignores the important role played by tax exemptions in encouraging diverse, indeed often sharply conflicting, activities and viewpoints. As Justice BRENNAN has observed, private, nonprofit groups receive tax exemptions because "each group contributes to the diversity of association, viewpoint, and enterprise essential to a vigorous, pluralistic society." Far from representing an effort to reinforce any perceived "common community conscience," the provision of tax exemptions to nonprofit groups 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,[4] "[t]he interest in preserving an area of untrammeled choice for private philanthropy is very great."

Id. at 609-10 (Powell, J. concurring) (citations omitted).
[91] Bob Jones, 461 U.S. 574 (1983).

United Kingdom.[92] We already knew that hate groups do not meet the contemporary non-legal conception of charity. After *Bob Jones*, it is possible to know whether hate groups are charitable in a formal legal sense as well.

One thing is certain. Charity is a concept resting on love of all humankind and the universal dignity and equality of all men and women.[93] Hatred of one group of humans is the antithesis of charity; nor is hatred of one group offset by love of one's own. A hate group cannot avoid the mutually exclusive relationship between hate and charity, by asserting it is only celebrating its own culture.[94] The assertion is axiomatic and need not be belabored.

Still, doubt and disbelief regarding the legal definition of charity thrive on uncertainty. While it is a matter of the highest judicial finding that racial discrimination is contrary to the contemporary meaning of charity, reliance on nondeliberative consensus expressed as "public policy" is not entirely satisfactory if only because consensus is difficult to determine except in the rarest of cases, apparently.[95] Doubt and disbelief dissipate, though, when consensus is arrived at

---

[92] *Id*.

[93] "Charitable organizations originate from the great command to love thy neighbor as thyself." Lars Gustafsson, *The Definition of "Charitable" For Federal Income Tax Purposes: Defrocking the Old and Suggesting Some New Fundamental Assumptions*, 33 HOUS. L. REV. 587, 589 (1996).

[94] A hate group that asserts it does not hate other groups, but merely loves its own, gets no pass if it implies a necessity to hate another group to love its own.

[95] Thus, *Bob Jones University* has not resulted in any subsequent recognition of a public policy sufficient to deny tax exemption to an otherwise qualifying entity. The American Law Institute cautions against the use of public policy:

> one still often-quoted statement was that "public policy is an unruly horse," and the other that it "seems to me extremely dangerous to limit the power of disposition on any general notion of impolicy, without some definite rule or principle being shown to apply to the case . . . The danger of relying on general notions of public expediency or policy, which varies so much from time to time . . . [is that] such a rule of decision may lead . . . to the greatest uncertainty as to individual rights in each particular case, if Courts of justice are to decide upon nice speculations . . . without some definite mischief to the public being clearly shown to apply to the case."

RESTATEMENT (THIRD) OF TRUSTS §29 General Notes on Clause (c) and Comments i through i(2) (AM. L. INST. 2012).

deliberatively and then articulated in statutes or rules.[96] Not that legislative or regulatory articulation proves forever that articulated consensus is always right. But the deliberative processes resulting in statutory or regulatory determinations provide a sense of certainty not provided by consensus expressed as a sort of public policy cloud drifting over jurisprudential landscape.[97]

The Internal Revenue Service perhaps doubts or does not believe its authority to deny tax exemption to hate groups, but that authority exists in articulated form, not just abstract public policy. Treasury Regulation 1.501(c)(3)-1(d) defines charity:

> Such term includes: relief of the poor and distressed or of the underprivileged; advancement of religion; advancement of education or science; erection or maintenance of public buildings, monuments, or works; lessening of the burdens of Government; and promotion of social welfare by organizations designed to accomplish any of the above purposes, or (i) to lessen neighborhood tensions; (ii) *to eliminate prejudice and discrimination; (iii) to defend human and civil rights secured by law; or* (iv) to combat community deterioration and juvenile delinquency.[98]

If charity includes efforts "to eliminate prejudice and discrimination," it cannot also mean efforts to perpetuate prejudice and discrimination. Likewise, if charity means defending "human and civil rights secured by law,"[99] it cannot also mean efforts to deny or resist human and civil rights

[96] *See* David A. Brennen, *The Power of the Treasury: Racial Discrimination, Public Policy, and "Charity" in Contemporary Society*, 33 U.C. DAVIS L. REV. 389, 426-27 (asserting that Congress is better able to utilize its legislative investigatory powers, and is more responsive to the democratic process, in the determination of public policy).

[97] *See Id*. at 426, note 193 ("This is not to suggest that Congress would necessarily come to the correct conclusion. However, given the passion voters generally have about racial issues any conclusion arrived at by Congress would, ideally, be reached only after thoughtful and careful consideration.")

[98] T.D. 6391, 24 FR 5220, June 26, 1959.

[99] Hence, the White Citizens Council, formed to resist desegregation after Brown v. Board of Education, 346 U.S. 886 (1954) would not have been "charitable" had the regulation been in place when the group formed. See supra notes 29 – 32 and accompanying text.

secured by law. Hate, as a purpose, is clearly contrary to a considered regulatory definition of charity, not just a definition based on abstract public policy.

Recall, too, that the Supreme Court accepts charitable trust law as the underlying definitional authority for charitable tax exemption.[100] Charitable trust law eliminates whatever doubt or disbelief might still linger by defining charity to exclude discrimination:

> It is particularly common, however, for provisions to be included in various types of charitable trusts, especially those created for educational or health purposes or for the relief of poverty, limiting the direct benefits or eligibility to persons of a particular national origin, religion, gender, sexual orientation, age group, political affiliation, or other characteristics or background . . . The issue for present purposes, however, remains what provisions of this general type may, as a matter of trust law and policy, be inconsistent with the nature of charitable purposes. Provisions of these types in charitable trusts are not valid if they involve invidious discrimination. . . 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. Thus, a trust to provide land and maintenance for a playground from which Black children are excluded, or a trust to support a scholarship program for which no Roman Catholic may apply, is not enforceable under those terms as a charitable trust. Similarly, although the exclusions are not *explicit*, a trust to provide research grants for which only "white, Anglo-Saxon Protestants" may apply is invidious and noncharitable.[101]

Thus, it can hardly be doubted that an organization, even one that teaches something is nevertheless disqualified from federal tax exemption if its purpose can be described as perpetuating discrimination or denying human or civil rights.

I am confident that the foregoing is accurate to the extent it relates how the word "charity" excludes hate groups under current law. But a descriptive understanding of charity

[100] Bob Jones University vs. 461 U.S. 574, 588-92 (1983).
[101] RESTATEMENT (THIRD) OF TRUSTS §28 cmt. f (Am. L. Inst. 2012)

ultimately rests on the notion that charity excludes hate groups simply because we say it does (even if we said so by regulation adopted a long time ago). This is nonetheless appropriate because as *Bob Jones* teaches, charity reflects public policy and ultimately public policy is what we say it is. We should admit though that "public policy . . . is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail."[102] Public policy cannot provide all the confidence we desire because it is sort of a "last ditch" effort appeal.

A normative understanding of charity mitigates the suspicion that the definition espoused above is appropriate only because it is convenient to a desired outcome. Here again, *Bob Jones* is illuminating because the justices – primarily Justices Burger, Powell, and to a lesser extent, Rehnquist -- took up an interesting debate regarding the normative basis of charity as that term relates to tax exemption. The justices emphasized different norms but ultimately agreed that the norms were not necessarily mutually exclusive.

They each began from the accepted premise that government is burdened with the obligation to pursue the general welfare through the dispensation of public goods and services. Public goods and services are paid for, of course, primarily through taxation. Burger theorized that tax exemption is appropriate when the recipient alleviates government of the costs of doing that which the government would otherwise have to do.[103] In a *quid pro quo* transaction, government pays exempt organizations in exchange for their doing what government would otherwise do. Hence, government – we, the people – loses nothing.[104] The public is compensated

[102] Richardson v Mellish (1824), 2 Bing 229 at 252, 130 ER 294.
[103] Bob Jones, 461 U.S. at 590.
[104] *Id*.

for the exemption granted certain organizations by reduction of the amount people are required to contribute via taxation. An important elaboration on this point, one which I think entirely reasonable, is that government pays exempt organizations for doing things that government *could* do itself, but for whatever reason decides to outsource or not do at all. In other words, government subsidy is appropriate only when government, itself, is permitted to do whatever the exempt organization is doing with government subsidy. It follows that government may not subsidize an activity that it is prohibited from performing itself. [105]

Justice Powell stressed a different normative rationale, one based on diversity and pluralism. He worried, unnecessarily as I explain below, that Burger's emphasis on the alleviation of government burdens imposed a conforming "orthodoxy"[106] on efforts by grassroots organizations who advocate or pursue goals alternative to those pursued by government. In Powell's view, exemption encourages a diversity of thought and action appropriate to a "vigorous pluralistic society."[107] Here, I would offer yet another elaboration. Exemption allows groups without a voting majority to follow an alternative priority with which public goods or services are pursued. Where government might think it unimportant to focus on environmental protection or endangered species, grassroots organizations might differ and direct their financial and human resources exclusively to preservation of wetlands or bald eagles. It is hard to know whether

[105] The important exception is tax exemption for religious organizations. Government is precluded from subsidizing religion. But in *Walz v. Tax Commission of City of New York*, the Supreme Court allowed government exemption of religious organizations because denying tax exemption would cause a greater constitutional harm – via government tax regulation of religious organizations – than does tax exemption. 397 U.S. 664 (1970).
[106] "Far from representing an effort to reinforce any perceived "common community conscience," the provision of tax exemptions to nonprofit groups 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 untrammeled choice for private philanthropy is very great." Bob Jones, 461 U.S. at 609-10 (Powell, J. concurring).
[107] *Id.*

Powell's view represents a diversion from Burger's public benefit rationale or just a clarification. I tend to think that Powell is asserting the right of individuals to differ with the government as to public priorities and the methods by which to accomplish those priorities, but not to define for themselves, without any limitation, what is intended by "public benefit."[108] Significantly, Powell did not argue that the pluralism and public benefit rationale were mutually exclusive, and he even conceded that one may take precedence over another.[109]

A third rationale, one not raised by the Court, is less convincing but nevertheless worth discussing. Two scholars have argued, and Congressional tax researchers[110] apparently agree, that one justification for tax exemption is that certain organizations are "morally commendable."[111] The earliest expression argued that it was "simply wrong" to tax organizations that "relieved the burdens of government, but also helped to form the moral fiber of the young

[108] Powell agrees that government may define those things that are not conducive to the public good. "In this case I agree with the Court that Congress has determined that the policy against racial discrimination in education should override the countervailing interest in permitting unorthodox private behavior." Id. at 610. (Powell, J. concurring).

[109] *Id*. at 610-612. (Powell, J. concurring). "As a matter of trust law, one of the main sources of the general law of charity, no trust can be created for a purpose which is illegal. The 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 crime." Rev. Rul. 75-384, 1975-2 C.B. 204. Thus, "Fagin's School for Pickpockets" is not denied tax exemption because it counsels the commission of illegal activity, but because teaching students how to engage in illegal activities is not charitable. Green v. Connally, 330 F. Supp. 1150, 1160 (1971). See also Bob Jones v. United States, 461 U.S. 574, 619 ("I have little doubt that neither the 'Fagin School for Pickpockets' nor a school training students for guerrilla warfare and terrorism in other countries would meet the definitions contained in the regulations."). The more important point is that teaching people how to commit crime is a speech activity undeserving of tax exemption, not just because teaching people how to commit crime is unprotected speech, but because teaching people how to commit crimes is not an activity within the public's moral conception of charity even if teaching people how to commit crimes constituted protected speech. Similarly, hate speech is protected speech, but teaching people to hate other people is not within the public's moral conception of charity.

[110] For a comprehensive summary of the rationale for charitable tax exemptions see, Joint Committee on Taxation, *Historical Development and Present Law of The Federal Tax Exemption for Charities and Other Tax-Exempt Organizations Scheduled for a Public Hearing Before the House Committee on Ways and Means on April 20, 2005* 17 – 20 (JCX- 29-05 No. 4) (April 19, 2005).

[111] *Id.* Dean Pappas, *The Independent Sector and the Tax Law: Defining Charity in an Ideal Democracy*, 64 S. CAL. REV. 461, 466 (1991). ("This policy may therefore place an initial qualification on the distribution of tax exemption that the organization serve some purpose that is morally commendable.")
Id. at 466-67.

nation."[112] A later assertion claimed that "charitable organizations provide important moral and social functions that deserve support."[113] Because of their "selfless service for the public benefit . . ." it might be immoral to tax them.[114] Paying homage to *summum bonum* does little to normatively distinguish deserving from undeserving organizations. But I do not mean to entirely dispense with morality as a normative rationale. Even if as a philosophical matter morality cannot be objectively determined, the notion of rewarding good or moral activities is nevertheless a worthy pursuit. The weakness of morality as a rationale occurs at the margins, rather than in the main, when people debate the ethics of harvesting stem cells or providing sanctuary for illegal immigrants for example. The morality of those purposes is legitimately debatable, but I contend that even haters admit that racial, ethnic, religious or gender-based hatred is always immoral.[115] To say that Congress seeks to limit tax exemption to organizations that are moral, even if it can hardly know, *ex ante*, the entire universe of those organizations, is hardly saying more than that Congress is pursuing the public good but not the public bad.

Still, it is unnecessary to inject amorphism into the analysis. The relatively objective rationales – public benefit and pluralism – aren't even in conflict regarding whether stochastic terrorism is conducive to a charitable outcome. Under the public benefit rationale, hate groups don't deserve tax exemption. Not only do they fail to provide a public good or service the

[112] *Id.*

[113] *Id*. at 466 (1991). Pappas quoted an earlier commentary: "A basic consideration underlying the concept of exemption is that of morality. In framing the income tax law, certain value judgments were made by Congress that it was simply wrong to tax certain types of organizations. It seemed anomalous to discourage the growth of educational, civic, charitable, or other similar organizations which . . . helped to form the moral fiber of the young nation." *Id.* quoting James J. McGovern, *The Exemption Provisions of Subchapter F*, 29 TAX LAW. 523, 526 (1976).

[114] *Id*.

[115] For example, those who defend the appropriateness of government's display of the confederate battle flag typically disclaim any malevolent motivation and instead assert that doing so merely recognizes and celebrates cultural heritage. See generally, Deborah R. Gerhardt*, Law in the Shadows of Confederate Monuments*, 27 MICH. J. RACE & LAW, 1 (2021).

government would or could otherwise provide, but they also tend to increase government burdens and hence the cost to the rest of us. The subsidy is not repaid by reduction in everybody else's tax bill because the costs of hate presumably outweigh any benefits derived. And although diversity is essential to a vigorous pluralistic society, hate groups necessarily work in political opposition to diversity and pluralism. Hate groups seek exclusion and concentration of socio-economic power. Thus, there is no accepted normative rationale for including hate groups in the universe of charities, however vast and otherwise undefined that universe may be.

III. EPISTEMOLOGY

This section begins with broad discussion of the value of education in socio-economic terms. It relates the philosophical value and goals of education, and then describes the epistemological methods that achieve those values and goals. I distinguish education from indoctrination, a teaching activity with different values, goals, and methods than education, and prove that exemption is appropriate for education but not indoctrination.

Two efficiency related points should be made. First, if teaching activities are ubiquitous perhaps their occurrence or increase need not be subsidized at all. Second, and as a rejoinder to the first point, certain teaching activities are considered essential to self- or societal-actualization. Universal exposure to – indeed, an oversupply of – that sort of teaching is desirable. Universal exposure would not occur without subsidy because teaching might be insufficiently profitable to occur in sufficient supply. It follows that some teaching activities or experiences are, as a matter of efficiency, more worthy than others. Some teaching activities are

entirely unworthy of public support because (1) there is sufficient supply without public subsidy, or (2) the activities work in opposition to self- or societal-actualization.

Here, it is helpful to summarize the analysis. Government should subsidize those teaching activities that encourage self- or societal-actualization. To assist in distinguishing activities worthy of subsidization from unworthy activities, I use the word "education" to refer to worthy teaching and "unmitigated indoctrination" to refer to unworthy teaching. Education and indoctrination are both teaching activities, though indoctrination is of the pejorative form. As a normative matter, indoctrination is unworthy when it is not mitigated by democratic controls that minimize negative effects on self- or societal-actualization. Tax exemption is thus appropriate to subsidize education and mitigated indoctrination. To be more precise, government should subsidize education whether it occurs in formal or informal settings; government should subsidize, or rather tolerate indoctrination only when it occurs in formal settings. In formal settings, indoctrination is mitigated by democratic oversight – e.g., elected school boards, accrediting bodies, regulatory agencies, or academic freedom – all forms of which are ultimately responsive to the public and not entirely insensitive to individualism expressed as dissent or unorthodoxy. Hence the harm of indoctrination in formal schooling is mitigated. In informal settings, indoctrination is less effectively subject to democratic oversight, if at all, and thus more often harmful to self- or societal-actualization. Unmitigated indoctrination, though it may not be prohibited, is therefore unworthy of public subsidy.

It is nearly impossible to overstate the value of benefits derived from education. Still, it is worth reciting the most common benefits because doing so exposes the normative reasons for educational tax exemption and helps identify teaching activities that do not generate those

benefits. Economists treat education as investment in human capital.[116] Returns are classified as either private or public, and then market or nonmarket.[117] Private returns are those enjoyed by individuals, with market returns measured almost exclusively by changes in productivity and earnings.[118] Private nonmarket returns are measured by changes in social well-being and include such things as differences in health and lower infant mortality, relative to health and infant mortality in the absence of education.[119] Public market returns are those not exclusively inuring to an individual and include changes in gross domestic product, for example.[120] Public nonmarket returns include such things as changes in crime rates, impact on public health, and changes in the rate of political and civic engagement.[121]

Along with higher earnings, private market returns to education include more fringe benefits and better working conditions.[122] Private nonmarket returns include lower divorce rates, better health and longer life expectancy, higher cognitive development amongst children of educated parents, increased high school graduation rates amongst children of educated parents, better child health, lower rates of teenage pregnancy, better physical health, lower prevalence of severe mental illness, more efficient consumer behavior, and higher "marital choice efficiency."[123] Public market returns include higher gross domestic product, lower

[116] Barbara L. Wolfe & Robert H. Haveman, *Social and Nonmarket Benefits in an Advanced Economy*, in EDUCATION IN THE 21ST CENTURY 97, 103-04 (Yolanda K. Kodrzycki ed., 2002). *See also, Lochner, Lance, "Nonproduction Benefits of Education: Crime, Health, and Good Citizenship, in* 4 Handbook of the Economics of Education, Ch. 2 (E. Hanushek, S. Machin, and L. Woessmann eds., AMSTERDAM: ELSEVIER SCIENCE, 2011.)
[117] Barbara L. Wolfe & Robert H. Haveman*, supra* note 114 at 103-14.
[118] *Id.*
[119] *Id.*
[120] *Id*.
[121] *Id.*
[122] *Id.*
[123] *Id.*

unemployment, and a better economy overall. Public nonmarket returns include higher rates of charitable giving and volunteer engagement, reduced social alienation and inequalities, higher rates of opposition to government repression, higher rates of membership in community organizations, lower crime rates, higher voter engagement and turnout, increased democratization, better public health (due to improved diet, fewer smokers, and reduced spread of contagious diseases), and less poverty and welfare dependency.[124]

To the foregoing it might be added that education is valuable without regard to exogenous consequences. The assertion is probably most accurate as it relates to the aims or goals of education. A purist might argue that the highest value of education is its impact on the mind and on individual autonomy, without regard to private market or public returns. Education should expand the mind, thereby allowing the educated to imagine, conceive, and bring to reality wholly new ideas, free of intellectual constraint.[125] To inquire about the aims of education is to inquire what the finished person ought to be. As a broad general matter, educational aims exhibit a duality where the outcomes are perhaps both mutually exclusive and mutually dependent. Educational traditionalism focuses on formation, "a process of impressing external standards on

---

[124] *Id.*

> Some of these public benefits are felt within the classroom and school: One student's better education facilitates her classmates' learning. Others accrue to the neighborhood: Education inculcates "behavior norms" in neighbors' children. Other benefits are felt locally: Education reduces crime and promotes participation. Still others impact the region: Education levels predict a metropolitan area's success. Finally, education generates some externalities that are experienced by society as a whole: Schooling is associated with lower probabilities of receiving welfare benefits, with technological development, and with economic growth. Perhaps most fundamentally, education promotes a "stable and democratic society."

Nadav Shoked, The New Local, 100 VA. L. REV. 1323, 1368 (2014). (citations omitted).

[125] Education should be "designed to free the whole personality of the learner for the fullest living, for the best and most independent exercise of all his powers, for the control of his own destiny. William Heard Kilpatrick, *Indoctrination and respect for persons*, in CONCEPTS OF INDOCTRINATION at 47 (I.A. Snook ed., ROUTLEDGE, 2010)

students in order to supplant their natural inclinations with prescribed standard behaviors."[126] Progressivism, on the other hand, seeks to cultivate individual talents with the goal that the student attains her own highest potential.[127] While traditionalism stresses conformity, by the transmission of knowledge previously discovered and adherence to certain social values, progressivism encourages individuality by inviting students to expand the universe of knowledge through curiosity, inquiry, and imagination. The mutual exclusiveness of these approaches is more apparent than real because one must know what is already known before one can intentionally expand knowledge. The combination of these two approaches results in what one philosopher, relying on Aristotle, calls "education as completion:"

> Education as completion, then, is the process by which humans are instilled with the virtues they need in order to realize their nature, perform their function well, and thereby lead a flourishing life. Education as completion does not aim at making students into something other than what they truly are, but instead uses methods of formation to help them realize the capacity they have to become what they already essentially are by nature, but while in the process of being educated are only in an undeveloped, incomplete way.[128]

Hence, traditionalism and progressivism work together to complete the individual.

The discussion thus far is useful for a high-minded understanding of what education's finished person should be, but its metaphysical nature makes it hardly useful to an exact

---

[126] William B. Cohen, *Dewey, Aristotle, and Education as Completion,* 28 PHIL. EDUC. 669 (2019).

[127]

> Two schools of thought have governed pedagogical thinking for almost one hundred years: traditionalism and progressivism. Traditionalism generally aims at instilling old knowledge in young minds—a transmission process best facilitated by enforcing strict rules of conduct for all students to follow uniformly. Progressivism, by contrast, generally aims at the gradual development of each individual student through project work and the construction of certain environments designed to enable students themselves to have direct experiences of what is to be learned.

Id.

[128] *Id*. at 674.

definition of education as it relates to tax exemption. We have a general idea that education seeks to cultivate and grow human intellectual capacity -- that source from which all discoveries and social advancements proceed. My goal is to better articulate the aims of education towards the goal of defining the educational process entitled to tax exemption. Philosophers continue to debate the matter, but the debate is largely semantic:

> Many aims have been proposed by philosophers and other educational theorists; they include the cultivation of curiosity and the disposition to inquire; the fostering of creativity; the production of knowledge and of knowledgeable students; the enhancement of understanding; the promotion of moral thinking, feeling, and action; the enlargement of the imagination; the fostering of growth, development, and self-realization; the fulfillment of potential; the cultivation of "liberally educated" persons; the overcoming of provincialism and close-mindedness; the development of sound judgment; the cultivation of docility and obedience to authority; the fostering of autonomy; the maximization of freedom, happiness, or self-esteem; the development of care, concern, and related attitudes and dispositions; the fostering of feelings of community, social solidarity, citizenship, and civic-mindedness; the production of good citizens; the "civilizing" of students; the protection of students from the deleterious effects of civilization; the development of piety, religious faith, and spiritual fulfillment; the fostering of ideological purity; the cultivation of political awareness and action; the integration or balancing of the needs and interests of the individual student and the larger society; and the fostering of skills and dispositions constitutive of rationality or critical thinking.[129]

Ultimately, all these lead to a conclusion that education aims for the betterment of individuals and of the society those individuals occupy.

As a more pragmatic matter, education aims to transmit produced knowledge and to transform the educated into a knowledge producer, whose knowledge may, in turn, be transmitted.[130] Epistemologists define knowledge in a manner very similar to the means

[129] Siegel, Harvey. P*hilosophy of Educatio*n," *Encyclopedia Britannica*, 27 Sep. 2022, https://www.britannica.com/topic/philosophy-of-education. (Accessed 30 October 2022).

[130] "It's common to regard students not only as consumers of expert information but also as apprentices to the cognitive communities that produce knowledge." Emily Robertson, *The Epistemic Aims of Education*, in THE OXFORD HANDBOOK OF PHILOSOPHY OF EDUCATION 11, 12 (Harvey Siegel ed. OXFORD UNIV. PRESS, 2009).

employed in law to distinguish between reliable and unreliable evidence from which triers of fact may know things. For epistemologist, to know something means to have a justified belief. In other words, someone who claims knowledge is ultimately asserting belief and must produce evidence such as observation, testimony, memory, reason and the absence of countervailing evidence if the belief should be elevated from opinion to knowledge.[131] As knowledge stores increase, so too does self-[132] and societal actualization.[133]

What, then, are the processes by which knowledge is produced and transmitted conducive to self- or societal-actualization? If government is for the purpose of producing those values, it is only those processes that should be subsidized. The law should not subsidize processes that preclude self- or societal-actualization.

First, subsidized education should require "epistemic virtues and cognitive emotions."[134] Education should instill in students the desire "to seek good reasons for one's beliefs . . . Associated virtues include open-mindedness, willingness to entertain the views of others, responsiveness to criticisms of others, reasonableness, and self-reflectiveness."[135] Second, education should instill a desire to know how a belief is justified, and to state the basis of justification – testimony, memory, observation, reason, and the absence of countervailing evidence.[136] I believe, for example, that planes can travel through the air – I have observed them, my observation is corroborated by the testimony of others, and there is no countervailing

[131] *Id.* at 14 – 19.
[132] William B. Cohen, *supra* note 124 at 674.
[133] *See generally,* John Dewey, DEMOCRACY AND EDUCATION: AN INTRODUCTION TO THE PHILOSOPHY OF EDUCATION (NEW YORK: MCMILLIAN, 1916).
[134] Emily Robertson, supra note 128 at 21.
[135] *Id.*
[136] Id. at 16 – 22.

evidence. Therefore, I know that planes fly.[137] Third, education must require that students accept the fallibility of beliefs, however justified those beliefs may be.[138] Belief in the fallibility of ideas is necessary for critical thinking; critical thinking involves questioning one's own beliefs and the articulated and justified beliefs of others before adopting them as our own.[139] One doesn't question beliefs one assumes are infallible.[140] The teaching tools of the educational process include presenting testimony (assertion), demonstration (observation and memory), hypothesizing (imagination), experimentation (verification), quantitative and qualitative analysis (verification), Socratic questioning,[141] and logic (reasoning).[142] Finally, education must admit that knowledge is not finite; one can never reach the outer limits of all that is knowable, but the effort is worthwhile (curiosity and fallibility).

---

[137] "Knowledge of individual propositions is an abstraction from knowledge in a broader sense that encompasses understanding. Understanding requires a holistic grasp of an area that involves seeing the connections among the individual elements – how they fit together to generate an overall pattern or system." *Id*. at 19.

[138] Jonathan E. Adler, *Why Fallibility Has Not Mattered and How it Could, in* THE OXFORD HANDBOOK OF PHILOSOPHY OF EDUCATION (Harvey Siegel, ed. OXFORD UNIV. PRESS, 2009).

[139] "He cannot be taught who is convinced there is no truth to be appropriated or none he does not possess already." Thomas F. Green, *Indoctrination and beliefs*, *in* CONCEPTS OF INDOCTRINATION: PHILOSOPHICAL ESSAYS at 39 (I.A. Snook, ed. ROUTLEDGE, 2010)

[140] Fallibilism is a philosophical theory that holds:

> that all propositions are subject to perpetual testing. And that process of testing, whether it takes the form of systematic observation, controlled experiment, logical derivation, or probabilistic calculation, must always hold out at least the possibility that prior understandings will be displaced. Time, after all, has upset many scientific laws. In short, no matter how elegant and coherent the explanation and supportive the current data, we might be wrong.

Vincent Blasi, *Holmes and the Marketplace of Ideas, 2004 Sup. Ct. Rev. 1,* 19 (2004).

[141] "For teaching, insofar as it involves matters of knowledge and belief, begins with posing questions to be answered or answers to be questioned." Thomas F. Green, supra note 137 at 39.

[142]

> Thus teaching involves such activities as telling, questioning, explaining, instructing, informing, giving examples, persuading, demonstrating, training, drilling, conditioning, gesturing, setting an example, structuring a situation, approving, reproving, correcting, grading and so on. These kinds of activity constitute teaching when the agent performs them in order to bring about learning.

Indoctrination as Mis-education, in CONCEPTS OF INDOCTRINATION at 133 (I.A. Snook ed., ROUTLEDGE 2010).

We can now define the boundaries of those teaching activities for which public subsidy is appropriate. As a general matter, we might define educational organizations as those employing epistemological methods to discover, produce and transmit justified beliefs. At the very least, that broad definition would point to a science that defines education with evolving precision and according to refereed philosophical consensus.[143] This definition, aided by common understanding, makes it possible to know what constitutes education, and what does not in most cases. For the difficult cases, applicants and deciders could access expert opinion just as occurs in other areas where hard factual distinctions are legally required. Hence, we can recognize education and explain what makes it such with at least the amount of precision necessary for legislative or regulatory articulation.

Teaching that does not pursue self- or societal-actualization should not be deemed education for tax exemption purposes. Nor should activities that generate no public or private market and nonmarket returns. Finally, teaching activities that do not pursue justified beliefs through epistemological processes should be excluded. These abstractions lend some clarity, but

[143] Epistemology is a relatively new term applied to an older science:

> Although the term "epistemology" is no more than a couple of centuries old, the field of epistemology is at least as old as any in philosophy. In different parts of its extensive history, different facets of epistemology have attracted attention. Plato's epistemology was an attempt to understand what it was to know, and how knowledge (unlike mere true opinion) is good for the knower. Locke's epistemology was an attempt to understand the operations of human understanding, Kant's epistemology was an attempt to understand the conditions of the possibility of human understanding, and Russell's epistemology was an attempt to understand how modern science could be justified by appeal to sensory experience. Much recent work in formal epistemology is an attempt to understand how our degrees of confidence are rationally constrained by our evidence, and much recent work in feminist epistemology is an attempt to understand the ways in which interests affect our evidence and affect our rational constraints more generally. In all these cases, epistemology seeks to understand one or another kind of *cognitive success* (or, correspondingly, cognitive *failure*).

Stanford Encyclopedia of Philosophy, Epistemology, https://plato.stanford.edu/entries/epistemology/#Aca (Apr. 11, 2020).

they are not, by themselves, sufficient. The starting point for a workable definition is to adopt a label, if one is available, that captures a teaching activity, but which connotes a purpose as nearly opposite to education as possible. That label is "indoctrination."[144] Labels are helpful, though not sufficient, to provide general connotation for applicants and deciders – the IRS and in the event of a disagreement between applicants and the IRS, the courts. Indoctrination has a known connotation, antithetical to education, even if it is sometimes difficult to distinguish from education. For present purposes, it is also important to note that indoctrination is a content-neutral concept.[145] It is a phenomenon that is capable of identification without regard to any particular subject or viewpoint.

In fact, "indoctrinate" has been nearly synonymous with "educate" for most of the history of the English language.[146] In the early 1900s, especially after America's involvement in World War I, the term began to be more often associated with authoritarianism and political tyranny.[147] John Dewey, the progressive educationalist, defined indoctrination as "the systematic use of every possible means to impress upon the minds of pupils a particular set of political and economic views to the exclusion of every other."[148] This definition implies what we know intuitively, a kind of hijacking of the mind to the indoctrinator's way of thinking and in opposition

[144] In older texts, "indoctrinate" is viewed almost synonymously with "teaching." Brian S. Crittenden, *Indoctrination as Mis-education*, in CONCEPTS OF INDOCTRINATION at 144 (I.A. Snook ed., ROUTLEDGE 2010). Other sources, like the Cambridge Dictionary defined indoctrination as "the process of repeating an idea or belief to someone until they accept it without criticism or question." *Indoctrination*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/indoctrination.

[145] *Id.*

[146] "It may be surprising to many that little over half a century ago the employment of 'indoctrination' was no more offensive in educational circles than the use of 'education.' Indeed, the two terms were practically synonymous." Richard H. Gatchel, *The evolution of the concept*, *in* CONCEPTS OF INDOCTRINATION at 9 (I.A. Snook ed. ROUTLEDGE 2010). See also, Kilpatrick, *supra* note 128.

[147] Richard H. Gatchel, supra note 144, 12 – 16.

[148] THE LATER WORKS OF JOHN DEWEY, VOLUME 11, 1925 – 1953, at 425 (Jo Ann Boydston, ed. S. ILL. UNIV. PRESS, 1987)

to self-actualization. America's wars against national socialism in Germany, and fascism in Italy further contextualized the word until it came to mean something entirely bad, the "antithesis of education."[149] Its meaning was especially influenced by geopolitical competitions between nations: "Indoctrination, however, is fundamentally and essentially undemocratic. It intends to anticipate choice. It inherently uses the individual as a means to an end, and this danger is present wherever any type of authoritarianism prevails."[150] Hence, indoctrinate, as an action verb involves an attack on autonomy, self-actualization, and freedom.[151] It "aims simply at establishing certain beliefs so that they will be held quite apart from their truth, their explanation, or their foundation in evidence."[152] When employed against individuals, indoctrination aims to instill unalterable beliefs that control behavior. Carter G. Woodson once observed:

> When you control a man's thinking you do not have to worry about his actions. You do not have to tell him not to stand here or go yonder. He will find his 'proper place' and will stay in it. You do not need to send him to the back door. He will go without being told. In fact, if there is no back door, he will cut one for his special benefit. His education makes it necessary.[153]

When used by nation-states, indoctrination aims to consolidate power, engender complete trust in and devotion to leaders, and eradicate criticism, dissent, and disbelief.[154]

---

[149] Richard H. Gatchel, *supra* note 144, at 14. ("Increasingly educational leadership came to view indoctrination as the antithesis of education for life in a democracy.")

[150] William H. Kilpatrick, *Education of Adolescents for Democracy*, 14 Religious Educ., at 130 (1919)

[151] Indoctrination is a "violation of the autonomy to which all persons within some wide range of normal cognitive functioning are rightfully entitled, irrespective of substantial differences in intellectual endowment among those within the range." Eamonn Callan and Dylan Arena, *Indoctrination*, in THE OXFORD HANDBOOK OF PHILOSOPHY OF EDUCATION, at 118 (Harvey Siegel, ed., OXFORD UNIV. PRESS, 2009).

[152] Thomas F. Green*, Indoctrination and beliefs*, in CONCEPTS OF INDOCTRINATION at 25-26 (I.A. Snook ed., ROUTLEDGE 2010)

[153] Carter G. Woodson, THE MISEDUCATION OF THE NEGRO, at 21 (ClearWords.org, 2009).

[154] The political philosopher and holocaust survivor Hannah Arendt once described the effect of indoctrination thusly:

> A mixture of gullibility and cynicism had been an outstanding characteristic of mob mentality before it became an everyday phenomenon of masses. In an ever-changing, incomprehensible

To put the matter in terms of our definition, indoctrination's purpose is imparting non-evidential, fiercely held beliefs.[155] Where education seeks fallible but evidential belief, indoctrination seeks unquestionable and unalterable beliefs. Indoctrination aims at intellectual enslavement as a means of individual control. "Education as contrasted with indoctrination, is said to be a process of teaching pupils *how* to think, rather than *what* to think."[156] In its broadest sense, indoctrination is aimed at gaining control over political and public institutions comprising government. Hence, indoctrination has no value to individuals or society, at least not values consistent with a society that endorses "life, liberty and the pursuit of happiness."

Philosophers continue to debate and elaborate on the "how" of indoctrination. They seek linguistic clarity, limiting the term to teaching activities that have a certain aim, employ certain methods, or intend certain doctrinal beliefs.[157] While some philosophers limit the use of indoctrination to the teaching of "doctrines," others focus on the aims and methods of indoctrinators without regard to the subject matter being taught.[158] Ultimately, though, they

> world the masses had reached the point where they would, at the same time, believe everything and nothing, think that everything was possible and that nothing was true. The mixture in itself was remarkable enough, because it spelled the end of the illusion that gullibility was a weakness of unsuspecting primitive souls and cynicism the vice of superior and refined minds. Mass propaganda discovered that its audience was ready at all times to believe the worst, no matter how absurd, and did not particularly object to being deceived because it held every statement to be a lie anyhow. The totalitarian mass leaders based their propaganda on the correct psychological assumption that, under such conditions, one could make people believe the most fantastic statements one day, and trust that if the next day they were given irrefutable proof of their falsehood, they would take refuge in cynicism; instead of deserting the leaders who had lied to them, they would protest that they had known all along that the statement was a lie and would admire the leaders for their superior tactical cleverness.
>
> Hannah Arendt, THE ORIGINS OF TOTALITARIANISM, at 382 (Harcourt Brace Javanovich, 1951).

[155] "A belief is held non-evidentially when it is held quite apart from any reasons, evidence or canons for testing reasons and evidence." Thomas F. Green, supra note 137 at 36.

[156] R. Roderick Palmer, *Education and Indoctrination*, 34 Peabody J. Educ. 224, 226 (1957).

[157] *See* John Wilson, *Indoctrination and Freedom*, in CONCEPTS OF INDOCTRINATION at 102 - 103 (I.A. Snook ed. ROUTLEDGE, 2010).

[158] *Id*.

agree that indoctrination is a teaching method that renounces justified belief as the ultimate outcome. In fact, with indoctrination "belief" necessarily precedes justifications. The best indicator of indoctrination are preordained beliefs, for which only evidence in support, whether that evidence is real or contrived, is presented. That is, belief invariably precedes evidence.

Education and indoctrination, then, can be objectively distinguished by content-neutral standards requiring the presence or absence, respectively, of unbiased epistemological methods preceding knowledge. Education does not require that every epistemological method be employed, nor does indoctrination require the absence of every method. The distinction must necessarily be based on whether objectively applied epistemological methods preponderate the teaching. In the remaining portion of this section, I compare the ideas developed here to the definition of education under current law and then offer regulatory language to better implement the ideas in this section.

Congress has never defined education for tax exemption purposes, instead leaving that task to the Treasury Department.[159] The regulation seemingly follows the analysis offered in this section; a general rule defines education broadly and a specific rule (or rules) apparently excludes what might be considered indoctrination. Education is:

> **(a)** The instruction or training of the individual for the purpose of improving or developing his capabilities; or
>
> **(b)** The instruction of the public on subjects useful to the individual and beneficial to the community.
>
> An organization may be educational even though it advocates a particular position or viewpoint so long as it presents a sufficiently full and fair exposition of the pertinent facts as to permit an individual or the public to

[159] For a general history of the exemption of educational organizations see Tommy F. Thompson, *The Availability of the Federal Tax Exemption for Propaganda Organizations,* 18 U.C. DAVIS L. REV. 487, 496 – 505 (1985).

> form an independent opinion or conclusion. On the other hand, an organization is not educational if its principal function is the mere presentation of unsupported opinion.[160]

Thus, parts (a) and (b) define education as a matter of self- or societal-actualization, respectively. The next part of the regulation expresses the "full and fair exposition" test. The last sentence could be interpreted as excluding organizations that present non-evidential or unjustified belief, but only if the organization "advocates a particular position or viewpoint." This interpretation is supported by assuming that the last sentence only clarifies the preceding sentence. If it is intended to exclude indoctrination, it does so only regarding the advocacy of "particular positions or viewpoints," whatever that means. Or, the last sentence could be interpreted to categorically exclude any organization, if the organization presents "mere" unjustified beliefs. This interpretation is supported by reading the last sentence as a comment on the general definition of education in parts (a) and (b). If we broaden the inquiry, by reference to predecessor language, it seems most likely that the specific rule concerns political indoctrination.[161] The predecessor regulation provided:

---

[160] Treas. Reg. 1.501(c)(3)-(1)(d)(3) (1959).

[161] Professor Thompson lays out a convincing case that the Treasury Department initially sought to exclude all propaganda organizations, regardless of whether their propaganda was related to politics. Tommy Thompson, *The Availability of the Federal Educational Tax Exemption for Propaganda Organizations*, 18 U.C. DAVIS L. REV. 487, 498 (1985). Treasury apparently defined "propaganda" the way I define "indoctrination" – i.e., imparting unjustified [non-evidential] beliefs designed to achieve the indoctrinator's goals rather than the student's:

> Initially, Treasury attempted to exclude all propaganda organizations from exemption, because when providing for deductibility of contributions to educational organizations, Congress did not intend to encourage the dissemination of ideas in support of one doctrine as against another. Thus, Treasury attempted to distinguish between 'true education', which is directed at and for the benefit of the individual, and propaganda, which is directed at the individual only as a means to accomplish the purpose of the organization instigating it. The position was applied to all forms of propaganda, with no attempt to distinguish among organizations based upon the perceived desirability of the position advocated.

Id. After losing in the courts, Treasury retreated from its initial position and eventually adopted the current regulation that appears limited to political indoctrination. *Id*.

> An organization formed, or availed of, to disseminate controversial or partisan propaganda is not an educational organization within the meaning of the Code. However, the publication of books or the giving of lectures advocating a cause of a controversial nature shall not of itself be sufficient to deny an organization the exemption, if carrying on propaganda, or otherwise attempting, to influence legislation forms no substantial part of its activities, its principal purpose and substantially all of its activities being clearly of a nonpartisan, noncontroversial, and educational nature.[162]

It is unclear why the drafters considered political speech presumptively outside the definition of education, but that conclusion is consistent with an early connotation of indoctrination as a phenomenon associated with the pursuit of political power,[163] especially during the years after World War I.[164] Perhaps the drafters were concerned with indoctrination but considered it antithetical to education only as it related to political speech. If that is the case, the current language is almost entirely superfluous because Congress has since adopted rather specific limitations on political speech by exempt organizations.[165] In effect, Congress has determined that political activity is not within the definition of charity and that its substantial occurrence will disqualify an organization's charitable status.[166] The only part of the education

[162] Treas. Reg. 94, Art. 101(6)-1 (1936)
[163] *See supra* notes 159.
[164] *Id.*
[165] The exclusion of organizations whose purpose is the dissemination of controversial or partisan propaganda was first introduced in 1919. David A. Brennen, Darryll K. Jones, Beverly I Moran, and Steven J. Willis, THE TAX LAW OF CHARITIES AND OTHER EXEMPT ORGANIZATIONS, 385 (4th ed. Carolina Academic Press 2021). A prohibition against lobbying that is more than an insubstantial part of an organization's activities has been in existence ever since. *Id*. The prohibition first appeared in statutory form in 1934. *Id*. In 1976 Congress sought to quantify the amount of permissible lobbying activity by enacting IRC 501(h). Id. In 1954, Congress enacted current law under which an exempt organization is completely prohibited from participating in any campaign. Id. at 409. See IRC 501(c)(3).
[166] An organization that violates the "no substantial lobbying" prohibition or the prohibition against participating in campaigns is referred to as an "action" organization. Treas. Reg. 1.501(c)(3)-1(c)(3) (1959). In addition, though, an organization whose goal or purpose is only attainable by legislation is not exempt if it "advocates, or campaigns for, the attainment of such main or primary objective or objectives as distinguished from engaging in nonpartisan analysis, study, or research and making the results thereof available to the public." Id. In determining whether an organization advocates and campaigns for a result, or engages in nonpartisan research, the Service states that it will consider "all the surrounding facts and circumstances, including the articles and all activities of the organization. *Id*. This third type of organization seems very much like the organization excluded under the "full

regulation imposing something not required by the political activity regulations is that otherwise undefined "advocacy" organizations must utilize full and fairly expository methods, and eschew propaganda.

For present purposes, I consider the differences between "propaganda" and "indoctrination" only matters of degree. Propaganda is indoctrination that seeks mass adherence.[167] Both seek to determine for the listener what he or she should think, rather than how to think, but propaganda is explicit about the belief the listener should steadfastly hold.[168] Indoctrination seeks the same outcome but is not explicit regarding the desired belief; with indoctrination, the listener thinks the desired belief is the result of his own independent thinking.[169] Finally propaganda is the abuse of power through domination, indoctrination through manipulation.[170] Thus, vague though its regulatory articulations may be, Treasury apparently sought an epistemological distinction between education and indoctrination.[171]

---

and fair exposition" language of the education regulation except the full and fair exposition test is not limited to educational organizations whose purpose can only be achieved by legislation. *Supra* note ____.

[167] I therefore conclude that the Service's early efforts to define "education" sought to exclude indoctrination. *Supra* note 159.

> Any modem propaganda will, first of all, address itself at one and the same time to the individual and to the masses, it cannot separate the two elements. For propaganda to address itself to the individual, in his isolation, apart from the crowd, is impossible. The individual is of no interest to the propagandist; as an isolated unit he presents much too much resistance to external action . . . any propaganda aimed only at groups as such — as if a mass were a specific body having a soul and reactions and feelings entirely different from individuals' souls, reactions, and feelings — would be an abstract propaganda that likewise would have no effectiveness. Modern propaganda reaches individuals enclosed in the mass and as participants in that mass, yet it also aims at a crowd, but only as a body composed of Individuals.

Jacques Ellul, PROPAGANDA: THE FORMATION OF MEN'S ATTITUDES at 10 (VINTAGE BOOKS, 1964).

[168] "Propaganda is involved when it is made explicit to the recipient what it is the sender wants him to do or think, whereas indoctrination is involved when this has not been made explicit to him." Pertti Hemánus, (1974). 20 *Propaganda and Indoctrination; a Tentative Concept Analysis,* 215, 217 GAZETTE (Leiden, Netherlands) (1974).

[169] *Id.*

[170] *Id*. at 215.

[171] Tommy Thompson, *supra* note 158 at 506, *quoting* Prop. Treas. Reg. §1.501(c)(3)-1(c), 21 Fed. Reg. 460, 464 (1956).

The DC Circuit Court of Appeals considered the vagueness intolerable and declared the current regulation unconstitutional.[172] The Court, in *Big Mama Rag vs. United States,* explained that the definition's vagueness inevitably chilled speech because organizations might stop speaking for fear of not be considered educational.[173] It also noted that in the absence of objective criteria, government agents could only rely on their own subjective views in determining whether an opinion was unsupported, or a viewpoint was subject to full and fair exposition.[174] Undeterred, the Treasury Department attempted to salvage the regulation by adopting an incomplete and somewhat faulty epistemological approach referred to as the "methodology test:"[175]

> The presence of any of the following factors in the presentations made by an organization is indicative that the method used by the organization to advocate its viewpoints or positions is not educational.
>
> 1. The presentation of viewpoints or positions unsupported by facts is a significant portion of the organization's communications.
>
> 2. The facts that purport to support the viewpoints or positions are distorted.
>
> 3. The organization's presentations make substantial use of inflammatory and disparaging terms and express conclusions more on the basis of strong emotional feelings than of objective evaluations.
>
> 4. The approach used in the organization's presentations is not aimed at developing an understanding on the part of the intended audience or readership because it does not consider their background or training in the subject matter.

[172] Big Mama Rag v. United States, 631 F.2d 1030 (D.C. Cir. 1980). Even so, the Treasury Department has never revoked or withdrawn the regulation.
[173] *Id*. at 1035.
[174] *Id*. ("the [vagueness] doctrine is concerned with providing officials with explicit guidelines in order to avoid arbitrary and discriminatory enforcement. . . Laws that have failed to meet this (vagueness)standard are, almost without exception, those which turn on language calling for the exercise of subjective judgment, unaided by objective norms.").
[175] Rev. Proc. 86-43; 1986-2 C.B. 729.

> There may be exceptional circumstances, however, where an organization's advocacy may be educational even if one or more of the factors listed in section 3.03 are present. The [Internal Revenue] Service will look to all the facts and circumstances to determine whether an organization may be considered educational despite the presence of one or more of such factors.

The methodology test received tepid endorsement, at best. The same court that declared the regulation unconstitutional declined to state whether the methodology test cured the regulation's vagueness, remarking only that the test reduced the constitutional infirmity.[176] On the other hand, the Tax Court fully adopted and has applied the test to deny tax exemption on three separate occasions.[177]

Nevertheless, the methodology test suffers from the same constitutional problems plaguing the regulation it purports to rescue. The test indicates that in all but exceptional cases the presence of any one factor will prove an organization is not educational. But three factors require the government to be the arbiter of truth, or the protector of individual sensibilities based on an examiner's subjective viewpoints. The first and second factor allow the government to deny educational exemption if it believes the facts presented are "unsupported" or "distorted."[178] The third factor allows the government to deny tax exemption if the language is

[176] National Alliance, 710 F.2d at 875 (D.C. Cir. 1983). ("[A]pplication by IRS of the Methodology Test would move in the direction of more specifically requiring, in advocacy material, an intellectually appealing development of the views advocated. The four criteria tend toward ensuring that the educational exemption be restricted to material which substantially helps a reader or listener in a learning process. The test reduces the vagueness found by the *Big Mama* decision.")

[177] Families Against Government Slavery v. Commissioner, T.C. Memo. 2007-49, 93 T.C.M. (CCH) 958 (organization teaching that FBI enslaved Hollywood celebrities sometimes with the forced participation of minority women on welfare is not educational because of reliance on "unsupported opinion"); Nationalist Foundation v. Commissioner of Internal Revenue, T.C. Memo. 2000-318, 80 T.C.M (CCH) 507 (hate group denied tax exemption because methods were not "educational" as required by methodology test); Nationalist Movement v. Commissioner of Internal Revenue, 102 T.C. 558 (1994) *aff'd* 37 F.3d 216 (5th Cir. 1994) (same).

[178] The Constitution's guarantee of free speech means that government may not be "the arbiter of truth." National Alliance, 710 F. 2d at 873-74. *See generally* Catherine J. Ross, *Ministry of Truth: Why Law Can't Stop Prevarications, Bullshit, and Straight-Out Lies in Political Campaigns*, 16 FIRST AMEND. L. REV. 367 (2017). "The first

"disparaging,"[179] "inflammatory," or indicative of strong "emotion" rather than objective analysis.[180]

None of the regulation's variables are capable of objective determination. It is possible, though, to fix the methodology test so that it is true to its original intent – discerning education from indoctrination – without reference to viewpoint or reliance on subjectivity. We know that teaching people to hate other people is not charity, and indoctrination is not education, but we seem dumbfounded when faced with the requirement to adequately define and express those known things. Thus, I propose the following in place of the current regulation ("the proposal"):

> **1.501(c)(3)-1(d)**. Education means a teaching activity in which epistemological methods are objectively employed to achieve intellectual goals.
>
> 1) Epistemological methods include the unbiased use of:
>
> **(a)** lectures or presentations, scholarly papers, news reports, fiction, or non-fiction literature, and the like,
> **(b)** observation, demonstration, immersive experience, and the like,
> **(c)** research, expository writing, debate, experimentation, collaboration, and the like,
> **(d)** logical reasoning, critical thinking, argumentative construction or deconstruction, and the like, and
> **(e)** problem solving, case analysis
>
> Whether an organization is educational will depend on an overall consideration of all the teaching methods. An organization must objectively employ at least one epistemological method but need not employ any higher number of methods. Nor is an organization required to use an equal number of methods supporting different propositions. An organization must, to a reasonable extent of its

danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and, if so, for the State to classify them." Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819, 835 (1995).

[179] "Inflammatory" and "disparaging" are so inherently vague as to hardly warrant further analysis. *See* Matal v. Tam, ___ U.S. ____, 137 S.Ct. 1744 (2017) (Lanham Act's "disparagement clause" declared unconstitutional because "speech may not be banned on the ground that it expresses ideas that offend" and, in any event, "disparagement" is unconstitutionally vague.)

[180] Although "fighting words" and defamatory speech may not be protected under the First Amendment, it goes too far to suggest that all emotive speech has no First Amendment value. *See* R. George Wright, *An Emotion-Based Approach to Freedom of Speech*, 34 LOY. U. CHI. L.J. 429 2002-2003. And of course, whether

resources, utilize an objective, unbiased pedagogy designed to foster the discovery of justified belief rather than the confirmation of pre-determined propositions or unjustified beliefs.

2) Intellectual goals include:

(a) Increasing knowledge, comprehension, and understanding
(b) Promoting independent thinking, curiosity, and exploration
(c) Acknowledging fallibility and employing critical thinking,
(d) Increasing subject matter fluency
(e) Promoting the social dispersion of all or any of the above

3) Indoctrination is not education. Indoctrination should be understood by reference to its contemporary usage but in all cases is characterized by the selective use of methods, epistemological or not, to impart predetermined beliefs without regard to epistemic justification. While indoctrination most often uses methods that excessively repeat a single proposition, or intentionally ignore or exclude evidence contrary to a proposition, the Service will consider all facts and circumstances to determine whether a teaching activity constitutes indoctrination rather than education. Indoctrination is not determined by whether a belief is true, a topic is "controversial," or the teaching method relies on emotive language. Indoctrination refers only to whether a teaching activity is designed to impart non-evidential beliefs.

4) Exemption shall not be denied on the basis that an organization described below engages in indoctrination:

(a) an organization which normally maintains a regular faculty and curriculum and normally has a regularly enrolled body of pupils or students in attendance at the place where its activities are regularly carried on.

(b) an organization whose primary purpose is teaching literary, performing, or visual arts, athletic performance, vocational skills, or religion.

A few comments are appropriate to conclude Section III. First, the proposal is consistent with the Service's early instinct that "propaganda" is not education and its efforts to articulate

that instinct.[181] The proposal is bereft of subject-matter or content references, except to the extent the proposal makes it easier to achieve exemption for the arts, athletic performance, vocational skills, and religious teaching activities. I allow for indoctrination regarding those activities, without intending to discount their value or the intellectual power necessary to their understanding, because their accomplishment often depends on mastery of physical and intellectual skill combined, in the case of athletic performance and vocational training, or there are simply no truths to be discovered in the epistemological sense, as in the case of the arts and religion. In those cases, there is only either opinion or faith. I do not intend the proposal to judge intent, except insofar that a consideration of the reasonably anticipated outcome of any epistemological method suggests a purpose other than discovery of justifiable beliefs. I also think it helpful that the trier of fact has linguistic reference points. I intentionally used words the philosophical meaning of which have been the subject of extensive study and scholarship. The overall purpose is distinguishing between two different things – education and indoctrination – so the articulation of that effort should employ semantics that best capture the distinction whether by denotation or connotation.

Finally, I put "schooling" in a separate category because I do not hold that indoctrination in formal schools denies individuals or society the benefits of education. A formal school may not be denied exemption on the basis that it engages in indoctrination. I do not intend, by this exception, that we should intentionally encourage indoctrination in schools, colleges, universities, and similar institutions. Instead, I want to avoid the whole legitimate debate

[181] *Supra* notes 159 - 169 and accompanying text.

regarding whether formal institutions educate or indoctrinate.[182] I accept that schooling is a form of indoctrination, most often for the perpetuation of certain morals, political beliefs, and social standards deemed fundamental even in a pluralistic society.[183] I assume that schools otherwise employ enough unbiased epistemological methods that they would be worthy of exemption in any case.[184] Most private schools in the United States, perhaps by necessity in some cases,[185] follow a teaching model prevailing throughout public education. It would be anomalous to consider private schools unworthy of exemption when their directly subsidized counterparts are largely indistinguishable.

IV. FREE SPEECH INCANTATIONS

I was admittedly incredulous upon learning that scholars could not articulate an analysis by which "charity" and "education" proscribe tax exemption for stochastic terrorists. I thought scholars were being indolent and that their indolence resulted from their having little at stake since none of the scholars were people of color. I happily admit my error. It is not that sloven minds truly believe hate groups are charities or that they really educate, it is that they find no justification for denying tax exemption to hate groups other than that government – we the

[182] *See generally* R. Roderick Palmer, *Education and Indoctrination* 34 PEABODY J. EDUC. 224 (1957).
[183] *Id.*
[184] My proposal is not intended to cause revocation if an organization engages in less than substantial indoctrination. *See* Better Business Bureau v. United States, 326 U.S. 279 (1945). (A non-exempt purpose will cause denial or revocation of tax exemption only if it is a "substantial" part of the organization's activities).
[185] It is worth mentioning that Title VI and IX condition federal benefits on private institutions' compliance with federal anti-discrimination requirements to which public institutions are already subject. 42 U.S.C. § 2000d (1964) (Title VI, prohibiting discrimination with respect to any federally funded program); 42 U.S.C. § 2000d-1 (1964) (Title VI, requiring denial of federal benefits to institutions that discriminate); 20 U.S.C. §1681 (1972) (Title IX, prohibiting discrimination with respect to educational institutions receiving federal funds); 20 U.S.C. §1682 (1972) (Title IX, requiring denial of federal benefits to educational institutions that discriminate). These laws obviously indicate that Congress seeks to preclude all federal benefits from organizations that practice discrimination. I do not assert, though, that they resolve the free speech concerns discussed below.

people – despise their ideas. Scholars know and understandably cringe from the real reason for denying tax exemption to hate groups. The short answer is to admit that real reason and then prove that government may oppose but not prohibit any non-constitutionally endorsed idea. When government engages in permissible activity, and does not directly prohibit speech, it need not act neutrally with respect to the activities or speech it subsidizes. This section resolves what turns out to be legitimate concern with denying tax exemption because we despise ideas.

a. Vagueness and Expressive Conduct

Vagueness is concerned with notice sufficient to ensure that people can go about their lives with reasonable confidence that they are neither violating the law, running afoul of any restriction, nor will they be arbitrarily adjudged to have done either.[186] Thus, vagueness is primarily a due process concern.[187] Part of going about our lives, though, includes the exercise constitutional rights, including free speech. When a law is so indeterminate that average people are uncertain whether to speak or what to say – when speech is chilled – the violation is not a First Amendment one, but a due process one.[188] Government is not making a direct assault on speech so a heightened bar to constitutionality is unnecessary.[189] In most instances, government is not concerned about speech at all, but rather an activity generally considered objectionable

[186] See Note, *The Void-for-Vagueness Doctrine in the Supreme Court,* 109 U. PA. L. REV. 67 (1960).
[187] *Id*. *citing* Champlin Ref. Co. v. Corporation Comm'n, 286 U.S. 210, 243 (1932).
[188] "[T]he doctrine of unconstitutional indefiniteness has been used by the Supreme Court almost invariably for the creation of an insulating buffer zone of added protection at the peripheries of several of the Bill of Rights freedoms." Note, *supra* note ___ at 75. *See, e.g*., Minnesota Voters Alliance v. Mansky, ____ U.S. ____, 138 S. Ct. 1876 (2019) (Minnesota has legitimate interest in preserving its polling places for intended use but ban on "political" buttons or stickers near polling place was unconstitutionally vague thus infringing free speech rights).
[189] *Id*. at ____, 138 S. Ct. at 1888 (state must articulate a "sensible" distinction between what is allowed and what is not, and whatever interpretive discretion vested on enforcement must "be guided by objective, workable standards.")

under certain circumstances – burning "stuff" (a flag, maybe) in a public place, or protesting at funerals – that implicates speech.[190] Government has the right to regulate conduct.[191] To survive a vagueness challenge when doing so, government need only speak in a manner that is comprehensible so the ordinary person is neither burdened by uncertainty nor subjected to the enforcer's unlimited discretion. [192] In contrast to strict scrutiny review applied to determine the constitutionality of direct speech prohibitions, vagueness review is said to be "forgiving."[193]

The jurisprudence regarding expressive conduct, like the vagueness doctrine, seeks the right balance between government's right to regulate conduct and people's rights to nonverbal communication. Thus, a protestor has a right to burn a draft card[194] or an American flag[195] to express war opposition. A racist even has the right to burn a 30-foot cross to express hatred.[196] But the government has an interest in regulating fires. Striking that balance in government's favor seems appropriate, apparently, because doing so does not entirely foreclose whatever speech is impacted. If government banned privately set fires altogether, war protestors and

[190] But when a statute directly concerns speech, the Court has sometimes applied an undefined heightened level of scrutiny. *See* Reno v. American Civil Liberties Union, 521 U.S. 844 (1997) (Government has the right to regulate the dissemination of pornography to children but "the [vagueness and resulting] breadth of this content-based restriction of speech imposes an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective as the [Communication Decency Act]." More recently, though, the Court stated that "[P]erfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." Minnesota Voters Alliance, ____ U.S. at ____, 138 S. Ct. at 1891 (2019).

[191] Cox v. Louisiana, 379 U.S. 559, 563 ("The conduct which is the subject of this statute—picketing and parading—is subject to regulation even though intertwined with expression and association.") (1965).

[192] Holder v. Humanitarian Law Project, 561 U.S. 1, 18 (210) ("A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited or is so standardless that it authorizes or encourages seriously discriminatory enforcement.")
The Court recently referred to this standard as a "forgiving test." Minnesota Voters Alliance, ____ U.S. at ____, 138 S. Ct. at 1891 (2019). A different test applies, though, to "expressive conduct." I address that test below. *Supra* note ___ and accompanying text.

[193] Minnesota Voters Alliance, ____ U.S. at ____, 138 S. Ct. at 1891.

[194] United States v. O'Brien, 391 U.S. 367 (1968).

[195] Texas v. Johnson, 491 U.S. 397 (1989); United States v. Eichman, 496 U.S. 310 (1990).

[196] Virginia v. Black, 538 U.S. 343 (2003); R.A.V. v. City of St. Paul Minnesota, 505 U.S. 377 (1992).

racists would not be prevented from otherwise expressing their sentiments. Government need only show that the incidental burden on the expressive part of conduct is permissible for an "important" or "substantial" purpose, and the impact on speech is only as much as is essential to accomplish the purpose.[197]

Education is nothing if not expressive conduct. It is an activity in which government has an important or substantial interest, and its accomplishment expresses ideas. Government may thus legislate about education if it does so in comprehensible language and without regard to viewpoint.[198] It may require a mathematics teacher in a public school discuss algebra or calculus and refrain from discussing art history.

If the methodology test "tends" toward clarity,[199]surely the proposal in Section III cures the vagueness complained about in *Big Mama Rag*. Ultimately, even that determination –

---

[197] United States v. O'Brien, 391 U.S. 367, 377 (1968). Justice Thomas' recently explained an important qualification:

> Although this Court sometimes reviews regulations of expressive conduct under the more lenient test articulated in *O'Brien,* that test does not apply unless the government would have punished the conduct regardless of its expressive component. Here, however, Colorado would not be punishing Phillips if he refused to create any custom wedding cakes; it is punishing him because he refuses to create custom wedding cakes that express approval of same-sex marriage. In cases like this one, our precedents demand "the most exacting scrutiny."

Masterpiece Cakeshop Limited v. Colorado Civil Rights Commission, ____ U.S. ____, 138 S.Ct. 1719, 1746 (2020) (Thomas, J. concurring in part and in the judgement) (citations omitted). *Masterpiece* involved compelled speech in the sense that the state sought to force a baker to say something he did not want to say in service of the state's efforts to prohibit discrimination in public accommodations. *Id*. The expressive conduct cases Justice Thomas cited involved flag burning and providing material support to "terrorist organizations." *Id. citing* Texas v. Johnson, 491 U.S. 397, 412 and Holder v. Humanitarian Law Project, 561 U.S. 1, 28 (2010). Taken together, the cases indicate that the state may proscribe conduct but only without regard to ideas expressed in intertwined speech. It's easy to see that those cases are not really sanctioning conduct if the conduct is permissible so long as a certain message is avoided or conveyed. If the permissibility of the conduct depends on the message, the law regulates message, not conduct.

[198] I note in passing that the requirement that laws be understandable to persons of ordinary intelligence obviously cannot be taken literally. There are just too many indecipherable provisions in the Tax Code or in the 1933 Securities Act for that to be a literal requirement.

[199] *See supra* note 174 and accompanying text.

whether the proposal is "vague" – must be a subjective one, constrained perhaps by similarly worded precedents. Suffice to say, the proposal provides a level of notice typical of existing tax regulations and provides objective standards constraining arbitrary or subjective enforcement. Since the proposal would apply regardless of subject matter, the proposal is content neutral and thus not subject to strict scrutiny.

Is charity expressive conduct? Whether charity inherently excludes hate groups is a bit more complicated, surprisingly. The question is more difficult to answer as a normative matter because the Supreme Court has prejudiced the outcome by judicial proclamation. I can easily conclude that charity is not "vague" in the constitutional sense because the broadness of the term encourages rather than discourages speech. Recall that vagueness is fatal when it discourages speech and leaves enforcement to an official's subjective opinion. Given that nearly any legal purpose can be labeled charity, and the 400 years of legislative and judicial interpretation of the word "charity,"[200] it would be almost impossible to make that case.[201] Regardless, the charitable definition is not one that an ordinary person would find incomprehensible. By excluding hate from the definition of charity, is the law content-based, and thus subject to strict scrutiny rather than the "forgiving" *O'Brien* test?[202] If that were the case, *Bob Jones* can only mean – by judicial proclamation – that denying exemption to hate

[200] *Supra* note 79 and accompanying text. In determining whether legislative language is vague, courts should consult "authoritative constructions" of the legislation. Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992).

[201] In *National Endowment for the Arts v. Finley*, the Supreme Court considered whether a provision requiring the National Endowment for the Arts "take into consideration general standards of decency and respect for the diverse beliefs and values of the American public" when making funding decisions. 524 U.S. 569, 588 (1998). The Court admitted that the provision is "undeniably opaque, and if they appeared in a criminal statute or regulatory scheme, they could raise substantial vagueness concerns. It is unlikely, however, that speakers will be compelled to steer too far clear of any "forbidden area" in the context of grants of this nature." *Id*.

[202] *See supr*a note 191-92.

groups survives strict scrutiny. Incidentally, I agree with but find no refuge in the argument that charity excludes the act of discrimination and therefore need not implicate speech. I think it honest to admit that discrimination – at least as practiced by hate groups – is accomplished primarily by speech. But the charitable regulations proscribe acts that "increase prejudice and discrimination."[203] It may be a close call, but "increasing prejudice and discrimination" is an activity that can be accomplished by all sorts of speech, not just hate speech. Thus, excluding hate groups because their purpose is to increase prejudice and discrimination does not require the conclusion that charity is defined by reference to speech content. To be charitable, the result must not be an increase in discrimination or prejudice (or a denial of human or civil rights), whatever the content of speech used to achieve that result. In fact, once government identifies an outcome that it may validly proscribe, it may just as validly identify expressive activities most likely to bring about the outcome and prohibit only those activities.[204]

There is a less obvious but just as important vagueness concern regarding the judicial definition of charity as it relates to hate groups. Scholars often correctly rely on *Bob Jones* to

[203] See supra note 96 and accompanying text.

[204] In *Virginia v. Black*, Virginia prohibited "cross-burning with intent to intimidate." 538 U.S. 343 (2003). Defendants argued that the prohibition constituted content-based discrimination because it singled out cross burning as a communicative activity capable of intimidation. The Court determined that Virginia legitimately proscribed intimidation and, having done so could validly discriminate between expressive activities tending to bring about the proscribed result:

> The First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation. Instead of prohibiting all intimidating messages, Virginia may choose to regulate this subset of intimidating messages in light of cross burning's long and pernicious history as a signal of impending violence. Thus, just as a State may regulate only that obscenity which is the most obscene due to its prurient content, so too may a State choose to prohibit only those forms of intimidation that are most likely to inspire fear of bodily harm.

Id. at 361-62.

assert that teaching racial hatred is not a charitable activity and, as a result, hate groups are not entitled to exemption.[205] As others point out, *Bob Jones* sets forth its own vague standard.[206] Imagine, for example, if prior to *Bob Jones* Congress passed a statute stating, "exemption shall be denied to groups whose purpose violates clearly defined public policy" and then Treasury denied tax exemption to schools that practiced racial discrimination. Would the Court have revoked Bob Jones University's tax exemption if Congress had by legislation mandated the action based on undefined public policy?[207] One suspects that the district court in *Big Mama Rag* relied, at least in part, on public policy to deny exemption because of the organization's views on homosexuality.[208] In any case, the government explicitly disavowed reliance on a public policy condemning lesbianism. And it seems very probable that had government explicitly relied on public policy the DC Circuit court would have rejected that basis as unconstitutionally vague. The Supreme Court obviously intends the public policy doctrine as a viable regulation of conduct, but reliance on public policy as basis for denying tax exemption implicates the interests protected by the vagueness doctrine.

My conclusion, that hate groups do not practice charity, is not based on *Bob Jones*'s public policy rationale. Instead, it is based on a specific regulatory codification expressed long before the Supreme Court decided *Bob Jones*.[209] Charity is defined by a 1954 regulation that necessarily

[205] *Supra* note 60 and accompanying text.
[206] *Supra* note 67 and accompanying text.
[207] Here, I do not mean that Congress could not legislate denial of tax exemption for groups that teach racial discrimination. Cf. IRC 501(i) (denying tax exemption for social clubs having a written policy of discrimination against any person on the basis of race, color, or religion). I assert only that a statutory provision stating "exemption shall be denied if the organization operates inconsistently with public policy" would be unconstitutionally vague.
[208] Big Mama Rag v. United States, 494 F. Supp. 473, 480 n. 7 (D. D.C., 1979) (noting that the IRS did not assert a public policy against "promoting lesbianism . . . despite the unfortunate comments of its officials [to that effect]."
[209] Treas. Reg. 1.501(c)(3)-(1)(d)(2) (1959).

excludes perpetuating prejudice and discrimination or denying human or civil rights. The regulation discourages speech in favor of discrimination and denying human or civil rights, but not because people are uncertain about whether to speak or what to say or because they cannot know whether an examiner will subjectively decide to deny exemption. It is instead because government may define charitable purposes, and by granting exemption only to groups pursing the defined purpose, disfavor communicative efforts unrelated to that purpose.[210]

We might still lament the thought that apparently society is prohibited from defunding hate by its precise name.[211] The foregoing analysis is necessitated only by the assumption that the tax code cannot explicitly say "tax exemption shall be denied to groups that advocate hatred of people." But the assertion is either a normative one masquerading as proscriptive, or just intellectually lazy. I do not assert that government may directly prohibit hate speech, but in the remainder of this article I prove that government may explicitly and with constitutional authority state that "exemption shall be denied to groups that teach people to hate other people."

b. Incantations: Government Speech, Subsidized Speech, Forum Analysis and Unconstitutional Conditions

Government may not teach people to hate other people because of immutable characteristics. Government may not proclaim from a billboard, "African Americans are dangerous," "Jews are greedy," or "America is a Christian nation." These are unremarkable

[210] *Supra* note 90 and accompanying text.

[211] I tend to agree with critical theorists who point out the racist irony that we easily find ways to protect First Amendment values while punishing defamatory speech, conspiracies, invasion of privacy, and all manner of harmful speech but we find ourselves powerless to directly punish hate speech. Mari J. Matsuda, Charles R. Lawrence III, Richard Delgado, Kimberle Williams Crenshaw, WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (ROUTLEDGE 1993).

assertions, though there is a plausible case that nobody has standing to enforce the prohibition.[212] Nevertheless, they ultimately explain why government can and must deny tax exemption to hate groups. But to finally arrive at that conclusion, one must understand and navigate a thicket of First Amendment incantations. Broadly speaking, these incantations focus on whether government is speaking for itself, maintaining a physical or metaphysical space for private speech, or just spending in pursuit of the public good. Another incantation, "the unconstitutional conditions doctrine" further impacts speech by preventing indirect punishment of speech. Even a fleeting familiarity with these doctrines sufficiently explains why scholars entertain the notion that government is constitutionally required to fund hate groups through tax exemption.[213]Ultimately, though, government may no more fund stochastic terrorism than it can directly engage in hate speech.

The detailed logic proceeds as follows: Government may say whatever it wants if what it says does not violate the Constitution.[214] Government may post a billboard stating, "America is

[212] See supra note 243. (stigmatizing harm, by itself, is not actionable as an equal protection violation). The potential lack of standing demonstrated in the cases cited in 243 doesn't concern me that much. First, even if it is true that no citizen – not even an African American challenging tax exemption to the Klan, for example – has standing to prohibit tax exemption to stochastic terrorist, this article first addresses the first order issue whether government may deny tax exemption, by its own choice rather than mandamus, to those groups. I suppose I am content to trust that once its authority is clear, government will do so because its just the right thing to do. Second, I do not concede that minorities and other targets of hate groups do not have standing to force government to deny tax exemption. This article, though, is already long enough so I address that issue in a forthcoming separate essay. Darryll K. Jones, *Who Has Standing to Challenge Tax Exemption of Stochastic Terrorists*? _____ PITT TAX REV. _____ (2024). Available at [I will insert the SSRN cite in early summer 2023].

[213] Professor Post admits that speech jurisprudence is garbled and generally indecipherable, but he notes that those who live with it every day develop an intuitive sense that leads them to the right conclusion. Robert Post, *supra* note 58. My personal disappointment is that constitutional scholars don't even bother to consider the proposition that government is not mandated to exempt hate groups. *Supra* note 70. Their failure bespeaks a First Amendment political philosophy but insufficient legal analysis.

[214] Abner S. Greene, Government of the Good, 53 VAND. L. REV. 1 (2000) (discussing the government speech doctrine generally); Richard C. Schragger, *Of Crosses and Confederate Monuments: A Theory of Unconstitutional Government Speech*, 63 ARIZ. L. REV. 45 (2021). (describing a theory of constitutional limitations on government speech).

a free country," but it may not post a billboard proclaiming, "America is a Christian nation." This is the government speech doctrine.[215] The government speech doctrine includes the government's right to say what it pleases through the mouths of employees or independent contractors.[216] Hence, government may pay a private citizen to proclaim, "America is a free country" and in doing so may preclude the private citizen from also saying anything else while so engaged or by use of government funding.[217] This is the subsidized government speech doctrine.[218]

There are places, always maintained and sometimes designated by government, where people can say whatever they please. This is the public forum doctrine.[219] Except for time, place, and manner restrictions, government may not regulate speech in these general-purpose amphitheaters.[220] Here, people can carry signs proclaiming, "African Americans are dangerous,"

---

[215] Shurtleff v. Boston, ____ U.S. ____, 142 S. Ct. 1583 (2022) (describing the holistic methodology employed to determine whether government is engaging in government speech); Pleasant Grove City v. Summum, 555 U.S. 460 (2009) (government can say whatever it wants, subject to restraint by the establishment clause); Matal v. Tam, _____ U.S. ____, 137 S. Ct. 1744, 1757 - 61 (2017) (describing the characteristics of government speech).

[216] Pleasant Grove City, 555 U.S. at 468. "When a government entity embarks on a course of action, it necessarily takes a particular viewpoint and rejects other (2006) s. The Free Speech Clause does not require government to maintain viewpoint neutrality when its officers and employees speak about that venture." Matal v. Tam, ____ U.S. at ____, 137 S. Ct. at 1757.

[217] Rust v. Sullivan, 500 U.S. 173 (1991). In *Rust*, the Supreme Court upheld a regulation prohibiting family planning grant recipients from discussing abortion when providing services with or connected with the grant funding. *Id*. But in *Legal Services Corp. v. Valazquez*, the Supreme Court struck down a regulation prohibiting legal service grant recipients from advocating the unconstitutionality of welfare laws when providing services with or connected with the grant funding. 531 U.S. 533 (2001).

[218] See generally Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151 (1996). The subsidized government speech doctrine is tempered, somewhat, by the right of government employees to speak on matters of "public concern." *See* Garcetti v. Ceballos, 547 U.S. 410, 417 (2006) ("The Court has made clear that public employees do not surrender all their First Amendment rights by reason of their employment. Rather, the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern.")

[219] Steven G. Gey, *Reopening the Public Forum: From Sidewalks to Cyberspace,* 58 OHIO ST. L.J. 1535 (1998).

[220]

> In conducting forum analysis, our decisions have sorted government property into three categories. First, in traditional public forums, such as public streets and parks, "any restriction based on the content of . . . speech must satisfy strict scrutiny, that is, the restriction must be narrowly tailored to serve a compelling government interest." *Pleasant Grove City v. Summum, 555 U.S. 460, 469, 129 S. Ct. 1125, 172 L. Ed. 2d 853, 862 (2009)*. Second, governmental entities

"Jews are greedy," and "America is a Christian nation." There are other places, always created and maintained by government, where people can speak their minds but only about a government-designated topic.[221] In these special purpose amphitheaters, government may not dictate viewpoints concerning the designated topic.[222] This is the limited public forum doctrine.[223] If the forum is for discussion of race in America,[224] people can say "African Americans are dangerous," and entry cannot be limited to people who say, "African Americans are no more dangerous than anybody else."[225] Entry to a limited public forum is typically conceptualized as a government benefit that may not be conditioned on the forfeiture of a constitutional right.[226] Significantly, government may create a limited public forum merely by subsidizing private speech

create designated public forums when "government property that has not traditionally been regarded as a public forum is intentionally opened up for that purpose"; speech restrictions in such a forum "are subject to the same strict scrutiny as restrictions in a traditional public forum." *Id., at 469-470, 129 S. Ct. 1125, 172 L. Ed. 2d 853, 858*. Third, governmental entities establish limited public forums by opening property "limited to use by certain groups or dedicated solely to the discussion of certain subjects." *Id., at 470, 129 S. Ct. 1125, 172 L. Ed. 2d 853, 858* As noted in text, "[i]n such a forum, a governmental entity may impose restrictions on speech that are reasonable and viewpoint-neutral." *Ibid*.

Christian Legal Society, 561 U.S. 661, 679 (2010).

[221] *Id*.

[222] "Although there is no requirement of narrow tailoring in a nonpublic forum, the government's restrictions still must be viewpoint neutral and must be "reasonable in light of the purpose served by the forum." In order to show that a speech restriction is "reasonable," the government must show that its restraint: (1) furthers a "permissible objective;" and (2) contains "objective, workable standards" that are "capable of reasoned application." Krasno v. Mnookin, No. 21-cv-99-slc, slip op. at 15 (W.D. Wisc. Nov. 2, 2022) (citations omitted).

[223] *Supra* note 218.

[224] "The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics." Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819, 829 (1995).

[225] "Thus, in determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, we have observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations." Id. at 829-30.

[226] *See* Christian Legal Society of the University of California v. Martinez, 561 U.S. 661, 682 n. 13 (2010) (university may not discriminate on the basis of viewpoint in determining entry into limited public forum).

rather than by designated a geographical space. In that case speech occurs in a "metaphysical" special-purpose amphitheater but viewpoint discrimination is still prohibited. [227]

The final part of this intricate house is that sometimes a subsidy is indicative of neither government speech nor the creation of a limited public forum. Government can pay someone to deliver its message, but sometimes government only pays for the amphitheater not the message.[228] The difficulty arises when it is not apparent whether government is paying for the speech or just the amphitheater. Worse yet, sometimes subsidy is merely an exercise of the government's spending power; by paying what looks like a subsidy, government may merely be purchasing an activity (even speech) to its own precise specifications. In the latter circumstances, government is entitled to get what it pays for and to reject what it does not even if by doing so government excludes speech regarding certain topics or even viewpoints.[229] Government may pay for a commercial saying "smoking is bad for your health," and does not also have to pay for a commercial saying "smoking is not that bad for your health." Thus, a subsidy may signal one of three different things. In some cases, subsidy indicates that government is speaking. Government may discriminate amongst ideas and opinions in its own speech. In others, subsidy indicates that private persons are speaking in a limited public forum created by the subsidy. At

[227] Id. at 830 (Funding to student groups using student activity fees created a "metaphysical" limited public forum).
[228] "Subsidized speech challenges two fundamental assumptions of ordinary First Amendment doctrine. It renders uncertain the status of speakers, forcing us to determine whether speakers should be characterized as independent participants in the formation of public opinion or instead as instrumentalities of the government. And it renders uncertain the status of government action, forcing us to determine whether subsidies should be characterized as government regulations imposed on persons or instead as a form of government participation in the marketplace of ideas." Robert C. Post, supra note 55 at 152.
[229] Rust v. Sullivan, 500 U.S. 173 (1991) (rule prohibiting funding to medical grantees that advise on abortion was not viewpoint discrimination, but rather a valid exercise of government spending power discriminating against certain outcomes). In National Endowment for the Arts v. Finley, the Court addressed whether the requirement that words be comprehensible lest they intolerably infringe on free speech rights, stating "when the Government is acting as patron rather than as sovereign, the consequences of imprecision are not constitutionally severe." 524 U.S. at 589.

most, government may define the topic, but it cannot dictate opinions about that topic.[230] In still others, subsidy is evidence only that the government is buying something about which it may discriminate as to speech necessary to that thing purchased.[231]

The unconstitutional conditions doctrine lurks somewhere in the shadows as another incantation. Broadly, the doctrine means that government may not condition a benefit on the recipient's waiver of a constitutional right.[232] I refer to the rule as one of situational ethics because it clearly doesn't apply in all situations. The most obvious example is when a criminal defendant is required to waive his right to a jury trial in exchange for reduced sentence. For our specific purposes, the unconditional conditions doctrine means that the government cannot

---

[230] Technically, government subsidizes traditional and designated public fora (sidewalks and parks, for example) too, but it is subsidizing the primary activity for which the fora were created – walking and lounging, for example in the case of sidewalks and parks. In these circumstances, it is unnecessary to characterize the subsidy's purpose as either government speech, private speech, or government spending because government may not regulate speech at all in those places (except as to time, place, and manner).

[231] In National Endowment for the Arts v. Finley, the Court addressed whether the requirement that words be comprehensible lest they intolerably infringe on free speech rights, stating "when the Government is acting as patron rather than as sovereign, the consequences of imprecision are not constitutionally severe." 524 U.S. at 589.

> The Spending Clause of the Federal Constitution grants Congress the power "[t]o lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." The Clause provides Congress broad discretion to tax and spend for the "general Welfare," including by funding particular state or private programs or activities. That power includes the authority to impose limits on the use of such funds to ensure they are used in the manner Congress intends. As a general matter, if a party objects to a condition on the receipt of federal funding, its recourse is to decline the funds. This remains true when the objection is that a condition may affect the recipient's exercise of its First Amendment rights. At the same time, however, we have held that the Government "'may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit.'"

Agency for Int'l Development v. Alliance for Open Society, International, 570 U.S. 205, 213 (2013). (citations omitted).

[232] Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415 (1989); Martin H. Redish and Daryl I. Kessler, *Government Subsidies and Free Expression*, 80 MINN. L. REV. 543 (1996); Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine is an Anachronism (with Particular Reference to Religion, Speech, and Abortion)* 70 B.U. L. REV. 593 (1990); Lloyd Hitoshi Mayer, Nonprofits, Speech, and Unconstitutional Conditions, 46 CONN. L. REV. 1045 (2014).

condition entry into a limited public forum on the entrant's waiver of the right of free speech. For example, a university may not require a student group to remain silent about religion to enter a forum made available for unlimited student discussion of any other topic.[233] This is but a specific manifestation of the broader rule that government may not do indirectly – via its power to allocate or withhold discretionary benefits – what it is prohibited from doing directly.[234] The unconstitutional conditions doctrine is clearly a restriction on government. It restricts government from that which would deprive people of rights specifically granted in the Constitution. It is not a source of an independent right for individuals.

It is here, finally, that we reach the irreducible conflict. On one hand, if government is prohibited from doing indirectly what it may not do directly, government is prohibited from subsidizing stochastic terrorism. Surely, government would violate the constitution if, speaking for itself, it posted a billboard proclaiming, "African Americans are dangerous," "Jews are greedy" or "America is a Christian nation." That unquestionably direct prohibition proves that the government may not pay agents to say the same things.[235] That would accomplish indirectly

[233] Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 81 (1995).
[234] *Supra* note 230.
[235] Norwood v. Harrison, 413 U.S. 455 (1973). So adamant was the Court on this point that it stated:

> That the Constitution may compel toleration of private discrimination in some circumstances does not mean that it requires state support for such discrimination. This Court has consistently affirmed decisions enjoining state tuition grants to students attending racially discriminatory private schools. A textbook lending program is not legally distinguishable from the forms of state assistance foreclosed by the prior cases. Free textbooks, like tuition grants directed to private school students, are a form of financial assistance inuring to the benefit of the private schools themselves. An inescapable educational cost for students in both public and private schools is the expense of providing all necessary learning materials. When, as here, that necessary expense is borne by the State, the economic consequence is to give aid to the enterprise; if the school engages in discriminatory practices the State by tangible aid in the form of textbooks thereby gives support to such discrimination. Racial discrimination in state-operated schools is barred by the Constitution and "it is also axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish."

what government may not accomplish directly. On the other hand, government is just as authoritatively prohibited from using its discretionary spending power to extract a waiver of

---

Id. at 463-64. (citations omitted). Continuing, the Court stated: "State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the [Fourteenth] Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws." Id. n. 7. More recently, the Court applied the prohibition to single-sex education:

> The issue will be not whether government assistance turns private colleges into state actors, but whether the government *itself* would be violating the Constitution by providing state support to single-sex colleges. For example, in Norwood v. Harrison, 413 U.S. 435 (1973), we saw no room to distinguish between state operation of racially segregated schools and state support of privately run segregated schools. "Racial discrimination in state-operated schools is barred by the Constitution and 'it is also axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish.'" Id. at 465; see also *Cooper v. Aaron, 358 U.S. 1, 19, 3 L. Ed. 2d 5, 78 S. Ct. 1401 (1958)* ("State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the [Fourteenth] Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws"); Grove City College v. Bell, 465 U.S. 555, 556 (1984) (case arising under Title IX of the Education Amendments of 1972 and stating that "the economic effect of direct and indirect assistance often is indistinguishable").

United States v. Virginia, 518 U.S. 515, 599 (1996). Importantly, the Court ruled that despite its facial neutrality and indeed the state's "good intentions," the effect was still unconstitutional:

> We need not assume that the State's textbook aid to private schools has been motivated by other than a sincere interest in the educational welfare of all Mississippi children. But good intentions as to one valid objective do not serve to negate the State's involvement in violation of a constitutional duty. "The existence of a permissible purpose cannot sustain an action that has an impermissible effect." Wright v. Council of City of Emporia, 407 U.S. 451, 462 (1972). The Equal Protection Clause would be a sterile promise if state involvement in possible private activity could be shielded altogether from constitutional scrutiny simply because its ultimate end was not discrimination but some higher goal.

Id. Thus, Justice Rehnquist's cursory rejection of the argument that government violates the Equal Protection Clause by exempting discriminatory organizations was premature at best. Bob Jones, 461 U.S. at 622 n. 4 ("Because of its holding [denying tax exemption to a university that discriminated in its admissions policy violated public policy], the Court does not have to decide whether it would violate the equal protection component of the Fifth Amendment for Congress to grant §501(c)(3) status to organizations that practice racial discrimination. I would decide that it does not. The statute is facially neutral; absent a showing of a discriminatory purpose, no equal protection violation is established. Washington v. Davis, 426 U.S. 229, 241 – 244 (1976)"). I accept the general view that government does not violate the Equal Protection Clause via a racially neutral statute unless a discriminatory intent is proven. *See* Helen Norton, THE GOVERNMENT'S SPEECH AND THE CONSTITUTION 107 n. 48 (CAMBRIDGE UNIV. PRESS 2019). But I do not accept that the general rule applies to racial discrimination in education. *Bob Jones University v. United States*, 461 U.S. 574 (1983), *Brown v. Board of Education*, 347 U.S. 483 (1976), and *Norwood v. Harrison*, 413 U.S. 455 (1973), taken together, but most explicitly *Norwood*, reject an intent requirement in the educational context. The normative case for and against Rehnquist's proposition will have to await another article.

rights to express viewpoints. Hence the conflict: By denying tax exemption to a hate group government "punishes"[236] a certain viewpoint, something it may not do directly. But by granting tax exemption to the hate group, government funds private speech it could not itself utter. When faced with a hate group's application for exemption, government violates the constitution one way or the other.

Irreducible does not mean irresolvable. One way to resolve the conflict is that government simply eliminate the benefit.[237] By not offering the benefit at all, government would simultaneously avoid viewpoint discrimination and equal protection violations. A second option is that government could limit educational tax exemption to formal schools, eliminating exemption only for informal educational organizations.[238] I would not support the second option, never mind the first, even if I lacked confidence in the analysis set forth in Sections II and III. My

[236] The word is appropriate, of course, only if one accepts that denial of subsidy is the equivalent of prohibition. See supra note 46 and accompanying text. The Supreme Court seems close to accepting Justice Scalia's adamantly stated distinction between denial of subsidy and punishment or prohibition of speech. *Id.* In *Christian Legal Society*, for example, a case regarding a university's requirement that a Christian group accept "all comers" (even atheists, for example), the Court noted:

> "this case fits comfortably within the limited-public-forum category, for CLS, in seeking what is effectively a state subsidy, faces only indirect pressure to modify its membership policies; CLS may exclude any person for any reason if it forgoes the benefits of official recognition. The expressive-association precedents on which CLS relies, in contrast, involved regulations that *compelled* a group to include unwanted members, with no choice to opt out. In diverse contexts, our decisions have distinguished between policies that require action and those that withhold benefits. See, *e.g.*, Grove City College v. Bell, 465 U.S. 555 (1984); Bob Jones Univ. v. United States, 461 U.S. 574 (1983). Application of the less restrictive limited-public-forum analysis better accounts for the fact that Hastings, through its RSO program, is dangling the carrot of subsidy, not wielding the stick of prohibition. Cf. Norwood v. Harrison, 413 U.S. 455 (1973). ("That the Constitution may compel toleration of private discrimination in some circumstances does not mean that it requires state support for such discrimination.")

561 U.S. 661, 682-83 (2010).

[237] Norwood, 413 U.S. 455, 462 ("Even assuming, therefore, that the Equal Protection Clause might require state aid to be granted to private nonsectarian schools in some circumstances -- health care or textbooks, for example -- a State could rationally conclude as a matter of legislative policy that constitutional neutrality as to sectarian schools might best be achieved by withholding all state assistance.")

[238] See *supra* note 64-65 and accompanying text.

purpose in this section is to assert that government may take more than a symbolic stand – short of outright prohibition – against hate speech. Eliminating the exemption entirely or excluding informal educational organizations from tax exemption would be just that stand but it throws the baby out too. My assertion is that government may legitimately and more surgically cut off public funding of stochastic terrorism by specific reference rather than by what may seem like intellectual gymnastics.

I should first admit that it is entirely possible to construct diametrically opposed, yet seemingly equivalent free speech arguments for and against government's right to explicitly deny tax exemption for hate groups. Thus, government has the right to speak for itself and since government speaks through agents, it may require subsidized agents to speak on designated topics and according to approved script.[239] That is, government may condition educational exemption on the subsidized speaker's agreement not to teach people to hate. But of course, this makes sense only when government speaks for itself. When, instead, government subsidizes the amphitheater, it does not speak for itself and may not engage in viewpoint discrimination. It may preclude stage guests from straying "off topic,"[240] but it may not dictate opinions about that topic. To the extent that teaching people to hate is educational (that is, is "on topic"), government cannot prohibit that viewpoint if it allows all others. Except government may sometimes engage in viewpoint discrimination even when it subsidizes speech. If the subsidy does not create a limited public forum but instead is simply how government purchases a public

[239] *See generally* Lawrence Rosenthal, *The Emerging First Amendment Law of Managerial Prerogative*, 77 Fordham L. Rev. 33 (2008). (discussing government right to regulate speech when government exercises its "managerial prerogative" over government activities).

[240] Krasno v. Mnookin, No. 21-cv-99-slc, slip op. at 15 (W.D. Wisc. Nov. 2, 2022) (citations omitted) (Court upheld University's right to delete "off-topic" comments from a limited public forum created by University's maintenance of social media website on which students were otherwise allowed to post comments).

good, government may engage in content and viewpoint discrimination necessary to precisely get that for which it pays and nothing more. Here, government can exclude content and viewpoint that is not what it wants in pursuit of the public good. Government may purchase family planning services, specifying that family planning is all things other than abortion, and then prohibit the "vendor" from talking about abortion. By this reasoning, withholding subsidy for abortion speech is merely government's decision to forego a purchase. As it relates to the government's spending power, tax exemption is not permission and denying tax exemption is not prohibition. Hence, government may decline to subsidize teaching hate simply because it decides not to purchase stochastic terrorism even though government engages in viewpoint discrimination as a practical matter thereby and may not directly prohibit stochastic terrorism.

Free speech purists might legitimately reject the notion that government can avoid First Amendment strictures by simply asserting that it is funding an activity rather than prohibiting speech necessary to the activity.[241] The activity/speech dichotomy threatens to eliminate all speech restrictions on government funding, whether direct or indirect. Taken to its limits, the government spending approach would allow government to undertake a grant program that funded only "conservative" or only "liberal" foodbanks, for example (if there were such things). But to ignore the dichotomy and test all funding distinctions against free speech jurisprudence, would be to prohibit government from discrimination in funding just about any activity. When government builds sidewalks or bridges for example, it funds activities, though speech is

[241] The spending power is analogous to government speech insofar as the necessity to discriminate amongst public goods and services. Just as government may discriminate amongst ideas when government speaks for itself, government may discriminate between activities, even expressive activities when it is buys for itself. Rust, 500 U.S. 17 (1991).

necessary. No speech concerns arise by allowing government to restrict contractors from asserting that government is forcing the utilization of discredited construction methods. We have no trouble concluding that government is funding an activity and may proscribe speech not conducive to the activity. Here Justice Scalia's criticism of equating the prohibition of speech and the denial of funding is apt.[242] But when government funds an activity that is "nothing but speech,"[243] the equation is apparent. Denying funding for education that teaches hate is necessarily to disfavor speech. So perhaps speech jurisprudence, rather than spending jurisprudence, should apply when government funds an activity that is "nothing but speech." Under this conception, government would be prohibited from making viewpoint distinctions between activities – like education – when the activity is so inherently communicative that government is funding nothing but speech. But to prohibit government's ability to discriminate when it funds "nothing but speech" would collide, full circle, with the government speech doctrine and its spending power, which allow government the right to discriminate when expressing its own idea, even if through agents, or discriminating between services it purchases.

Speech incantations lend themselves to varied but defensible conclusions because they depend on dubious factual predicates or distinctions, derived from subjective characterization of government intent. They necessarily lend themselves to disparate conclusions. It is never objectively obvious, for example, whether government is speaking for itself, funding private speech, or purchasing a public good or service. The distinction is dispositive but whether

[242] *Supra* note 46.

[243] International Brotherhood of Teamsters, Local 695, A.F.L. v. Vogt, Inc. 354 U.S. 284, 296 ("But where, as here, there is no rioting, no mass picketing, no violence, no disorder, no fisticuffs, no coercion—indeed nothing but speech—the principles announced in *Thornhill* and *Swing* should give the advocacy of one side of a dispute First Amendment protection.")

government is doing one or the other depends on the observer's intellectual vantage. We cannot determine whether government may or must deny exemption to hate groups by rote application of incantations.

A last look at the unconstitutional conditions doctrine provides the final proof that speech incantations cannot be cathartic. Recall the general rule that government may not do directly what it may not do indirectly. The doctrine restricts government, it does not enable citizens. Thus, government may not condition subsidy on the organization's promise to refrain from hate speech. Since government may not prohibit hate speech by command, it is also precluded from doing so indirectly by its taxing power. But the analysis requires an exact definition of that which may not be accomplished directly. If the prohibited direct action is that "government may not itself engage in hate speech," it may not pay others to do so on its behalf. Government may neither utter hate speech, nor commission private persons to do so as its agents. But if the direct prohibition is against "*government* hate speech," the unconstitutional doctrine cannot logically support denying tax exemption because tax exemption commissions private speech. The government does not engage in government speech indirectly via tax exemption because tax exemption funds something different -- private speech. As a result, government is not entering a constitutionally prohibited space. If we define the prohibited direct action differently, though no less accurately, the unconstitutional conditions doctrine would apply to prohibit government from exempting hate groups. If the prohibited direct action is "advocating discrimination or the denial of human rights secured by law," tax exemption must be denied because tax exemption is an indirect way of accomplishing the same outcome. A third definition of the prohibited direct action – "operation of a racially discriminatory school" – renders the same outcome. If

government is constitutionally prohibited from directly operating a racially discriminatory school, it may not do so indirectly by giving aid to private hate groups to do so.

The unconstitutional conditions doctrine is demonstrably indeterminate in one last context. If private speech can create a reasonable though mistaken belief that private speech is government speech, government has a legitimate basis to impose conditions on its subsidy to prevent that misapprehension.[244] It may even be required to do so. Assuming a factual predicate is found, and the least restrictive means are employed, government may or must impose conditions to eliminate the potential that listeners will mistake private hate speech for government speech.[245]

c. Incantation Futility and Relative Constitutional Harms

Wherever we turn, here we are. Incantations help us focus on different factors of apparently equal import, but that they render varying outcomes is probably a safe indication that they obscure more than they illuminate. In fact, none of the incantations provide a definitive or unassailable conclusion. They all seem to defeat whatever solace might be had from logical, and

[244] Helen Norton, *Not For Attribution: Government's Interest in Protecting the Integrity of its Own Expressions*, 37 U.C. DAVIS L. REV. 1317 (2004).

> Several recent cases illustrate courts' difficulties in distinguishing the government's constitutionally suspect regulation of private expression from its permissible efforts to protect its own speech from private appropriation. On one hand, the Eighth Circuit in 2000 held that the University of Missouri's public radio station did not violate the First Amendment when it refused to accept - and thus acknowledge on-air - financial support from the Ku Klux Klan. Just a few months later, however, a different panel from the same circuit held that Missouri's Highway and Transportation Commission ran afoul of the First Amendment when it rejected the Klan's application to participate in a roadside clean-up program that would require its recognition on a state highway sign. In both cases, Missouri argued that it legitimately sought to ensure that the Klan's views were not erroneously attributed to the state, while the Klan maintained that its exclusion violated the First Amendment.

Id. at 1319.

[245] Rosenberger

defensible answers to the following questions: (1) Is government faced with the prospect of causing constitutional harm via legitimate activity? (2) Will government's effort to avoid the first harm cause another constitutional harm? (3) If so, can government's effort be better engineered to reduce or eliminate both harms? (4) If not, which harm is worse?[246]

A virtual world example helps bring the conundrum into better focus. Suppose government builds a highway billboard on which it allows organizations to post educational materials. To explicate what we know about tax exemption, assume that along the bottom of the billboard it is stated "This Billboard is made possible by your tax dollars." Let's assume government would have created a limited public forum; if we assumed government was simply purchasing an educational program of its choosing, we would have settled the matter because government cannot purchase speech prohibited to it, but it can limit the purchased program to exclude hate speech as not being according to government's purchase order. We need to assume the billboard is a limited public forum to understand the analogy. Now suppose one group used the billboard to proclaim that: "African-Americans are dangerous, Jews are greedy, and America is a Christian nation." The precise harm from the perspective of all who see the billboard (not just African American, Jewish or Muslim people) is not that government is speaking. The words on the billboard might even be accompanied by a disclaimer as a matter of regulatory or statutory law. It is not even that through their taxes, people are being compelled to fund speech. The harm is that people know their government is facilitating speech advocating inequality in a

[246] This is the analysis relied upon by the Supreme Court in Walz v. v. Tax Commissioner of City of New York. By granting tax exemption to a religious organization, government can be viewed as establishing a religion, but by denying tax exemption government might be viewed as entanglement in religion. The Court noted that when government is between that sort of rock and hard place, it may legitimately decide which course of action is least harmful. 397 U.S. 664 (1970). Indeed, the opinion suggests that the government's reasonable decision as to a course of action is to be accorded deference.

societal realm that guarantees equality before that very government.[247] If government cannot exclude that group's use of the billboard, its only remaining choice is to tear down the billboard or inflict a constitutional harm by permitting the billboard's use for stochastic terrorism.

The solution therefore seems obvious if we focus on the four questions above. First, government's otherwise legitimate funding of the billboard causes a harm of constitutional dimension when the billboard is used or stochastic terrorism. The government funds an activity it could not itself perform, and that funding results in a message government may not convey. Second, if the government denies hate groups the use of the billboard because of their ideas, the government denies hate groups the right to be treated by government without regard to whether

[247] The Eleventh Circuit indulges the legal fiction that symbols historically associated with racial hatred offends all citizens alike, and therefore government does not violate the Equal Protection Clause by displaying those symbols. NAACP v. Hunt, 891 F.2d 1555, 1562 (11th Cir. 1990) (Alabama's display of confederate flag "offended citizens of all races" equally); Coleman v. Miller, 117 F.3d 527, 529–530 (11th Cir. 1997) (Georgia's display of confederate flag offended citizens of all races equally). The Fifth Circuit implicitly acknowledges the differential harm on certain citizens but concludes that a stigmatizing harm is insufficient by itself to prove an Equal Protection violation. Moore v. Bryant, 853 F.3d 245 (5th Cir. 2017). A fascinating application of the rule that government's racialized speech offends all citizens equally (if at all) occurred in *Penkoski v. Bowser* 486 F.Supp.3d 219 (D. DC 2020). "Plaintiffs see the [District of Columbia's "Black Lives Matter"] Mural as something that declares the District's preference for black citizens who adhere to Secular Humanism. This favoritism, they claim, violates both the Establishment Clause and Equal Protection Clause. They may, indeed, be subject to a discriminatory message every time they see the Mural. But they have made no showing that the Mayor or the District have subjected them to any discriminatory *treatment* because of their race." *Id*. Unlike *NAACP and Coleman*, *Moore* and *Penkoski* acknowledged plaintiffs suffered a stigmatizing harm different from other people but held that the harm was not cognizable without discriminatory treatment. *Id*. I might spend several pages explaining why these holdings, while they permit government's display of racist symbols, could not possibly justify government display of explicit speech proclaiming, "African Americans are dangerous," "Jews are greedy," or "America is a Christian nation." All three billboards, according to the logic described those cases, would presumably offend all citizens alike. And in the absence of actual discriminatory treatment, a plaintiff might only be able to prove a stigmatizing harm. Nevertheless, the billboards would constitute explicit speech – not symbols. They would explicitly advocate a position prohibited to government. I am confident that distinction would prevail to provide standing to any plaintiff, but especially African Americans, Jews, and non-Christians, who would then prevail on equal protection grounds. The three billboards are emblematic of the speech used by hate groups to teach what they teach; hate groups may use symbols but they are not so indirect that their speech is not of the sort in my billboard examples. A footnote is inadequate of course to explicate this argument. I elaborate on a companion forthcoming companion essay. See Darryll K. Jones, *Who Has Standing to Challenge Tax Exemption for Stochastic Terrorists*? _____ PITT TAX REV. _____ (2024).

they agree with government orthodoxy. Third, there is no practical way government can avoid one or the other harm. Fourth, the constitutional harm visited upon everyone else by allowing hate groups to use the billboard is worse than the deprivation visited upon hate groups by denial of that use. The constitutional harm when hate groups use government funding is felt by all citizens, some more intensely than others, and inevitably fosters a legitimate and pessimistic disrespect for government. Hate groups, on the other hand, may still use the billboard for any message that would not generate a constitutional harm by its association with government subsidy, and may otherwise teach or say whatever they want elsewhere (that is through a medium other than the subsidized billboard) without fear of punishment from government. The constitutional harm to government is wide because subsidized hate speech affects everyone, and deep because it fosters suspicion and disrespect of government. By contrast, the harm to stochastic terrorists groups is narrow – affecting only the hate group and only regarding a message government may not convey – and shallow, because hate groups are not precluded from speaking their minds everywhere else without fear of government punishment.[248]

By that analysis, government should have the right, if not the duty, to exclude hate groups from using the billboard because government (1) is constitutionally mandated to do so and (2) has a compelling state interest even if excluding hate groups is not constitutionally mandated.

[248] The Supreme Court has occasionally pointed to the availability of alternative avenues of speech to condone limited public forum conditions that require organizations to forego constitutional rights. *See* Christian Legal Society of the University of California v. Martinez, 561 U.S. 661, 690-91 (2010) (availability of social media and other avenues supports upholding University's condition impacting First Amendment free speech and association rights). But it quickly points out that alternative methods are of no avail if the condition is not viewpoint neutral. Id. 682 n. 13. Walz v. Tax Commission of the City of New York, 397 U.S. 66 (1970) (denial of exemption for organizations engaged in political speech upheld where organizations had alternative avenues of political speech). Still, the availability of alternative means of communication is indeed persuasive if the alternative is that government must either forego tax exemption altogether or invariably violate a constitutional prohibition such as the Equal Protection Clause.

The conclusions' patency is somewhat belied by the torturous trek through the free speech incantations. Nevertheless, it maintains government's status as benevolent and neutral, enforces the rights of all citizens to equal protection before the law, and avoids the complete suppression of speech, not even the hate speech which may still be expressed. There is no reason why what seems so obvious in the physical forum – that government must or should exclude hate groups from using the billboard – should not apply in the metaphysical forum.

V. CONCLUSION

A wise tribunal, at least under the American tradition, would avoid constitutional issues raised by government's denial of tax exemption to a hate group. It could do so, more safely than in the past, by first focusing on a definition of charity with long historical precedent. Government has officially and specifically – not just as a derivation from public policy -- recognized that increasing prejudice and discrimination or having a purpose in opposition to human and civil rights, is not charity. Hate groups – stochastic terrorists -- engage in noncharitable activities by their purpose not their particular speech. Or a court might look to methods by which hate groups teach – methods I think invariably meet the definition of indoctrination as it is commonly and scientifically understood – and conclude that hate groups do not engage in the sort of teaching activity intended to be subsidized by 501(c)(3). Thus, Treasury's early instinct that what it called "propaganda" is not education has always been correct. Indoctrination is a pejorative, anathema to freedom and democracy, not to epistemological learning. Indoctrination is both illiberal and undemocratic so Congress could not have intended to support it by granting indoctrinators exemption as though they were educators. By employing a more precise definition of education

– one that excludes indoctrination by methodology rather than by reference to speech or subjectivity – a court could uphold government's power to deny tax exemption to hate groups without constitutional concern.

But if a court was somehow forced to dive into the constitutional deep end, it could and should still uphold government's denial of tax exemption to hate groups. Put simply, and without tripping over a thick rope of first amendment incantations, a court could acknowledge two indisputable constitutional points. First, government may speak or spend for itself, and in either case, it may make whatever distinctions between ideas or acquisitions it deems appropriate if the distinctions violate no constitutional provision. Second government may not enable constitutional violations through private action or even speech. By granting tax exemption to stochastic terrorists, government enables speech it could not itself speak. Hence, if government is not required to deny tax exemption to avoid that harm, government has at least a compelling interest to do so. This conclusion does not damage free speech incantations, sacred and murky though they may be, because it affirms that government may not do indirectly what it may not do directly, and because it limits conditions on subsidies to those necessary to prevent government's own constitutional wrongdoing. The result does not portend a slippery slope of exceptions by which the government could act against disfavored ideas. A wise tribunal should avoid these issues if possible, but a wise legislative or executive branch should confront the constitutional issues head-on.

EPILOGUE

After the massacre at Mother Emanuel, governments employed their own speech in more conspicuous pursuit of the good.[249] Across the country, and overseas, governments began removing statues and monuments, lowering flags, and renaming public places to disassociate themselves from hate.[250] Governments policed their own speech as it relates to hatred. Predictably, government speech precipitated private speech and sometimes more government speech in opposition to viewpoints opposing symbols of hate.[251] A raucous debate ensued in different venues, often punctuated by violence. Except for that violence, the marketplace of ideas seemed to be functioning as the founders envisioned.

On August 11 and 12, 2017 various white supremacist groups gathered in Charlottesville, Virginia's Lee Square for what was billed as a rally to unite right wing groups (the "Unite the Right" rally).[252] Lee Square's namesake was General Robert E. Lee, the military leader of the

[249] Dara Lind, *Unite the Right, the violent white supremacist rally in Charlottesville, explained*, VOX, at https://www.vox.com/2017/8/12/16138246/charlottesville-nazi-rally-right-uva (Aug. 14, 2017, 12:06 pm) (discussing efforts to remove offensive statutes and monuments after the shooting at Mother EmanueL). Huw Jones and Estelle Shirbon, City of London to remove statutes linked to slavery trade, Reuters, at https://www.reuters.com/article/uk-britain-finance-diversity-idUKKBN29Q1H5 (same).

[250] Caesar Alimsinya Atuire, Black Lives Matter and the Removal of Racist Statues, 1 21 Inquiries Into Art, History, and The Visual, 449 (Germany) (2020), *available at* https://journals.ub.uni-heidelberg.de/index.php/xxi/article/view/76234/70966. (discussing growing efforts to remove offensive statues and monuments after the murder of George Floyd)

[251] "In the wake of the Charleston church shooting in June 2015, efforts were made across the South to remove Confederate monuments from public spaces and rename streets honoring notable figures from the Confederacy. While often successful, these efforts faced a backlash from people concerned about protecting their Confederate heritage." Unite the Right rally, WIKIPEDIA, THE FREE ENCYCLOPEDIA https://en.wikipedia.org/wiki/Unite_the_Right_rally.

[252] Dara Lind, *Unite the Right, the violent white supremacist rally in Charlottesville, explained*, VOX, at https://www.vox.com/2017/8/12/16138246/charlottesville-nazi-rally-right-uva (Aug. 14, 2017, 12:06 pm).

Confederate States of America.[253] Protestors selected it as their venue because the City Council had recently decided to remove a statue of General Lee from the park, a decision with which right wing groups vehemently disagreed.[254] Media reports depicted marchers, including members of the National Policy Institute, an "educational" organization exempt under 501(c)(3) that helped organize the rally,[255] shouting slogans often associated with hate. During the darkness hours of August 11, 2017, for example, marchers carried torchlights through the University of Virginia shouting, among other things, "you will not replace us," and "Jews will not replace us!"[256] Participants marched in careful formation, harkening days during which National

[253] Sheryl Gay Stolberg and Brian M. Rosenthal, *Man Charged After White Nationalist Rally in Charlottesville Ends in Deadly Violence,* N.Y. TIMES (AUG. 12, 2017) https://www.nytimes.com/2017/08/12/us/charlottesville-protest-white-nationalist.html.

[254] *Id*.

[255] Lucas Ropek, What Happened in Charlottesville today? Here's what you need to know

[256] Unite the right rally *supra* note 249. The "replacement theory" is one of the non-evidentiary beliefs taught by many hate groups, including the tax-exempt organization, National Policy Institute, Inc. Thomas Chatterton Williams, *The French Origins of "You Will Not Replace Us,"* THE NEW YORKER, Dec. 4, 2017, https://www.newyorker.com/magazine/2017/12/04/the-french-origins-of-you-will-not-replace-us (describing Richard Spencer, founder of the National Policy Institute, Inc.'s adoption of "Identitarianism," as the label used to refer to belief in the replacement theory); Gillian Brockell, *The father of 'great replacement': An ex-socialist French writer,* WASH. POST, May 17, 2022 at 7:44 a.m. (describing Richard Spencer's endorsement of replacement theory). The French novelist Jean Raspail is credited with first articulating the theory. National Immigration Forum, The Great Replacement Theory, Explained, (Dec. 1, 2021) https://immigrationforum.org/article/the-great-replacement-theory-explained/. Raspail's novel, "The Camp of the Saints, [is] an apocalyptic tale that attempts to depict the destruction of white, Western society at the hands of mass immigration from the Global South." *Id*.

> As soon as the frenzy of delight was over, it soon became clear that even for poor wretches long used to living on top of each other, the occupied strip of coastline would never be enough. But those who had climbed to the tops of the buildings discovered the length and breadth of their domain. Stretching as far as the eye could see, a lush, rich land stood ready to greet them. The houses, packed thick, were no blemish on nature. Indeed, it seemed to enfold and embrace them, and their very number made the refugees feel at home. Clearly this was no desert! Farther on, at the foot of the wooded hills, the scouts on the rooftops were amazed to discover vast orchards of trees, some thick with flowers, others in all their greenery, heavy with fruit. They passed on the good news, sang it out like town criers, or like muezzins atop their minaret perches. In no time it spread through the horde, from mouth to mouth. And everywhere—the streets, the gardens, the squares—people came together, in small groups and large, to talk, and talk … We really must emphasize, one last time, the role of the rain and the scramble that followed in the newfound surge of acquisitive instincts. Quite simply, the mob had developed a morale. A spirit of steel. A conquering spirit. The result was that more than three- quarters of the

Socialists or Klansmen marched through the night to make whatever point they desired. Counter-protestors gathered.[257] The marketplace of ideas bustled. It would be only a matter of time before truth prevailed.

The next day saw more of the same in broad daylight. Protestors marched again, this time shouting "Jewish media is going down," among other slogans.[258] The marketplace became so raucous that government authorities cancelled the organizers' permit for public safety reasons.[259] Around 1:45 pm, as protestors and counter-protestors shouted at each other while moving away from Lee Park, 20-year-old James Alex Fields, Jr. drove his 2010 Dodge Challenger

---

> horde—the strongest and most adventurous—decided not to stop, but to push on still further. Later, historians would turn this spontaneous migration into an epic, dubbed "The Winning of the North," a term we agree with, but only by comparison. One can't help thinking of the first panel of the diptych: the flight to the north, the pathetic exodus of the country's rightful owners, their self-willed downfall, their odious surrender. In a word, the anti-epic! Putting the two mobs side by side in the balance, one gets a clear picture …."

Jean Raspail, THE CAMP OF THE SAINTS at 90 (Norman Shapiro trans., ÉDITIONS ROBERT LAFFONT, 1975). Later, another French novelist, Renaud Camus, helped bring the theory to the attention of American hate groups. Renaud Camus, THE GREAT REPLACEMENT (INTRODUCTION TO GLOBAL REPLACISM) (2011). Thus, the phrase "you will not replace us," is most often associated with anti-immigrant sentiment generally. Sarah Widman, *"You will not replace us": a French philosopher explains the Charlottesville chant,* VOX https://www.vox.com/world/2017/8/15/16141456/renaud-camus-the-great-replacement-you-will-not-replace-us-charlottesville-white (Aug 15, 2017, 9:20am). The phrase "Jews will not replace us" reflects an evolution of the replacement theory from one which warns of white replacement by brown and black immigrants, to one that accuses Jews of orchestrating the replacement of white people by brown and black immigrants:

> I locate "Jews will not replace us" in the broader historical context of a long-lasting antisemitic narrative. This fear of a Jewish plan for world domination had two major themes. First, Jews would encourage massive non-white immigration from inferior races that would outbreed and eventually replace whites. Second, they would promote racial interbreeding that would destroy whites' supposed natural advantages in intelligence and character, hastening replacement through "mongrelization." These aims would be accomplished through Jewish-directed communism by promoting a "hoax" of racial equality.

Andrew S. Winston, *"Jews will not replace us!": Antisemitism, Interbreeding and Immigration in Historical Context,* 105 AM. JEW. HIST., 1 (2021).

[257] *Id*.
[258] *Id.*
[259] *Id*.

– a latter day version of the 1969 Dodge known as the "General Lee" in the 1980's action comedy "The Dukes of Hazzard" – at high speed into a crowd of counter protestors, eventually slamming into two other vehicles and then squealing away backwards from the crowd as counter protestors were tossed aside or jumped out of the way.[260] Almost 30 people were injured, including 32-year-old Heather Hedley who attended the rally, according to her mother, to voice her opposition to the ideas espoused by the rally's organizers. Heather died from her injuries that day.[261]

It can hardly be denied that the marketplace is slowly achieving the outcome envisioned by the First Amendment. If measured by dwindling membership and growing disorganization among stochastic terrorists, truth and justice seem slowly emergent. After the massacre at Mother Emanuel and then after they Unite the Right Rally, protest organizers sought to disavow the violence or their relationship to the perpetrators. Many groups splintered as their membership and organized activities dwindled.[262] Shall we take solace in our faith that truth and justice will inevitably prevail and so be unconcerned that hate groups may achieve tax exemption?[263] To that question Justice Stevens might have repeated what he once stated: "[a]

---

[260] *Id. See also* Joe Heim, Ellie Silverman, T. Rees Shapiro and Emma Brown, *One dead as car strikes crowds amid protests of white nationalist gathering in Charlottesville; two police die in helicopter crash,* WASH. POST. Aug. 13, 2017, https://www.washingtonpost.com/local/fights-in-advance-of-saturday-protest-in-charlottesville/2017/08/12/155fb636-7f13-11e7-83c7-5bd5460f0d7e_story.html.

[261] *Id.*

[262] Unite the Right *supra* note 249.

[263] In the meantime, violence instigated by beliefs taught by hate groups continues. On October 27, 2018, 46-year-old Richard Bowers shot 17 Jewish worshippers, killing 11 of them, at Tree of Life -- Or L'Simcha Congregation in the Squirrel Hill neighborhood of Pittsburgh, Pennsylvania. Pittsburgh synagogue shooting, WIKIPEDIA, THE FREE ENCYCLOPEDIA, https://en.wikipedia.org/wiki/Pittsburgh_synagogue_shooting, He did so, according to reports quoting his social media statements, because of his belief that Jewish people were encouraging immigration as a way of orchestrating the replacement of white people. *Id*. On May 14, 2022, Payton S. Gendron shot 13 African American people, killing 10 of them, at a grocery store in Buffalo, New York. He, too, referred to the replacement theory as a reason for his violence. Will Parker and Ginger Adams Otis, *Buffalo Supermarket Shooting Leaves at Least 10 Dead,* Wall St. J., May 15, 2022, https://www.wsj.com/articles/multiple-people-shot-at-buffalo-supermarket-11652561758.

free society must tolerate such groups. It need not subsidize them, give them its official imprimatur, or grant them equal access to . . . facilities." [264]

[264] Christian Legal Society Chapter of the University of California v. Martinez, 561 U.S. at 703. (Stevens J. concurring).