SYMMETRY AND SPEECH: NONPROFITS AND THE FIRST AMENDMENT

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ABSTRACT

In the spring of 2025, President Trump threatened Harvard's tax-exempt status, accusing it of "pushing political, ideological, and terrorist inspired/supporting 'Sickness.'" In the following months, the Administration has continued to threaten nonprofits with which it disagrees, such as those advocating critical race theory, Palestinian rights, and climate change, in a variety of ways. As this Article shows, these threats violate the First Amendment. Although this conclusion will likely be uncontroversial to most readers, stopping there misses the deeper lesson.

More importantly, revisiting the relationship between free speech principles and nonprofits in "easy" cases such as Harvard's yields two insights. First, it reminds us how they should apply in more fraught contexts. The guardrails that protect Harvard and progressive nonprofits also protect right-leaning organizations that progressives may view as engaging in hate speech and misinformation, no matter how heinous. Second, limiting nonprofit speech is antithetical to the role nonprofits play in our pluralistic society. Restricting it risks turning the sector into a governmental mouthpiece, which directly contradicts its role as a counterweight to governmental power. It also silences voices that challenge prevailing viewpoints, which are more likely to be labeled dangerous. This undermines the sector's ability to provide alternative solutions to societal problems ranging from COVID-19 to climate change, and to effectuate social change. Recall, for example, that the civil rights movement began as an unpopular expression of contrarian values. These arguments should appeal across the ideological spectrum. Conservatives who are sympathetic to the Administration's current crackdown should be wary of jettisoning the First Amendment's guardrails, because if and when the winds change, a future administration could retaliate against them. And progressives should remember that the principles that protect them now will also protect those with whom they disagree in the future.

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INTRODUCTION

In the spring of 2025, President Trump threatened Harvard's tax-exempt status, accusing it of "pushing political, ideological, and terrorist inspired/supporting 'Sickness'" and announcing that "Tax Exempt Status is totally contingent on acting in the PUBLIC INTEREST!"[1] A few months

1. Tyler Pager, Andrew Duehren, Maggie Haberman & Jonathan Swan, *Trump Threatens Harvard's Tax Status, Escalating Billion-Dollar Pressure Campaign,* N.Y. TIMES (Apr. 15, 2025), https://www.nytimes.com/2025/04/15/us/politics/trump-harvard-tax-status.html [https://perma.cc/TKC8-FWCY].

later, the Administration announced that it will crack down on nonprofits that "foment[], facilitate[], and engage[] in violence," hinting that it will use a variety of means, and an expansive definition of those terms, to silence nonprofits with which it disagrees.[2] As several scholars have argued in the media, these threats violate the First Amendment.[3] This conclusion will be uncontroversial to most readers, who are likely sympathetic to Harvard and other charities around whose status rumors are swirling.

Yet revisiting the relationship between free speech principles and nonprofits in "easy" cases such as Harvard's yields two insights. First, it reminds us how they should apply in more fraught contexts. The guardrails that protect Harvard and progressive nonprofits also protect right-leaning organizations accused of hate speech and misinformation, no matter how heinous.[4] Second, limiting nonprofit speech is antithetical to the role nonprofits play in our pluralistic society. The values underpinning the First Amendment apply in a unique manner to the sector, given its distinct function. Even if Congress and the IRS *could* constitutionally deny exemption for hate speech, misinformation, or any other subject, they *should* not.

This Article explores the relationship between free speech and the charitable tax subsidies. Part I provides an overview of tax exemption under Section 501(c)(3) and the charitable contributions deduction under Section 170(c).[5] It describes their theoretical justifications as well as the requirements for eligibility. Four stand out. All exempt organizations, regardless of statutory purpose, may neither contravene "fundamental public policy," engage in substantial illegal activities, nor support

2. Zolan Kanno-Youngs, Andrew Duehren, Kenneth P. Vogel & Katie Rogers, *Trump Invokes Kirk's Killing in Justifying Measures to Silence Opponents,* N.Y. TIMES (Sept. 22, 2025), https://www.nytimes.com/2025/09/16/us/politics/trump-kirk-free-speech-hate-speech-left.html [https://perma.cc/MC9R-8BHC].

3. Moreover, the President lacks the power to order the IRS to revoke exemptions. Ellen P. Aprill, *Once and Future Revocation of Tax Exemption for Pursuit of DEI and Other Alleged Violations of Section 501(c)(3),* TAX LAW. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5233657 [https://perma.cc/YDQ6-K7RP]; Neal Katyal, Opinion, *The Law Bars Trump from Threatening Harvard's Tax Exemption*, WALL ST. J. (May 11, 2025), https://www.wsj.com/opinion/the-law-bars-trump-from-threatening-harvards-tax-exemption-irs-political-influence-f6c9386d [https://perma.cc/9WCM-E6U6].

4. Eugene Volokh has discussed these arguments before Congress. *See, e.g.*, Eugene Volokh, *The First Amendment and Tax Exemptions for "Hate" Groups*, REASON: VOLOKH CONSPIRACY (Sept. 19, 2019), https://reason.com/volokh/2019/09/19/the-first-amendment-and-tax-exemptions-for-hate-groups/ [https://perma.cc/9QEZ-XMC5]. However, no in-depth law review analysis concludes that denying exemption to these groups is unconstitutional. Most argue the opposite.

5. *See* Miranda Perry Fleischer, *Theorizing the Charitable Tax Subsidies: The Role of Distributive Justice*, 87 WASH. U. L. REV. 505 (2010). Organizations qualifying for one benefit almost always qualify for the other. "Nonprofit," "charity," and "tax-exempt" are all used colloquially to refer to such groups.

terrorism.[6] Educational organizations face another limit; they may "advocate" for a position only if they provide a "full and fair exposition" of its factual basis.[7]

Next, Part II explores the constitutional issues. It is a bedrock First Amendment principle that once the government chooses to provide a benefit, it cannot discriminate based on a recipient's views. The Supreme Court regularly characterizes tax exemption as a benefit,[8] and the D.C. Circuit recently echoed this conclusion, stating that "in administering the tax code, the IRS may not discriminate on the basis of viewpoint."[9] The unconstitutional conditions doctrine buttresses this conclusion, and neither the government's ability to speak on its own nor its authority to choose what activities to fund allows it to engage in viewpoint discrimination in this context.

Part III then applies these principles, starting with current threats to nonprofits that discuss critical race theory, the Middle East, global warming, and other progressive causes. These attacks take a variety of forms. One is to distort existing doctrines such as *Bob Jones* and the Methodology Test to limit the subsidies to "approved" messages. Another is to implement explicit new limits on what nonprofits can say and do through executive orders, grant conditions, and potential amendments to Sections 170 or 501(c). A third is to selectively enforce legitimate restrictions, such as prohibitions on nonprofit campaign activity, illegality, financing terrorist activity, and incitement.

As the principles described above show, regardless of the approach, denying the benefits of Sections 170 or 501(c) to Harvard, Wikipedia, or any other nonprofit because of its viewpoint would be unconstitutional. Importantly, Part III also argues that the same principles would apply to future calls (if and when the political winds shift) to deny subsidies to groups that engage in "hate speech" or "misinformation,"[10] rendering such proposals unconstitutional as well.[11]

6. Bob Jones Univ. v. United States, 461 U.S. 574, 592–98 (1983).

7. Treas. Reg. § 1.501(c)(3)-1(d)(3)(i) (2009); Rev. Proc. 86-43, 1986-2 C.B. 729 (elucidating the methodology test ("Methodology Test")).

8. Speiser v. Randall, 357 U.S. 513 (1958); Regan v. Taxation with Representation of Wash., 461 U.S. 540 (1983); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995).

9. Z Street v. Koskinen, 791 F.3d 24, 30 (D.C. Cir. 2015) (addressing delays in processing exemption applications).

10. *See, e.g.*, Ways and Means Democrats (@WaysMeansCmte), X (Sept. 19, 2019), https://x.com/WaysMeansCmte/status/1174726669900419083 [https://perma.cc/N4NQ-U4KD]; Samuel D. Brunson, *Addressing Hate: Georgia, the IRS, and the Ku Klux Klan*, 41 VA. TAX REV. 45, 84 (2021); Darryll K. Jones, *Stochastic Terrorism, Speech Incantations and Federal Tax Exemption*, 54 N.M. L. REV. 69 (2024).

11. *See* Matal v. Tam, 582 U.S. 218 (2017); Minn. Voters All. v. Mansky, 585 U.S. 1 (2018).

Part IV zooms out, arguing that the underlying First Amendment principles are especially vital in this context for two reasons. First, differentiating "good" and "bad" speech is exceedingly difficult and getting it wrong undermines the sector's unique role. Incorrectly distinguishing misinformation and unwelcome information silences minority viewpoints, which are more likely to be seen as misinformation instead of plausible arguments. This hampers the provision of alternative solutions to problems, whether relating to COVID-19 or climate change. Drawing a line between harmful speech and merely unpopular speech likewise thwarts the sector's promotion of dissenting views in other matters, which is necessary for it to effectuate social change. Recall, for example, that the civil rights movement began as an unpopular expression of contrarian values. Whether incorrectly deemed "misinformation" or "hate speech," suppressing speech hampers the sector's role in minimizing market failures in the marketplace of ideas.

Second, even if we *could* make these distinctions, we *should* not. Going beyond a reluctant admission that line-drawing is too difficult, free speech provides benefits that are especially relevant to the nonprofit sector.[12] Take free speech's role as a check on government. Given that nonprofits also serve as counterweights to government power, regulating their speech undermines that role directly and risks turning them into governmental mouthpieces. Allowing "bad" speech also provides information about the breadth of support for disfavored views. One cannot adequately counter untrue beliefs about Ivermectin, for example, without knowing how widespread those views are. Lastly, allowing all speech simultaneously promotes toleration in listeners, which is necessary in our pluralistic society, and provides a safety valve for speakers, who can use words instead of violence.

The Article concludes by emphasizing that these arguments should appeal across the political spectrum. Conservatives who are sympathetic to the Administration's current crackdown should be wary of jettisoning the First Amendment's guardrails, because if and when the winds change, a future administration could retaliate against them. And progressives should remember that the principles that protect them now will also protect those with whom they disagree in the future.

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12. *See* Conor Clarke, *The Conservative Case for Leaving Harvard Alone*, THE ATLANTIC (Apr. 18, 2025), https://www.theatlantic.com/ideas/archive/2025/04/harvard-trump-irs-nonprofit/682507/ [https://perma.cc/SB4F-7GDC] (exploring a similar tension between nonprofit purposes and strengthening *Bob Jones*).

I. OVERVIEW OF THE CHARITABLE TAX SUBSIDIES

Charities have enjoyed privileged tax status for over 100 years.[13] Most importantly, Section 501(c)(3) exempts such organizations from federal income taxation, and Section 170 allows individuals to deduct charitable contributions from income.[14]

A. General Principles

To qualify for these benefits, organizations must both be formed for a "religious, charitable, scientific, literary, or educational purpose"[15] and comply with a host of negative requirements. Groups meeting these requirements are generally referred to as "charitable organizations," even if they serve a specific purpose (such as religion or education) instead of the more general "charitable purpose."[16] The statutory language is broad and encompasses a wide array of organizations and activities—covering all "educational" organizations and not simply schools, for example, and all "religious" organizations, not just houses of worship. Although Congress could have limited these benefits only to certain types of organizations serving these purposes—choosing to favor schools but not museums, perhaps—it did not.[17]

Neither Section 501(c)(3) nor Section 170 defines these purposes; instead, regulations, judicial precedent, and administrative materials have developed content-neutral definitions that forgo explicit judgments about what is "good" for society in favor of diversity.[18] For example, institutions such as museums qualify as educational if they provide "instruction of the public on subjects useful to the individual and beneficial to the community," but the regulations do not specify what is "useful to the individual" or

13. For a more in-depth history, see Fleischer, *supra* note 5.

14. This Article will focus on organizations that qualify for both tax-exemption and the ability to receive deductible contributions, setting aside 501(c)(4) social welfare organizations and other non-charitable exempt organizations.

15. I.R.C. § 170(c)(2)(B); *see also* I.R.C. § 501(c)(3).

16. Although the two statutes contain slightly different wording, organizations qualifying for exemption almost always qualify to receive deductible contributions and vice versa. The terms "nonprofit," "tax-exempt," and "charity" are all colloquial terms for these organizations, and this Article uses all three interchangeably.

17. Of course, any such limits would have to comply with the constitutional constraints discussed in Part II. Although Congress could choose to subsidize schools and not museums, it cannot choose to subsidize only schools and museums that promote a certain viewpoint while withholding subsidies from schools and museums that offer an opposing viewpoint. Similarly, Congress could not choose to exempt only Catholic or Protestant churches and not Jewish synagogues.

18. *See* Lloyd Hitoshi Mayer, *Nonprofits, Taxes, and Speech*, 56 LOY. L.A. L. REV. 1291, 1348 (2023).

"beneficial to the community."[19] As a result, groups ranging from a barbed wire museum to street art initiatives to modern dance troupes all qualify. Likewise, neither the IRS nor courts define a church based on the content of its belief. Instead, they apply a facts-and-circumstances test that examines characteristics such as having a distinct creed, form of worship, literature, rituals, and religious history; youth instruction and clergy training; and regular services and congregations. This allows organizations as disparate as the Church of Body Modification, Wiccan covens, and mainstream churches, mosques, and synagogues all to qualify.

The Supreme Court has repeatedly described Sections 170(c) and 501(c)(3) as subsidies, reasoning that:

> 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 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.[20]

Scholars offer a variety of sometimes overlapping rationales for these subsidies.[21] What I have previously termed "the traditional subsidy theory" justifies subsidies on the grounds that nonprofits do "good things" for society. They provide alternative and creative solutions to problems both big and small, offer diverse artistic and cultural viewpoints, act as a counterweight to state power, further experimentation and pluralism, and relieve governmental burdens such as poverty relief.[22]

To avoid the normative judgments inherent in the traditional subsidy theory, later theorists focused on economics. The "economic subsidy theory" argues that subsidizing charities helps them to provide public goods, which are often underproduced by the market due to free-rider problems and

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19. Treas. Reg. § 1.501(c)(3)-1(d)(3)(i) (2009). Although the IRS and Treasury—like Congress—could have crafted narrower definitions, any such definitions would have to be viewpoint neutral. *See infra* Part II.

20. Regan v. Taxation with Representation of Wash., 461 U.S. 540, 544 (1983).

21. David E. Pozen, *Remapping the Charitable Deduction,* 39 CONN. L. REV. 531, 552–53 (2006) ("In Congress, the courts, the media, and now academia, the deduction is widely viewed not as a means to reify the ideal tax base . . . but as a tax expenditure used to promote charitable giving and thereby the ultimate well-being of society. That is, the deduction is widely viewed as a government subsidy . . . ."). A minority of scholars disagree, arguing that Sections 170(c) and 501(c)(3) are necessary to measure income. *See, e.g.*, William D. Andrews, *Personal Deductions in an Ideal Income Tax*, 86 HARV. L. REV. 309, 314–16 (1972); Boris I. Bittker & George K. Rahdert, *The Exemption of Nonprofit Organizations from Federal Income Taxation*, 85 YALE L.J. 299, 307–14 (1976); Johnny Rex Buckles, *The Community Income Theory of the Charitable Contributions Deduction*, 80 IND. L.J. 947, 952 (2005).

22. *See* Fleischer, *supra* note 5, at 518.

contract failure.[23] Although the government can use its taxing power to fund the production of some public goods, it will only do so for goods supported by the median voter.[24] Subsidizing charities overcomes this "government failure." People who support projects other than those favored by the median voter—such as the opera—band together in an "I'll scratch your back; you scratch mine" coalition.[25] Each agrees to provide a little bit of support, but not full funding, to the others' projects. As the cost of a given project drops, the median voter's support for it increases.

Additional work explores the advantages of using the tax system instead of direct grants to provide these subsidies. One benefit is efficiency. A tax deduction or credit better matches the cost of a given good or service with how much someone values it. People who highly value a given project pay more by donating to it in addition to funding it indirectly via taxation. Low demanders pay less, funding it only indirectly through the tax system. In contrast, direct grants would likely require across-the-board tax increases unrelated to taxpayers' differing subjective values.[26]

Using the tax system also enhances pluralism by allowing individuals more direct say in how to allocate the subsidies. Saul Levmore, for example, characterizes the charitable deduction as allowing taxpayers to vote on which activities to subsidize. Since a taxpayer must make a contribution to trigger the subsidy, the subsidy better matches public enthusiasm for a project than direct grants would. He theorizes that giving taxpayers this type of input makes them more tolerant of redistribution and the public funding of various goods and services, deepens their commitment to nonprofit organizations, and encourages them to be more active volunteers and monitors.[27] David Schizer likewise argues that this mechanism increases donor generosity and enhances monitoring.[28]

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23. *See, e.g.*, JOHN D. COLOMBO & MARK A. HALL, *Theoretical Foundations of the Donative Theory*, *in* THE CHARITABLE TAX EXEMPTION 99, 100–08 (1995); Mark P. Gergen, *The Case for a Charitable Contributions Deduction*, 74 VA. L. REV. 1393, 1396–406 (1988); Burton A. Weisbrod, *Toward a Theory of the Voluntary Nonprofit Sector in a Three-Sector Economy*, *in* THE ECONOMICS OF NONPROFIT INSTITUTIONS 21 (Susan Rose-Ackerman ed., 1986); Henry Hansmann, *The Rationale for Exempting Nonprofit Organizations from Corporate Income Taxation*, 91 YALE L.J. 54, 72 (1981). *But see* David A. Brennen, *A Diversity Theory of Charitable Tax Exemption—Beyond Efficiency, Through Critical Race Theory, Toward Diversity*, 4 PITT. TAX REV. 1 (2006) (pushing back on the economic subsidy theory).

24. This stems from the democratic process that turns on majority preferences. If the median voter supports national defense but not the opera, then only the former receives funding.

25. COLOMBO & HALL, *supra* note 23, at 107–08.

26. Gergen, *supra* note 23, at 1399–406.

27. Saul Levmore, *Taxes as Ballots*, 65 U. CHI. L. REV. 387, 405–12 (1998).

28. David M. Schizer, *Subsidizing Charitable Contributions: Incentives, Information, and the Private Pursuit of Public Goals*, 62 TAX L. REV. 221, 229–42, 256–67 (2009).

Crucially, the traditional subsidy theory and the economic subsidy theory can complement each other. Even if the economic theory better explains as a descriptive or positive matter why the subsidies exist, the traditional subsidy theory highlights their positive externalities. Given those benefits, one should be careful about reforms to the sector that undercut them.

B. The Negative Limitations

In addition to fulfilling a statutory purpose, charities must also comply with a host of negative prohibitions such as prohibitions on private inurement and private benefit, the commerciality doctrine, and limits on lobbying and political activity. These rules theoretically cabin the vagueness of the positive charitable purpose requirement: If a charity is neither benefiting specific individuals nor acting in a manner that too closely resembles a for-profit commercial enterprise, then it must be doing something good for the community that merits a subsidy. Of these negative requirements, three are particularly relevant to this Article due to their unique susceptibility to being used as an ideological weapon against disfavored views: the illegality doctrine, the fundamental public policy requirement, and limitations on "propaganda" for educational organizations.[29]

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29. Of course, other rules can and have been used ideologically. In particular, accusations that the IRS enforces the prohibition on political campaign activity selectively on a partisan basis have been rampant for decades. Because of the long-standing nature of these accusations, a rich debate already addresses the constitutionality of these limits, their desirability as a normative matter, and problems with their selective enforcement. Instead of revisiting well-worn ground, this Article sets those limitations aside to focus on rules that have gained attention as ideological weapons only in the last decade or so. For a sampling of the debate surrounding the campaign intervention rules, see Ellen P. Aprill, *Amending the Johnson Amendment in the Age of Cheap Speech*, 2018 U. ILL. L. REV. ONLINE 1; Ellen P. Aprill, *Churches, Politics, and the Charitable Contribution Deduction*, 42 B.C. L. REV. 843 (2001); Samuel D. Brunson, *Dear IRS, It Is Time to Enforce the Campaigning Prohibition. Even Against Churches*, 87 U. COLO. L. REV. 143 (2016); Samuel D. Brunson, *A New Johnson Amendment: Subsidy, Core Political Speech, and Tax-Exempt Organizations*, 43 YALE L. & POL'Y REV. 354 (2025); Johnny Rex Buckles, *Not Even a Peep? The Regulation of Political Campaign Activity by Charities Through Federal Tax Law*, 75 U. CIN. L. REV. 1071 (2007); Laura Brown Chisolm, *Politics and Charity: A Proposal for Peaceful Coexistence*, 58 GEO. WASH. L. REV. 308 (1990); Roger Colinvaux, *The Political Speech of Charities in the Face of* Citizens United*: A Defense of Prohibition*, 62 CASE W. RSRV. L. REV. 685 (2012); Roger Colinvaux, *Political Activity Limits and Tax Exemption: A Gordian's Knot*, 34 VA. TAX REV. 1 (2014); Brian Galle, *Charities in Politics: A Reappraisal*, 54 WM. & MARY L. REV. 1561 (2013); Benjamin M. Leff, *Fixing the Johnson Amendment Without Totally Destroying It*, 6 U. PA. J.L. & PUB. AFFS. 115 (2020); Benjamin M. Leff, *"Sit Down and Count the Cost": A Framework for Constitutionally Enforcing the 501(c)(3) Campaign Intervention Ban*, 28 VA. TAX REV. 673 (2009); Mayer, *supra* note 18; Lloyd Hitoshi Mayer, *Grasping Smoke: Enforcing the Ban on Political Activity by Charities*, 6 FIRST AMEND. L. REV. 1 (2007); Donald B. Tobin, *Political Campaigning by Churches and Charities: Hazardous for 501(c)(3)s, Dangerous for Democracy*, 95 GEO. L.J. 1313 (2007); PHILIP HAMBURGER, LIBERAL SUPPRESSION: SECTION 501(C)(3) AND THE TAXATION OF SPEECH (2018).

The illegality doctrine and the fundamental public policy requirement are associated with *Bob Jones University v. United States*, in which the Supreme Court upheld the revocation and/or denial of exempt status to two schools with racially discriminatory policies.[30] In so doing, it layered common law principles of charity atop the plain language of Section 501(c)(3), reading into it two requirements from charitable trust law not specifically elucidated in the statute. The first (the illegality doctrine) holds that an exempt organization may not have an illegal purpose. This requires more than showing that an organization or its employees have violated a law. Instead, courts and the IRS have invoked the illegality doctrine only when the organization itself has an illegal purpose (such as drug trafficking[31] or promoting polygamy[32] or the sexual exploitation of minors) or is so entwined with illegal activity (such as tax evasion and burglary of IRS offices[33]) that it is impossible to separate those activities from the organization's goals.[34]

The second is that exempt organizations cannot engage in activities "contrary to fundamental public policy," a requirement referred to as either the "fundamental public policy requirement" or simply the "public policy requirement." The Court reasoned that "[c]haritable exemptions are justified on the basis that the exempt entity confers a public benefit . . . . [A]n institution . . . must demonstrably serve and be in harmony with the public interest."[35] It acknowledged that identifying what counts as a "public benefit" or "public policy" is sensitive and emphasized that exemption should be denied only where there is "no doubt" the activity contravenes fundamental public policy.[36] The Court reasoned that however one defines those terms, racial discrimination in education violates them. Although it avoided crafting its own definition as a substantive matter, it suggested that a long-standing and consistent history of congressional action, executive

30. 461 U.S. 574 (1983). The IRS had gestured toward the illegality doctrine in earlier revenue rulings. *See* Rev. Rul. 71-447, 1971-2 C.B. 230. However, its inclusion in *Bob Jones* increased its importance. For an in-depth history of the doctrine, see Lauren Libby, Tax-Exemption and the Shadow of Law (Nov. 28, 2025) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5824182 [https://perma.cc/YJR6-DS8Z].

31. Iowaska Church of Healing v. Werfel, 105 F.4th 402, 414 (D.C. Cir. 2024); Mysteryboy Incorporation v. Comm'r, 99 T.C.M. (CCH) 1057, *19 (2010).

32. I.R.S. Priv. Ltr. Rul. 201323025 (June 7, 2013).

33. Church of Scientology of Cal. v. Comm'r, 83 T.C. 381, 505–06 (1984).

34. For more on the illegality doctrine, see Professors of Tax'n & Nonprofit L., Comment Letter Proposed Changes to Public Service Loan Forgiveness (Sept. 16, 2025) [hereinafter PSLF Comment Letter], https://www.regulations.gov/comment/ED-2025-OPE-0016-8696 [https://perma.cc/83QK-6AUZ]; Libby, *supra* note 30 (arguing that the institutional constraints on using the illegality doctrine are weak, rendering it a "loaded weapon" waiting to be used against disfavored groups).

35. *Bob Jones*, 461 U.S. at 591–92.

36. *Id.* at 592.

orders, and its own decisions could illuminate what counts as fundamental public policy.[37] To date, the IRS has rarely applied *Bob Jones*'s public policy requirement beyond the limited context of race discrimination in education against minority groups,[38] although there are frequent calls for its expansion. Some on the left argue that groups advocating white supremacist views or religious organizations that refuse to acknowledge same-sex marriage are violating *Bob Jones*,[39] while some on the right have argued that groups promoting critical race theory; advocating for diversity, equity, and inclusion initiatives; or criticizing Israel are the ones whose activities are contrary to public policy.[40]

In addition to the two requirements of *Bob Jones* (which applies regardless of the specific enumerated purpose for which an organization is formed), an additional test applies to organizations formed for "educational purposes." This test stems from a requirement in the regulations that allows educational organizations to "advocate" for a given position, so long as they provide a "sufficiently full and fair exposition" of the factual basis for that

37. *Id.* at 592–95.

38. *See* Alex Zhang, *Antidiscrimination and Tax Exemption*, 107 CORNELL L. REV. 1381 (2022).

39. Arguments from the left side of the political spectrum to expand *Bob Jones* come from both policymakers and academics. *See, e.g.*, Corey Brettschneider, *Democratic Persuasion and Freedom of Speech: A Response to Four Critics and Two Allies*, 79 BROOK. L. REV. 1059, 1069–74 (2014) (arguing that "organizations that discriminate or advocate hateful beliefs should not enjoy the tax privileges that come with 501(c)(3) status" on the grounds that attacking "the public good of free and equal citizenship" is not charitable); Samuel D. Brunson & David J. Herzig, *A Diachronic Approach to* Bob Jones*: Religious Tax Exemptions After* Obergefell, 92 IND. L.J. 1175, 1204–17 (2017) (proposing three methods for clarifying and expanding the public policy requirement); Jones, *supra* note 10 (arguing that hate groups are by definition not charitable); 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 (2022) (contending that the lessons of critical race theory should inform the public policy analysis); Richard Schmalbeck, Bob Jones *and the Public Policy Doctrine, 35 Years Later*, NAT'L CTR. ON PHILANTHROPY & L. CONF. PROC., 2018, at 34–37, https://ncpl.law.nyu.edu/wp-content/uploads/2022/07/Richard-L.-Schmalbeck.pdf [https://perma.cc/Q6P6-WVGX] (exploring whether a sufficiently objective public policy test could be created that would deny exemption to "White supremacy [and] Holocaust denial" groups); Zhang, *supra* note 38, at 1401 (arguing the doctrine should cover discrimination based on any protected characteristic in addition to race).

40. In contrast to arguments from the left side of the political spectrum, arguments from the right to expand *Bob Jones* tend to come not from academics but from politicians, policymakers, and other advocates. *See, e.g.*, sources cited *infra* note 124. For descriptions and academic discussions of these calls for expansion from the right, see Aprill, *supra* note 3 (extensively cataloguing and analyzing current threats to liberal nonprofits); David A. Brennen, *Race Conscious Affirmative Action by Tax Exempt 501(c)(3) Institutions After* Students for Fair Admission v. Harvard and UNC, 21 PITT. TAX REV. 49 (2023) (assessing conservative arguments that recent Supreme Court jurisprudence renders traditional affirmative action for minorities contrary to public policy); Roger Colinvaux, *Charitable Giving and Civil Rights: A Defense of Private Remedial Action*, 135 YALE L.J. 549 (2025) (asserting that affirmative action programs by tax-exempt organizations are not at odds with public policy, contrary to assertions by the Trump Administration); Samuel D. Brunson & Ellen P. Aprill, *The University, Ideology, and Tax Exemption*, 168 TAX NOTES FED. 1037 (Aug. 10, 2020) (discussing the charge that opposition to requiring foreign students to take at least one class in-person violates public policy).

position.[41] After the D.C. Circuit found that the "full and fair exposition" test, standing alone, was unconstitutionally vague,[42] the IRS published the methodology test ("Methodology Test") in an effort to cure the identified flaws in the regulatory test.[43] This test attempts to provide an objective basis for determining when organizations that advocate for a particular viewpoint are educational by focusing on how the organization advances its arguments. In laying out the test, the IRS explains that:

> The method used by the organization will not be considered educational if it fails to provide a factual foundation for the viewpoint or position being advocated, or if it fails to provide a development from the relevant facts that would materially aid a listener or reader in a learning process.[44]

To that end, the presence of any of the following suggests that an organization 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.[45]

Neither the Supreme Court nor a federal appeals court has ruled on whether the Methodology Test does, in fact, cure the shortcomings of the full and fair exposition test. That said, the Tax Court held that it was constitutional, and the D.C. Circuit upheld the denial of exemption to a white supremacist group without directly ruling on the constitutional question.[46] Like *Bob Jones*, the IRS uses it sporadically but not frequently,

41. Treas. Reg. § 1.501(c)(3)-1(d)(3)(i) (2009).
42. Big Mama Rag, Inc. v. United States, 631 F.2d 1030, 1039–40 (D.C. Cir. 1980).
43. Rev. Proc. 86-43, 1986-2 C.B. 729.
44. *Id.* § 3.02.
45. *Id.* § 3.03.
46. Nationalist Movement v. Comm'r, 102 T.C. 558, 583–90 (1994); Nat'l All. v. United States, 710 F.2d 868, 876 (D.C. Cir. 1983) ("We do not . . . reach the question whether the application of the

including applying it to some anti-abortion activists.[47] Also like *Bob Jones*, many have called for its expansion as a means of denying exemption to hate groups and groups that traffic in misinformation.[48]

II. TAX EXEMPTION AND THE FIRST AMENDMENT

As a legal matter, the First Amendment almost certainly prohibits Congress and the IRS from engaging in viewpoint discrimination with respect to tax-exemption and the charitable deduction. Applying this fundamental rule to the current situation yields two insights. First, it protects the nonprofit sector from current threats to its tax status. But more importantly, it demonstrates that calls for reform that many readers likely find more sympathetic—such as proposals to limit hate speech or misinformation—are also unconstitutional.

A. The Relevant First Amendment Principles

This conclusion follows from untangling a knot of potentially applicable overlapping doctrines. On one hand, the First Amendment clearly prohibits the government from banning, restricting, or punishing purely private speech based on viewpoint—including by imposing fines.[49] On the other hand, the government is allowed to speak for itself and to choose which viewpoints it voices.[50] There is nothing unconstitutional about the government speaking out against, say, tobacco use.[51]

In the middle are situations where the government provides a benefit to a private individual or organization and attaches speech-related conditions

Methodology Test, either as a matter of practice or under an amendment to the regulations would cure the vagueness found in the regulation by this court in Big Mama.”).

47. *See, e.g.*, Denial Letter from Paul M. Harrington, Dist. Dir., Internal Revenue Serv., to Applicant, (Apr. 22, 1996) (denying recognition of tax-exempt status under I.R.C. § 501(c)(3)), https://www.irs.gov/pub/irs-lafa/den0266r.pdf [https://perma.cc/YB7N-UK3T]; Mayer, *supra* note 18, at 1309 n.80 (collecting instances of its use). Most observers believe the IRS only invokes the Methodology Test in “extreme” cases, but proving this point empirically is difficult. *See, e.g.*, Email from Lloyd Mayer to author (Apr. 8, 2026) (on file with author).

48. *See, e.g.*, Brunson, *supra* note 10, at 84 (arguing that the Methodology Test be used to deny the charitable tax subsidies to hate groups); Alex Reed, *Subsidizing Hate: A Proposal to Reform the Internal Revenue Service's Methodology Test*, 17 FORDHAM J. CORP. & FIN. L. 823, 862–69 (2012). In the same spirit, Darryll Jones has proposed replacing the Methodology Test with a test that would distinguish education from indoctrination in order to preclude subsidizing hate groups. *See* Jones, *supra* note 10, at 92–107; *see also* Eric Franklin Amarante, *Why Don't Some White Supremacist Groups Pay Taxes?*, 67 EMORY L.J. ONLINE 2045, 2065–67 (2018) (arguing that “educational purposes” should be redefined to include schools and organizations like museums while excluding advocacy groups).

49. Speiser v. Randall, 357 U.S. 513, 518–19 (1958). As discussed later, there are exceptions for true threats and incitement to violence. *See* discussion *infra* Section III.C.

50. Matal v. Tam, 582 U.S. 218, 234 (2017); Rust v. Sullivan, 500 U.S. 173, 193 (1991).

51. *Matal*, 582 U.S. at 234–35.

to that benefit. Some such cases are still relatively easy, as when the government is simply outsourcing its own speech to a third party. As part of a public health initiative, the government could fund private groups to mount anti-smoking campaigns and condition the funding on the message conveying an anti-smoking viewpoint. In that situation, the government does not also have to fund private groups who wish to mount pro-smoking campaigns.[52]

The tricky cases arise when the government provides a less-targeted, more broadly available benefit and attaches speech-based restrictions. When is withholding a benefit akin to punishing an individual or organization for certain views, and when is it simply reflective of a legitimate government decision about which types of speech and which messages to subsidize? What emerges is the principle that although the government may choose whether or not to provide certain benefits in the first instance, once it does so, it may not engage in viewpoint discrimination unrelated to the purpose of the benefit.[53]

The Supreme Court has repeatedly affirmed this principle in numerous contexts, ranging from direct financial subsidies for student newspapers to the more intangible advantage of trademark protection and the indirect benefit of tax exemption. With respect to tax subsidies, the 1958 case *Speiser v. Randall* struck down a California law denying property tax exemptions (such as one available to veterans) to people or groups that advocated the overthrow of the U.S. government or who advocated support for foreign governments in the event of a conflict with the United States.[54] The Court recognized that tax exemption was a privilege, but reasoned that denying a privilege—be it tax exemption, use of the postal system, or public employment—based on one's speech is akin to imposing a fine for that speech.[55] Such denials, the Court continued, "have the effect of coercing the claimants" and are "frankly aimed at the suppression of dangerous ideas."[56] As such, the limit was not a "reasonable" condition on the privilege of receiving a tax exemption.[57]

Three decades later, the Court extended this analysis to tax-deductible contributions and clarified its contours in the 1983 case *Regan v. Taxation*

52. *Rust*, 500 U.S. at 192–94; Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 570 U.S. 205, 217 (2013).

53. *See, e.g.*, *Rust*, 500 U.S. at 194–95 (distinguishing between "a general law singling out a disfavored group on the basis of speech content" and "the Government refusing to fund activities, including speech, which are specifically excluded from the scope of the project funded").

54. 357 U.S. at 516, 518–19.

55. *Id.* at 518.

56. *Id.* at 519 (quoting Am. Commc'ns Ass'n v. Douds, 339 U.S. 382, 402 (1950)).

57. *Id.* at 518–19.

with Representation of Washington.[58] In that case, the Court examined whether prohibiting 501(c)(3) organizations—but not 501(c)(4)s—from substantial lobbying violates the First Amendment.[59] The key differences are that the former can receive tax-deductible contributions but cannot engage in "substantial" lobbying, while the latter can do all the lobbying they like but donors to them cannot deduct contributions. As a result, organizations that lobby can receive the subsidy from tax-exemption, but not the extra subsidy from deductibility. The Court held that this structure was a permissible viewpoint-neutral decision not to subsidize lobbying activities, as there is no right to have one's constitutionally protected right to lobby subsidized.[60] The organization could still lobby, and it could still be tax-exempt; it just had to lobby with non-deductible funds instead of tax-subsidized funds.[61]

Two points are relevant. First, the Court distinguished *Speiser* on the grounds that *Speiser* denied an independent benefit based on the veterans' speech. The property tax exemption was not meant to further a given governmental message, rendering the law in *Speiser* a fine or punishment for speech, as opposed to a decision about which governmental messages to subsidize.[62] This reasoning echoes a distinction drawn in *Rust v. Sullivan* between conditions placed on the recipient of a subsidy that prohibit them from engaging in a constitutional right at all, versus conditions placed on receipt of funds for a specific program or service (such as family planning).[63]

Second, even though the lobbying prohibition in *Regan* was content based, it was viewpoint neutral. *All* substantial lobbying was prohibited, not just lobbying for or against certain causes. The Court explicitly stated that "[t]he case would be different if Congress were to discriminate invidiously in its subsidies" against "dangerous ideas."[64] It found no suggestion, however, that the lobbying prohibition was meant to suppress certain viewpoints.[65] *Regan* reaffirms that although Congress can pick and choose

58. 461 U.S. 540 (1983).

59. Such groups were still eligible for tax-exemption under Section 501(c)(4), but they were ineligible for exemption from Section 501(c)(3), to which attaches the ability to receive deductible contributions under Section 170(c).

60. *Regan*, 461 U.S. at 545–46.

61. *Id.* at 545. One key fact is that 501(c)(3)s can easily create sister 501(c)(4) organizations to lobby.

62. *Id.* at 545–47.

63. Rust v. Sullivan, 500 U.S. 173, 197 (1991). The Court addressed this distinction again in Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 570 U.S. 205 (2013). *See infra* notes 81–85 and accompanying text.

64. *Regan*, 461 U.S. at 548 (citing Cammarano v. United States, 358 U.S. 498, 513 (1959)).

65. *Id.*

what *types* of speech to subsidize via the tax code, once it decides to subsidize a certain type of speech, it cannot pick and choose among views within that group.[66]

Since *Regan*, the Supreme Court has reconsidered the issue of selective benefits in a variety of contexts. In the 1995 case *Rosenberger v. Rector and the Visitors of the University of Virginia*, the Court considered a subsidy for student publications that was denied to a religious student newspaper.[67] In holding that the denial violated the students' First Amendment free speech rights, the Court forcefully reiterated that although the government is not required to subsidize speech, it cannot engage in viewpoint discrimination once it "expends funds to encourage a diversity of views from private speakers."[68] The Court elaborated that the chilling effect from allowing the government to determine which ideas are palatable and which are not is especially dangerous in the university setting, given its vital role in "the Nation's intellectual life."[69]

Two strands of the Court's reasoning are especially important. First, the Court analogized the provision of the subsidies to the creation of a limited public forum, albeit a "metaphysical" one.[70] Although the government may create limited forums with specific purposes,[71] once it opens that forum up, it cannot bar speech when the prohibition is not reasonably related to the purpose of the forum or is based on viewpoint.[72] This is especially true when the point of the forum is to foster the exchange of ideas,[73] as was the case with the subsidy for student newspapers in *Rosenberger*.

Second, the Court distinguished between subsidizing others' speech, which must be done in a *viewpoint*-neutral manner under *Regan*, with the government's own speech. When the government itself is speaking, it may

66. *See also* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995) ("When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.").

67. *Id.* at 827, 834. The denial was based on the grounds that the newspaper was a "religious activity," meaning that it "promote[d] or manifest[ed] a particular belie[f] in or about a deity or an ultimate reality" and as such, was not eligible for the subsidy. *Id.* at 827.

68. *Id.* at 834; *see also Regan*, 461 U.S. at 548.

69. *Rosenberger*, 515 U.S. at 836. The Court also considered whether the subsidies violated the Establishment Clause, finding no violation since the subsidies were neutral. *Id.* at 840.

70. *Id.* at 829–30.

71. The government may also condition the use of limited public forums on complying with neutral rules related to conduct. *See, e.g.*, Christian Legal Soc'y v. Martinez, 561 U.S. 661, 693 (2010). In addition, it may impose viewpoint-neutral restrictions in nonpublic forums such as polling places. *See* Minn. Voters All. v. Mansky, 585 U.S. 1, 11–13 (2018); *infra* note 136 and accompanying text.

72. *Rosenberger*, 515 U.S. at 829.

73. Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 800 (1985) ("Because a principal purpose of traditional public fora is the free exchange of ideas, speakers can be excluded from a public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest.").

of course determine the message.[74] The same is true when the government spends money to promote a favored viewpoint or conduct a specific program, such as an anti-smoking campaign. But subsidizing speech generally, as in *Rosenberger*, does not transform private speech into government speech or a government program. In *Rosenberger*, the students' speech was not the University's.[75] Therefore the First Amendment required that the subsidy be viewpoint neutral.

After *Rosenberger*, the Court has twice revisited the distinction between general subsidies and programs designed for a specific purpose. In *National Endowment for the Arts v. Finley*, it rejected a facial challenge to a National Endowment for the Arts (NEA) requirement that grant applicants be judged partly on "general standards of decency and respect."[76] The Court described the NEA grant process as inherently content-based, noting that due to NEA's mandate to make "esthetic judgments" and "limited resources . . . it must deny the majority of the grant applications that it receives."[77] In a competitive process, the government can use criteria that would be impermissible if used to directly regulate or punish speech.[78] This distinguished the grant process from the *Rosenberger*/public fora cases, as well as from other situations where benefits such as mailing privileges or use of a school auditorium were allocated on an objective basis.[79] In dicta, however, the Court added a key caveat to the government's ability to award grants on a subjective basis:

> If the NEA were to leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints, then we would confront a different case. . . . [E]ven in the provision of subsidies, the Government may not 'ai[m] at the suppression of dangerous ideas.'[80]

A few years later, in *Agency for International Development v. Alliance for Open Society International*, the Court reaffirmed that even when it comes to funds or subsidies for specific programs, speech-related conditions must be related to the purpose of the program.[81] That case concerned federal grants to private groups fighting HIV overseas; the grants required not only that grant funds not be used to promote prostitution or sex trafficking, but

74. *Rosenberger*, 515 U.S. at 834–35; Rust v. Sullivan, 500 U.S. 173, 194 (1991).
75. *Rosenberger*, 515 U.S. at 834–35.
76. 524 U.S. 569, 576, 587–88 (1998).
77. *Id.* at 586, 585.
78. *Id.* at 587–88.
79. *Id.* at 586–87.
80. *Id.* at 587.
81. 570 U.S. 205 (2013).

also that recipient organizations have an explicit organizational policy opposing prostitution and sex trafficking.[82] The recipient organizations did not challenge the first condition, as it was clearly constitutional under *Rust*.[83] With respect to the second, the Court characterized past case law (including *Rust* and *Regan*) as creating a distinction between "conditions that define the federal program and those that reach outside it."[84] (This distinction is also consistent with the reasoning in *Speiser* and *Rosenberger*, although the Court did not address those cases.) While acknowledging that the line between the two can be murky, it felt "confident that the Policy Requirement falls on the unconstitutional side of the line" and therefore held that it violated the First Amendment.[85]

And most recently, the Court in 2017 considered how these precedents apply to the intangible benefit of trademark protection. In *Matal v. Tam*, a plurality held that denying a trademark to a rock band named "The Slants" under a rule that excluded "disparaging" trademarks from various protections was unconstitutional viewpoint discrimination.[86] As an initial matter, the majority opinion held that trademark protection does not constitute a seal of approval that transforms private speech into government speech.[87] In reaching this conclusion, the Court distinguished a pro-beef campaign funded by the Department of Agriculture, a small city park containing 15 monuments, and specialty license plates.[88] With respect to the latter two situations, the Court noted that monuments and license plates are closely identified with the government by the public and are often used to convey the government's own messages. In contrast, nobody conceptualizes trademarked speech as the Government's due to the trademark; the public understands it remains private speech.[89] This echoes the reasoning in *Rosenberger* that the students' speech was not the University's.[90]

Next, a plurality found the exclusion of "disparaging" trademarks to be unconstitutional viewpoint discrimination.[91] It first rejected the government's contention that trademark protection was akin to providing

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82. *Id.* at 208.
83. *Id.* at 217–18.
84. *Id.*
85. *Id.*
86. 582 U.S. 218 (2017).
87. *Id.* at 235 ("But while the government-speech doctrine is important—indeed, essential—it is a doctrine that is susceptible to dangerous misuse. If private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints. For this reason, we must exercise great caution before extending our government-speech precedents.").
88. *Id.* at 237–39.
89. *Id.*
90. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 834–35 (1995).
91. *Matal*, 582 U.S. at 246–47.

cash subsidies for a specific program or type of activity, as in *Rust*, *NEA*, and *Open Society*.[92] It therefore did not discuss the circumstances under which the government can impose viewpoint restrictions on cash subsidies (although it did mention that tax benefits are "comparable" to cash subsidies). Instead, the plurality analogized to the *Rosenberger* line of limited public fora cases.[93] Even though the prohibition was evenhanded and applied equally no matter who was being disparaged, it still "[was] viewpoint discrimination: Giving offense is a viewpoint."[94]

B. The Charitable Tax Subsidies as a Limited Public Forum

Assessing how these principles apply to the denial of tax-exempt status based on a charity's views, the messages it promotes, or the government's subjective opinion of the programs it conducts requires several steps. As an initial matter, the Court has repeatedly recognized that tax-exempt status and the ability to receive tax-deductible contributions are valuable benefits akin to cash subsidies.[95] The precedents just discussed that concern cash subsidies thus control. And of these precedents, *Rosenberger*'s limited public forum analysis is especially applicable. As explained in more detail below, the charitable tax subsidies are neither government speech nor subsidies for nonprofits to carry out a specific activity or transmit a specific message. Instead, they subsidize a wide range of activities that often involve communicating viewpoints, and this triggers the public forum analysis. In *Lamb's Chapel*, for example, the Court used that analysis to invalidate a school district policy allowing the after-hours use of facilities for social, civic, and recreational—but not religious—purposes.[96] *Rosenberger* thus controls even though the charitable tax subsidies are not meant to subsidize speech *per se* (in contrast to the publication subsidies at issue in *Rosenberger*), but rather a wide range of activities.

To flesh the public fora analogy out, recall what the charitable tax subsidies do: They provide benefits to an extraordinarily broad array of organizations based on objective criteria.[97] A group must serve a "religious, charitable, scientific, literary, or educational purpose"; what counts as educational, religious, or charitable, for example, is defined in a viewpoint-

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92. *Id.* at 239–43.
93. *Id.* at 243–44.
94. *Id.* at 243.
95. Regan v. Taxation with Representation of Wash., 461 U.S. 540, 544 (1983); *see also* Bob Jones Univ. v. United States, 461 U.S. 574, 591 (1983).
96. Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 393–95 (1993) (finding the rule prohibiting religious uses not viewpoint neutral).
97. *See supra* Section I.A.

neutral manner and assessed using process-based tests.[98] Organizations must also comply with prohibitions against private inurement, private benefit, commerciality, excessive lobbying, and election advocacy.

As long as organizations meet these objective and viewpoint-neutral criteria, they receive exemption, and denial of exempt status is extraordinarily rare. In 2018, for example, the IRS denied only 72 out of 91,981 applications—a measly 0.078%.[99] The subsidies therefore differ from the arts grants at issue in the *NEA* case, in which the government was using numerous subjective criteria to choose a few grant recipients from among a large pool of applicants.[100] Instead, they are akin to programs that allocate based on objective criteria, such as the student activities funding in *Rosenberger* or the provision of school facilities during non-school hours to community groups for social, civic, and recreational purposes, as in *Lamb's Chapel*.[101]

What results is an incredibly diverse array of subsidized groups. In 2023, there were over 1.5 million organizations exempt under Section 501(c)(3),[102] with a cacophony of purposes, messages, and goals. These include educational organizations ranging from Harvard University to Montessori kindergartens to think tanks across the ideological spectrum to the International Paper Hall of Fame, the Barbed Wire Museum, and the Mustard Museum. Catholic, evangelical, Wiccan, Jewish, and Muslim houses of worship all qualify as religious organizations—as do the Church of Body Modification and American Atheists. The charitable prong covers environmental groups and public interest legal groups ranging from the ACLU to the conservative Pacific Legal Foundation, as well as arts galleries in rural areas and large metropolitan hospitals.

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98. See John D. Colombo, *The Role of Access in Charitable Tax Exemption*, 82 WASH. U. L.Q. 343 (2004) (discussing the tests used to determine if an organization serves a "charitable" purpose); JAMES J. FISHMAN, STEPHEN SCHWARZ & LLOYD HITOSHI MAYER, NONPROFIT ORGANIZATIONS: CASES AND MATERIALS 396–414, 417–30 (6th ed. 2021) (explaining the tests used for "educational" and "religious" organizations, respectively).

99. Zhang, *supra* note 38, at 1395–96. Historically, the most common reason for denial is some sort of violation of the private inurement rule. Terri Lynn Helge, *Rejecting Charity: Why the IRS Denies Tax Exemption to 501(c)(3) Applicants*, 14 PITT. TAX REV. 1, 30 (2016). It should be noted, however, that this number does not include applications that are never ruled on by the IRS because they are withdrawn or incomplete, and that there can be thousands of such applications each year. See Email from Lloyd Mayer, *supra* note 47.

100. Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 585, 588 (1998).

101. *Lamb's Chapel*, 508 U.S. at 386–87.

102. *See SOI Tax Stats – Tax-Exempt Organizations and Nonexempt Charitable Trusts – IRS Data Book Table 14*, INTERNAL REVENUE SERV. (May 29, 2025), https://www.irs.gov/statistics/soi-tax-stats-tax-exempt-organizations-and-nonexempt-charitable-trusts-irs-data-book-table-14 [https://perma.cc/6RXH-9UJF].

This diversity illustrates why the charitable tax subsidies resemble the student subsidies in *Rosenberger*, the school use policy in *Lamb's Chapel*, and other limited public forums that are open to all participants meeting viewpoint-neutral criteria. In contrast, they differ from the subsidies in *Rust*, *Open Society*, and other government speech cases. Although the government is perfectly free to fund charitable organizations and other third parties to promote specific messages or conduct identifiable programs with narrow goals, that is not what Sections 501(c)(3) or 170(c) are for.[103] Quite the opposite. Consider that the following pairs of groups all benefit from the charitable tax subsidies:

- The National Rifle Association Foundation (which is "committed to safeguarding our Second Amendment rights by promoting safe and responsible firearms ownership")[104] and Brady United (which seeks stronger firearms laws through a combination of policy reform, cultural change, and industry oversight);
- ProLife Across America (which provides anti-abortion education) and the National Abortion Federation (which "unites, supports, and represents abortion providers and the people they serve, in pursuit of accessible and equitable abortion care")[105];
- The NAACP's Legal Defense Fund (which litigates in favor of affirmative action) and Students for Fair Admissions (which litigates against affirmative action);
- Progressive think tanks such as the Center for American Progress and the Progressive Policy Institute as well as conservative think tanks such as the Cato Institute and the Heritage Foundation;
- The Reading League (which advocates for a return to phonics-based reading instruction in lieu of balanced literacy) and the Children's Literacy Initiative (which de-emphasizes phonics).

Both the sheer diversity of exempt organizations and the subsidization of so many groups with diametrically opposing viewpoints mean that the charitable tax subsidies cannot plausibly be characterized as "government speech" or "government activity." How can the government be both for and

103. Could the Department of Health and Human Services fund outside groups to provide educational programs about safe gun use without funding groups with a contrary message? Absolutely. Just as it could fund an outside group to provide abstinence counseling without funding abortion counseling, or vice versa. But that is not what the charitable tax subsidies are for.

104. Amanda McLennan, *Supporting Second Amendment Freedoms: The NRA Foundation's Impact*, FRIENDS OF NRA (Sept. 24, 2024), https://www.friendsofnra.org/content/supporting-second-amendment-freedoms-the-nra-foundation-s-impact/ [https://perma.cc/9AFH-2QV9].

105. *Mission, Vision, & Leadership*, NAT'L ABORTION FED'N, https://nationalabortionfederation.org/mission-leadership/ [https://perma.cc/4DWK-AURJ].

against affirmative action, for and against phonics, for and against abortion, and so on, all at the same time? In rejecting the contention that trademark protection rendered trademarked speech "government speech," the Court wrote: "If the federal registration of a trademark makes the mark government speech, the Federal Government is babbling prodigiously and incoherently. It is saying many unseemly things. . . . It is expressing contradictory views."[106] The same is true of exempt status. If exempt status renders the activity government activity, then the government is likewise expressing contradictory views and pursuing contradictory outcomes and goals.

Scholars, policymakers, and the Court all celebrate this diversity not simply as a mere side benefit, but instead as one of the raisons d'être of the sector. In Justice Powell's *Bob Jones* concurrence, for example, he laments that the majority opinion "ignores the important role played by tax exemptions in encouraging diverse, indeed often sharply conflicting, activities and viewpoints. . . . [P]rivate, nonprofit groups receive tax exemptions because 'each group contributes to the diversity of association, viewpoint, and enterprise essential to a vigorous, pluralistic society.'"[107]

Even more crucially, this diversity enables the sector to serve as a counterweight *to the government* itself. As Powell's concurrence emphasizes, "[f]ar 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."[108] And in illustrating the extent to which the subsidies tolerate divergent views by listing a grab-bag of exempt organizations, he notes that many of these views are at odds with the government's.

For these reasons, the charitable tax subsidies should be treated like UVA's payment of printing expenses for student organizations.[109] In *Rosenberger*, the Court recognized that the government had "expend[ed] funds to encourage a diversity of views from private speakers."[110] And that is exactly what the charitable tax subsidies do.

106. Matal v. Tam, 582 U.S. 218, 236 (2017).

107. Bob Jones Univ. v. United States, 461 U.S. 574, 609 (1983) (Powell, J., concurring) (citing Walz v. Tax Comm'n, 397 U.S. 664, 689 (1970)).

108. *Id.*

109. *But see* Jones, *supra* note 10, at 113–14 (disputing the use of limited public forum analysis in this context). Because Jones believes this analysis is inapposite, he also rejects the unconstitutional conditions doctrine in this context. To that end, one argument he offers against subsidizing hate groups is that since the government itself cannot speak in a hateful manner, it cannot subsidize others to do so. *Id.* at 78. This, however, misconstrues the subsidies as purchasing specific public goods or services.

110. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 834 (1995).

III. THE (UN)CONSTITUTIONALITY OF CURRENT THREATS TO CHARITIES

This context helps us assess current threats to the sector, which are unfortunately numerous. These attacks take a variety of forms. One is to interpret existing doctrines such as the fundamental public policy requirement and the Methodology Test to limit the subsidies to "approved" messages. Another is to implement explicit new limits on what nonprofits can say and do through executive orders, grant conditions, and potential amendments to Sections 170 or 501(c). A third is to weaponize legitimate restrictions, such as the illegality doctrine, anti-terrorism rules, and prohibitions on threats, incitement, and nonprofit speech. As the principles described above show, regardless of the approach, denying the benefits of Sections 170 or 501(c) to Harvard, Wikipedia, Students for Justice for Palestine, or any other nonprofit because of its *viewpoint* would be unconstitutional. And when the political winds shift, the same principles will protect organizations on the other side of the political spectrum, such as the Alliance Defending Freedom, the Family Research Council, and those challenging affirmative action programs.

A. Explicit Prohibitions

One hazard to the sector is the explicit prohibition on expressing disfavored viewpoints (such as those related to diversity, equity, and inclusion). These threats currently take the form of executive orders and grant conditions that apply only to subsets of the nonprofit sector, but these rules could also serve as a model for amending Sections 170 and 501(c)(3) themselves. In either case, these prohibitions are unconstitutional.

Consider the following condition attached to DHS grants to high-risk nonprofits to pay for additional physical security and cybersecurity. Recipients of such grants cannot "operate any programs that advance or promote DEI, DEIA, or discriminatory equity ideology in violation of Federal anti-discrimination laws."[111] The DHS guidelines punt to Executive Order 14190 to define "discriminatory equity ideology" as:

111. *FY 2025 DHS Standard Terms and Conditions*, U.S. DEP'T OF HOMELAND SEC. (Apr. 18, 2025), https://www.dhs.gov/sites/default/files/2025-08/2025_0418_fy2025_dhs_terms_and_conditions_version_3.pdf [https://perma.cc/SP96-NABZ]. Presumably, the limiting phrase "in violation of Federal anti-discrimination law" is meant to protect against charges of viewpoint-based discrimination by governing what types of *conduct* are prohibited. In theory, restricting grants to organizations that comply with anti-discrimination laws is a conduct-based requirement that does not implicate the First Amendment. The catch is that current hostile work environment precedent might support a claim that diversity trainings with certain viewpoints violate federal anti-discrimination law. *See* Chislett v. N.Y.C. Dep't of Educ., 157 F.4th 172 (2d Cir. 2025) (finding that trial court erred in granting defendant's motion

> (b) [A]n ideology that treats individuals as members of preferred or disfavored groups . . . and minimizes agency, merit, and capability in favor of immoral generalizations, including that:
>
> (i) Members of one race, color, sex, or national origin are morally or inherently superior to members of another . . . ;
>
> (ii) An individual, by virtue of the individual's race, color, sex, or national origin, is inherently racist, sexist, or oppressive, whether consciously or unconsciously;
>
> (iii) An individual's moral character or status . . . is primarily determined by the individual's race, color, sex, or national origin;
>
> . . .
>
> (v) An individual, by virtue of the individual's race, color, sex, or national origin, bears responsibility for, should feel guilt, anguish, or other forms of psychological distress because of . . . actions committed in the past by other members of the same race, color, sex, or national origin, in which the individual played no part;
>
> . . .
>
> (vii) Virtues such as merit, excellence, hard work, fairness, neutrality, objectivity, and racial colorblindness are racist or sexist or were created by members of a particular race, color, sex, or national origin to oppress members of another race, color, sex, or national origin; or
>
> (viii) the United States is fundamentally racist, sexist, or otherwise discriminatory.[112]

Almost-identical language permeates a flurry of other federal orders and state legislation. For example, various executive orders on workplace training[113] and Florida's so-called "Stop Woke" Act[114] ban discussions of the ideas elucidated above unless the discussions are "in an objective manner without endorsement . . . ."[115] These explicitly prohibit speech expressing certain opinions: Arguing that the idea of merit is racist or that white individuals often engage in unconscious stereotyping is forbidden, while disputing these claims is allowed. The Eleventh Circuit thus held that Florida's law was unconstitutional viewpoint discrimination, recognizing

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for summary judgment on plaintiff's hostile work environment claim). Assuming that the Trump Administration shares this view, its logical extension is that trainings with certain viewpoints are prohibited, thus collapsing the distinction between speech and conduct in this context.

112. Exec. Order No. 14190, 90 Fed. Reg. 8853 (Feb. 3, 2025).

113. *See, e.g.*, Exec. Order No. 13950, 85 Fed. Reg. 60683 (Sept. 22, 2020).

114. The law's official title is the Individual Freedom Act. FLA. STAT. ANN. § 760.10(8)(a) (West 2025).

115. *Id.* § 760.10(8)(b); *see, e.g.*, Exec. Order No. 13950, § 10(b), 85 Fed. Reg. 60683, 60688 (Sept. 22, 2020).

that "the First Amendment keeps the government from putting its thumb on the scale" and that these types of prohibitions "penalize[] certain viewpoints—the greatest First Amendment sin."[116]

For these reasons, explicit prohibitions on discussing DEI, critical race theory, the 1619 Project, Palestinian rights, global warming, and other causes disfavored by the Trump Administration would almost certainly meet a similar fate. This is true whether the ban is in the form of a directive in an executive order that applies to the sector, a condition in some type of grant, or a potential amendment to Sections 501 or 170 themselves. In all such cases, the government would either be restricting speech directly or imposing an unconstitutional condition on a benefit that is made broadly available on an objective basis.[117]

Importantly, these principles would also apply to outright bans on speech that progressives find abhorrent. Although legislation explicitly prohibiting "hate speech" by nonprofits or denying exemption to "hate groups" has not been introduced, one can imagine what such a prohibition might look like. The Southern Poverty Law Center, for example, defines a "hate group" as an "organization 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."[118] Several university policies could also easily serve as a template for amending Sections 170 and 501(c)(3) or the regulations thereunder. Barnard College, for example, defines prohibited harassment to include "epithets, slurs, or negative stereotyping"; "denigrating jokes"; "offensive or derogatory displays or circulations"; and "written or graphic material that disparages or shows hostility or aversion toward an individual or group."[119] Colgate University's definition includes "unwelcome, demeaning, intimidating or graphic comments; using ethnic, racial, religious, or other slurs to refer to a person or group" and "creating or displaying racially, ethnically, or religiously offensive pictures, symbols, flags, cartoons, or graffiti that disparages another person or group because

116. Honeyfund.com Inc. v. Governor, 94 F.4th 1272, 1275, 1277 (11th Cir. 2024).

117. The DHS grant, for example, should be treated as the same type of broad benefit as the charitable tax subsidies themselves.

118. S. POVERTY L. CTR., METHODOLOGY: HOW HATE GROUPS ARE IDENTIFIED AND CATEGORIZED (2020), https://www.splcenter.org/resources/reports/methodology-how-hate-groups-are-identified-and-categorized/ [https://perma.cc/P9DN-F53F].

119. BARNARD COLL., POLICY AGAINST DISCRIMINATION AND HARASSMENT AND RELATED PROCEDURES 5 (2024), https://www.fire.org/sites/default/files/2025/01/Barnard%20College%20Policy%20Against%20Discrimination%20and%20Harassment%20%26%20Procedures.pdf [https://perma.cc/5E3Q-CXZR].

of . . . [a] Protected Characteristic[].”[120] And in the 1990s, campus speech codes like Stanford’s, which prohibited speech “intended to insult or stigmatize an individual . . . on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin,” proliferated.[121]

These types of prohibitions would face two problems. First, as Lloyd Mayer has explored, defining “hate speech” in a constitutional manner is incredibly difficult.[122] Are analyses of potential innate differences between men and women denigrating and derogatory? What about discussions of crime statistics vis-à-vis various racial categories, or studies of illegal immigration? It is far from clear that the proxy definitions above would survive a vagueness challenge.

But even assuming that a workable definition could be found, the bigger problem is that bans on hate speech are, by definition, bans on specific viewpoints and would be unconstitutional on those grounds. The First Amendment flatly prohibits the government from picking and choosing what viewpoints tax-exempt organizations may express. Hate speech is no exception. Recall that in *Matal v. Tam*, a plurality of the Court invalidated a ban on “disparaging” trademarks, concluding that the ban “[was] viewpoint discrimination: Giving offense is a viewpoint.”[123]

B. Expanding Existing Doctrines

A second threat to the sector is the use of existing rules such as *Bob Jones* and the Methodology Test. And in fact, conservative legislators and lawyers are already deploying these tactics against organizations such as Students for Justice for Palestine and Wikipedia.[124] On the opposite end of the spectrum, several progressive academics and policymakers have suggested using these tests to deny or revoke exemption to hate groups.[125] In 2019, for example, the Ways and Means Oversight Subcommittee held a hearing

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120. *Student Non-Discrimination and Anti-Harassment Policy*, COLGATE UNIV., https://www.colgate.edu/about/offices-centers-institutes/equity-and-diversity/non-discriminationsexual-misconduct-2/student [https://perma.cc/73T7-JL5F].

121. NOAH R. FELDMAN & KATHLEEN M. SULLIVAN, FIRST AMENDMENT LAW 106–07 (9th ed. 2026) (citing Corry v. Leland Stanford Junior Univ., No. 740309 (Cal. Super. Ct. Feb. 27, 1995)).

122. Mayer, *supra* note 18, at 1348–49.

123. Matal v. Tam, 582 U.S. 218, 243 (2017).

124. *See, e.g.*, Letter from Jason Smith, Chairman, H. Comm. on Ways & Means, to Daniel Werfel, Comm’r, IRS (Sept. 20, 2024) [hereinafter Smith Letter], https://waysandmeans.house.gov/wp-content/uploads/2024/09/Tax-Exempt-Status-Revocation-Letters.pdf [https://perma.cc/3V69-T73N]; Letter from Edward R. Martin, Jr., U.S. Att’y for D.C., to Wikimedia Foundation, Inc. AKA Wikipedia (Apr. 24, 2025), https://upload.wikimedia.org/wikipedia/commons/e/e0/Letter_from_interim_US_attorney_for_DC_Ed_Martin_to_Wikimedia_Foundation_2025.pdf [https://perma.cc/FM4R-ED2B] (accusing Wikipedia of engaging in propaganda instead of education); Aprill, *supra* note 3.

125. *See generally* sources cited *supra* note 39.

examining "How the Tax Code Subsidizes Hate." In opening remarks, the Chair of the House Ways and Means Committee urged that "groups that propagate white supremacy, anti-Semitism, hatred for the LGBTQ community, among others, do not deserve government subsidy through tax exemptions. Hate is not charitable, and it is not educational."[126] John Lewis, then the chair of the Oversight Subcommittee, concurred, arguing that "organizations [that] promote hate based on race, gender, religion, sexual orientation, or ethnic background . . . . taint the good work of all tax-exempt organizations."[127]

Both *Bob Jones*'s public policy requirement and the Methodology Test raise serious First Amendment concerns. Not only should calls to expand their use be resisted, but they should be repealed altogether.[128] Although the government has deployed them very sparingly in the past, this is largely due to its own self-restraint and not due to any effective guardrails on their use. This lack of constraint risks rendering these doctrines both unconstitutional—as explored immediately below—and bad policy, as explored in Part IV.

1. *Not Facially Neutral?*

As an initial matter, it is plausible that some of these rules—specifically the fundamental public policy requirement and the Methodology Test—are unconstitutional because they are not facially neutral. To illustrate, consider the evolution of *Bob Jones*. The Supreme Court itself took pains to determine what constituted fundamental public policy in a neutral manner, looking to Court decisions and "myriad Acts of Congress and Executive Orders" spanning over two decades.[129] And to be clear, using *Bob Jones* in this manner and limiting its application to *conduct* that undermines established public policy would be facially constitutional.[130] The

126. *Hearing on How the Tax Code Subsidizes Hate Before the Subcomm. on Oversight of the H. Comm. on Ways & Means*, 116th Cong. 8–9 (2019) (statement of Richard Neal, Chairman, H. Comm. on Ways & Means).

127. *Id.* at 11.

128. This Article sets aside the larger question of whether *Bob Jones* was wrongly decided as a matter of statutory interpretation or agency authority, although the author believes that it was. *See, e.g.*, Bob Jones Univ. v. United States, 461 U.S. 574, 612–23 (1983) (Rehnquist, J., dissenting). Instead, it focuses on the doctrine's constitutionality under the First Amendment and the implications of the public policy requirement for the sector's broader role in society.

129. *Id.* at 593.

130. Darryll Jones relies on this distinction to argue that Congress could deny exemption to hate groups on the grounds that they *teach* others to hate, which constitutes discriminatory conduct and seeks an outcome which is not charitable. Jones, *supra* note 10, at 111. He makes a similar outcome/conduct argument based on the language of Regulation 1.501(c)(3)-1(d)(2) that defines "charitable" purposes to

government can, without implicating the First Amendment, condition tax exemption on the recipient's conduct (so long as it applies those conditions equally across the board).

Unfortunately, recent calls to broaden the fundamental public policy doctrine risk extending its reach beyond conduct in ways that would be unconstitutional. First, they minimize the emphasis on concrete expressions of public policy by actual governmental bodies, focusing more on arguments that a certain type of conduct does not serve a vaguely defined "public interest" or provide a vaguely defined "community benefit." This opens the door to regulating more than conduct. These calls also seem to go beyond policing conduct to policing advocacy.[131] In *Bob Jones*, the problem was the school's discriminatory conduct, not the fact that it advocated discrimination. The conduct/advocacy distinction was again highlighted in *Christian Legal Society v. Martinez*, which held that a public law school could refuse to recognize a student group that did not comply with a nondiscriminatory membership policy while reaffirming that the school could not discriminate against the group due to its views.[132]

Extending *Bob Jones* to advocacy and speech that contradicts public policy thus risks rendering it facially unconstitutional. At first glance, this extension might sound appealing—how can speech that denigrates and disparages groups of people based on race, sex, ethnicity, and so on possibly serve the public interest? In fact, does it not undermine the goal of providing a community benefit? But determining what is or is not "in the public interest" turns on the viewpoint expressed. A group that publishes a newsletter portraying a given group in a positive manner is subsidized as being in the public interest, but a newsletter portraying that same group in a negative manner is denied a subsidy as being counter to the public interest. What is the difference? The viewpoint expressed. That is the very definition of viewpoint discrimination. Similarly, substantial portions of the Methodology Test—namely, the third factor—are facially not neutral. Whether language is inflammatory, emotional, or disparaging turns on the

include "eliminating prejudice and discrimination." That definition, he argues, means that since hate groups do the exact opposite by increasing prejudice and discrimination, they are by definition not charitable. Jones, *supra* note 10, at 88. The problem with these arguments, however, is that they still turn on the viewpoint expressed and therefore cannot escape that they are not viewpoint neutral.

131. I.R.S. Priv. Ltr. Rul. 201323025 (June 7, 2013) illustrates the porous nature of this line. The group at issue, Principle Voices of Polygamy, conducted a variety of activities that included both advocating for changing anti-polygamy laws and providing support for people who engaged in polygamy. It did not itself engage in activities that were illegal. At times, however, the letter ruling reads as if the group's advocacy activities were in and of themselves contrary to public policy by attempting to change public opinion and ultimately laws about polygamy, which would be a facially unconstitutional interpretation of *Bob Jones*.

132. 561 U.S. 661, 693–94, 696 (2010).

viewpoint of the content expressed—again, the type of viewpoint discrimination precluded by the First Amendment.

2. As Applied Discrimination/Vagueness

The larger problem—which also underscores how dangerous these tests are as a policy matter—is that *Bob Jones* and the Methodology Test inevitably involve discriminatory application. Both presume a set of shared values and an epistemic framework that does not currently exist, and perhaps never did.[133] The values question embedded in *Bob Jones*—whether private schools should be allowed to racially discriminate—was hotly contested at the time, as the furor over the Court's decisions showed. At most, one might argue that there was less epistemic fracturing at the time with respect to factual matters (in contrast to today, where even basic factual matters are viewed differently from different political vantage points). At the time of *Bob Jones*, there were three television networks, more Americans attended mainstream churches, experts such as professors and scientists were accorded more deference, and so on.[134] Truth was still revered as an ideal, even if it was elusive, and we had not yet fully entered our "post-truth" world.[135]

Given the fracturing of that framework and the proliferation of alternative sources of information and epistemic bubbles, however, it is impossible to apply these tests today without engaging in viewpoint discrimination. And that is unconstitutional. In another context, the Court recently struck down a Minnesota ban on "political" apparel at polling places on First Amendment grounds.[136] That case concerned the more lenient standards applicable to nonpublic forums, in which the state may impose content-based restrictions to preserve a forum's intended purpose. These rules, however, must be "reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."[137] In holding that the prohibition was unconstitutional even under that more

133. I thank David Pozen for this point.

134. *See, e.g.*, Douglas Blanks Hindman & Kenneth Wiegand, *The Big Three's Prime-Time Decline: A Technological and Social Context*, 52 J. BROAD. & ELEC. MEDIA 119 (2008); M. Anthony Mills & Price St. Clair, *The Strange New Politics of Science*, ISSUES SCI. & TECH., Spring 2025, at 40; GREGORY SMITH ET AL., PEW RSCH. CTR., DECLINE OF CHRISTIANITY IN THE U.S. HAS SLOWED, MAY HAVE LEVELED OFF 375 app. C (2025); BRIAN KENNEDY & ALEC TYSON, PEW RSCH. CTR., AMERICANS' TRUST IN SCIENTISTS, POSITIVE VIEWS OF SCIENCE CONTINUE TO DECLINE (2023).

135. *See generally* CASS R. SUNSTEIN, #REPUBLIC: DIVIDED DEMOCRACY IN THE AGE OF SOCIAL MEDIA 1–30 (2017); Claudia Deane, *Americans' Deepening Mistrust of Institutions,* TREND, Fall 2024, at 8.

136. Minn. Voters All. v. Mansky, 585 U.S. 1, 23 (2018).

137. *Id.* at 12 (citing Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n, 460 U.S. 37, 46 (1983)).

permissive standard, the Court emphasized the expansive nature of the word "political." In theory, it could apply to "anything 'of or relating to government, a government, or the conduct of governmental affairs' . . . or anything '[o]f, relating to, or dealing with the structure or affairs of government, politics, or the state.'"[138] This indeterminacy made the ban ripe for abuse; allowing an official's "own politics [to] shape his views on what counts as 'political.'"[139] The same principles apply in this context.

Starting with the Methodology Test, one could argue that since it defines "educational" based on the existence of facts and the rational development of an argument, it is theoretically viewpoint neutral. Even if true, it is exceedingly difficult to apply in a way that precludes its discriminatory application based on the listener's priors, as evaluation of its factors turns on the listener's attitude toward the viewpoint expressed.

Consider the first two factors, that the "presentation of viewpoints or positions unsupported by facts is a significant portion of the organization's communications" and whether "the facts that purport to support the viewpoints or positions are distorted."[140] A listener who is skeptical of a given viewpoint is much more likely to conclude that said viewpoint is not adequately supported by facts and/or any facts given are distorted. To illustrate, imagine a newsletter arguing that there are only two sexes[141] that offers supporting facts that discuss gametes, and gametes alone. Readers who believe there are only two sexes will feel that this viewpoint is supported by facts and that those facts are undistorted. In their view, the newsletter is educational. In contrast, readers who believe sex is a spectrum and/or find the newsletter's views hateful will likely conclude that this viewpoint is unsupported by facts or that those facts are distorted.[142]

The third factor, whether 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

138. *Id.* at 17 (citations omitted).

139. *Id.* at 22.

140. Rev. Proc. 86-43, 1986-2 C.B. 729.

141. I am specifically referring to "sex" and not "gender." There is an academic debate about whether biological sex itself is a spectrum or whether it is binary. *See, e.g.*, AGUSTÍN FUENTES, SEX IS A SPECTRUM: THE BIOLOGICAL LIMITS OF THE BINARY (2025); Claire Ainsworth, *Sex Redefined*, 518 NATURE 288 (2015).

142. *See, e.g.*, Julia Marnin, *Neuroscience Professor Removed from APA Discussion After Saying There Are Only Two Sexes*, NEWSWEEK (May 17, 2021), https://www.newsweek.com/neuroscience-professor-removed-apa-discussion-after-saying-there-are-only-two-genders-1591697 [https://perma.cc/M2LF-MVN9]; Jon Levine, *Maine University in Uproar After Professor Insists There Are Only 2 Sexes*, N.Y. POST (Oct. 8, 2022), https://nypost.com/2022/10/08/maine-college-in-uproar-after-professor-gender-claim/ [https://perma.cc/YFA6-MB2K]; Meimei Xu, *Biology Lecturer's Comments on Biological Sex Draw Backlash*, HARV. CRIMSON (Aug. 12, 2021), https://www.thecrimson.com/article/2021/8/11/biology-lecturer-gender-comments-backlash/ [https://perma.cc/SY6T-FS97].

evaluations" faces similar shortcomings.[143] First, identifying what counts as "inflammatory" and "disparaging" necessarily entails distinguishing among the viewpoints expressed. Does the viewpoint calm, or inflame? Does it praise a group, or denigrate it? These are questions that by definition turn on the viewpoint. Second, listeners will again judge whether something is inflammatory or disparaging based on their own views. Some hear the phrase "From the River to the Sea" as inflammatory and the term "Zionist" as disparaging, others do not. Some believe "illegal alien" to be disparaging and inflammatory, others do not. In both cases, the split likely turns on the listener's views about these issues.

An additional consideration is that even-handed and strict enforcement of the Methodology Test would disqualify numerous groups widely seen as benign—or even positive. One could imagine, for example, a group dedicated to fighting animal abuse that uses inflammatory language and appeals to emotion.[144] Given the unlikeliness of widespread application to groups universally considered harmless, it is highly likely that in reality, the only groups that will be targeted are ones considered controversial. Unless the IRS applies the test more widely to these types of groups, its use will be discriminatory in application.[145]

Like the Methodology Test, the fundamental public policy requirement of *Bob Jones* invites viewpoint discrimination in two respects. First, recall that in holding that racial discrimination in education was against public policy, the Court looked at its own opinions, as well as "myriad Acts of Congress and Executive Orders."[146] Theoretically, canvassing such materials to discern what fundamental public policy is objective—one reads them and identifies what they say. But the choice of how widely to cast a net, and what materials to rely on or discard, is fraught with subjectivity. Should state laws be considered? Or only federal?[147] If the former, which states? Red, blue, or all? What if state or local law diverges from federal law, as in the case of marijuana use or sanctuary cities? Given our federalist

143. Rev. Proc. 86-43, 1986-2 C.B. 729.

144. *See* Big Mama Rag, Inc. v. United States, 631 F.2d 1030, 1039 (D.C. Cir. 1980) (discussing an example of anti-smoking advocacy).

145. *See* Frederick Douglass Found. v. District of Columbia, 82 F.4th 1122, 1142–43 (D.C. Cir. 2023).

146. Bob Jones Univ. v. United States, 461 U.S. 574, 593 (1983).

147. In *Bob Jones* itself, the Court relied on federal sources such as its own decisions, executive orders, and federal legislation, suggesting that at the time, it interpreted fundamental public policy as meaning federal, not state, public policy. Given the other ways in which the public policy and illegality doctrines are being stretched in ways that appear to exceed the Court's original vision for the doctrine, however, one can imagine an argument that public policy should not necessarily be limited to federal public policy.

system, identifying a single "public policy" when it comes to numerous policy issues is almost impossible.[148]

Second, many current invocations of *Bob Jones* eschew identifying concrete laws and policies, instead arguing that hate and other disfavored groups do not provide a "community benefit," do not further the "public interest," or are not "charitable."[149] These terms are just as indeterminate and expansive as the word "political" in the disfavored Minnesota ban on "political" apparel at polling places. As the Court noted about the Minnesota ban, this inevitably invites the decisionmaker to imbue these terms with their own substantive preferences.[150]

Just as almost anything related to the "structure or affairs of government, politics, or the state," can be deemed political, almost any type of advocacy, education, or effort to change the status quo can be deemed antithetical to established public policy. Does advocacy for or against Palestinian statehood provide a community benefit? The United States has had a firmly pro-Israel policy for many decades. What about arguing for or against the repeal of the Nineteenth Amendment, which has been in effect for over a century? What about advocating for a change in abortion laws? Abortion was recognized as a constitutional right for almost fifty years—until it wasn't. One's ideological priors will inform how one interprets vague terms like "community benefit" and "public interest," rendering such tests unconstitutional. Importantly, this guardrail protects both progressive groups from current threats and conservative groups from future threats.

C. Weaponizing Legitimate Restrictions

A final threat to nonprofit expression is the weaponization of otherwise legitimate restrictions. The First Amendment is not absolute; it does not protect incitement, and it allows prohibitions on nonprofits' political advocacy, illegal activities, and financing terrorism.[151] These exceptions, however, are limited in scope. They are inapplicable to much activity targeted by the current administration, just as they will be inapplicable to

148. For a thoughtful discussion of "safe harbor" approaches to defining public policy that would be viewpoint neutral, see Brunson & Herzig, *supra* note 39, at 1204–17 (suggesting tying the definition to strict scrutiny, the Civil Rights Act, or clearly delineated Treasury pronouncements).

149. *See, e.g.*, Jones, *supra* note 10, at 85–87 (invoking *Bob Jones* to argue that hate groups are not "charitable").

150. Minn. Voters All. v. Mansky, 585 U.S. 1, 19–23 (2018).

151. This Article does not discuss the prohibition on political activity, other than to emphasize that its selective enforcement is unconstitutional. Allegations that the IRS enforces these rules selectively against a given administration's political opponents are nothing new, and other scholars have extensively covered these allegations and the normative merits of the political activity rules themselves. *See* sources cited *supra* note 29.

activity conducted by conservative nonprofits that future administrations may abhor. Moreover, the selective deployment of these doctrines for ideological reasons is unconstitutional, protecting both progressive nonprofits from the current Administration as well as nonprofits with contrary views in the future.[152]

1. Illegality

First, the Administration has signaled that it will wield the illegality doctrine expansively. For example, it recently revised the public interest loan forgiveness program to exclude organizations with a "substantial illegal purpose";[153] many fear that this is a precursor to using the doctrine outright to deny exemption to disfavored groups. And in fact, several Republican legislators have urged the IRS to use the doctrine against groups supporting Palestinian rights.[154] Likewise, a conservative nonprofit has urged the IRS to invoke the doctrine against several nonprofits, including the Gates Foundation, with scholarship and similar programs for under-represented minorities.[155]

Although the doctrine has a long history in charitable trust law, it is rarely deployed in the nonprofit context—only when the organization's purpose is violating a criminal law itself or inducing others to commit crimes. Most recently, for example, it was used to deny exemption to an organization that engaged in drug trafficking and another whose sole purpose was to encourage the sexual exploitation of minors.[156] In those cases, the whole reason for the organization was to encourage the performance of criminal activities. The doctrine was also deployed against a group that engaged in such numerous and repeated acts of tax fraud that the criminal tax fraud became part and parcel of the organization.[157]

In contrast, the doctrine is not deployed when organizations engage in illegal acts—even repeatedly—when those acts are not criminal, not

152. *See* Frederick Douglass Found. v. District of Columbia, 82 F.4th 1122 (D.C. Cir. 2023) (discussing the selective prosecution of protestors chalking "Black Pre-Born Lives Matter" but not those chalking "Black Lives Matter").

153. Exec. Order No. 14235, 90 Fed. Reg. 11885 (Mar. 12, 2025).

154. Smith Letter, *supra* note 124.

155. Press Release, Am. All. for Equal Rts., American Alliance for Equal Rights Files Request to IRS to Examine Racial Practices at Three Tax-Exempt Foundations: Gates Foundation, Lagrant Foundation and Creative Capital Foundation (Apr. 1, 2025), https://www.prnewswire.com/news-releases/american-alliance-for-equal-rights-files-request-to-irs-to-examine-racial-practices-at-three-tax-exempt-foundations-gates-foundation-lagrant-foundation-and-creative-capital-foundation-302417428.html [https://perma.cc/6RUL-8VV7].

156. Mysteryboy Incorporation v. Comm'r, 99 T.C.M. (CCH) 1057, *19 (2010); Iowaska Church of Healing v. Werfel, 105 F.4th 402, 414 (D.C. Cir. 2024).

157. Church of Scientology of Cal. v. Comm'r, 83 T.C. 381, 506 (1984).

substantial *and* not the raison d'être of the organization. Notably, the Supreme Court opinion that solidified the doctrine's standing as one requirement for tax exemption did not rely on the doctrine itself in holding that the schools in question did not deserve exemption even though the schools had repeatedly violated civil rights laws.[158] Instead, the Court used the fundamental public policy doctrine, emphasizing that more than twenty-five years of legislation, judicial decisions, and executive orders illustrated that racial segregation in education was not worthy of the charitable tax subsidies. Despite this history, the revisions to the PSLF program indicate the Administration plans to wield the illegality doctrine more bluntly. It lists several purposes the Administration now considers sufficient to invoke the rule, such as engaging in activities that are illegal in some states but not others (such as related to medical care for youth with gender dysphoria); violating civil rights laws; and even minor infractions like trespassing.[159] This is a vast and dangerous expansion of the doctrine.

Broadening it to include civil laws as well as criminal, to include minor violations, and to include violating state laws that are not uniform across the country invites the selective use of the doctrine. Luckily for those nonprofits espousing now-disfavored views, constitutional prohibitions against selective enforcement should protect them. And in the future, those same guardrails will protect conservative nonprofits that might picket abortion clinics or protest government policies favored by a liberal administration.

2. *Incitement, Terrorism, and Political Violence*

A second line of attack is to link groups with disfavored views to terrorism and violence, threatening them with various criminal investigations or violations of Section 501(p), which denies exempt status to terrorist organizations. Last fall, for example, the Trump Administration tried to paint recent acts of political violence such as the murder of Charlie Kirk, assassination attempts on President Trump and Supreme Court Justice Kavanaugh, and attacks on ICE officers, as a "culmination of sophisticated, organized campaigns of targeted intimidation, radicalization, threats, and violence."[160] To that end, it directed numerous government actors, including the Attorney General, the Department of Justice, the National Joint Terrorism Task Force, the Treasury Department, and the IRS to "investigate

158. *See* Bob Jones Univ. v. United States, 461 U.S. 574, 591 (1983); PSLF Comment Letter, *supra* note 34, at 3.

159. William D. Ford Federal Direct Loan (Direct Loan) Program, 90 Fed. Reg. 48966, 49000–02 (Oct. 31, 2025) (to be codified at 34 C.F.R. pt. 685).

160. National Security Presidential Memorandum on Countering Domestic Terrorism and Organized Political Violence, 2025 DAILY COMP. PRES. DOC. 958 (Sept. 25, 2025).

and disrupt networks, entities, and organizations that foment political violence."[161] And in Congress, several Republicans have introduced legislation that would allow the Treasury Secretary to suspend the tax-exempt status of any charity he or she determines to be "terrorist-supporting" while bypassing traditional IRS processes.[162]

Nonprofits, like all other actors, are bound both by general criminal laws and more specific anti-terrorist laws. And the First Amendment does not protect true threats of violence or incitement. But heated rhetoric—even when it includes harsh criticism of government officials, vague calls to action, or derogatory language—is not the same as a call to political violence, domestic terrorism, or incitement. Incitement is punishable only if it is intended to and likely to provoke *imminent* unlawful action (that is, within hours or a few days), while more general advocacy of lawbreaking or violence at some indefinite time remains protected.[163] True threats may be banned or punished, but this too has a specific meaning: "Statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."[164] And revoking exemption on the grounds that a group is a terrorist organization requires a lengthy procedural process and an opportunity to challenge that designation.

The narrowness of these exceptions thus protects nonprofits currently accused of fomenting violence, such as several pro-Palestinian organizations and groups that use heated rhetoric to fight for racial justice.[165]

161. *Id.*

162. *See, e.g.*, Stop Terror-Financing and Tax Penalties on American Hostages Act, H.R. 9495, 118th Cong. (2024).

163. Brandenburg v. Ohio, 395 U.S. 444, 447–49 (1969); EUGENE VOLOKH, THE FIRST AMENDMENT AND RELATED STATUTES 4 (8th ed. 2024). This distinction holds even when the statements at issue take place during rallies, demonstrations, and public gatherings at which it is not entirely unforeseen that some participants may engage in illegal activity. Even in such cases, general discussions and exhortations to violence remain protected. *See Brandenburg*, 395 U.S. at 448 (suggesting, at a KKK rally, that "revengeance" might need to be taken against Jewish people and African Americans and announcing a later march on Congress was not incitement); Hess v. Indiana, 414 U.S. 105, 107 (1973) (claiming "We'll take the fucking street later" after police removed anti-war protestors who had blocked a street was not incitement); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 902 (1982) (NAACP leader did not engage in incitement by saying "If we catch any of you going in any of them racist stores, we're gonna break your damn neck" and that boycott violators would be "disciplined"). In contrast, incitement usually includes concrete and specific exhortations and instructions. For a fuller exploration of the distinction between these two, see Alan Z. Rozenshtein & Jed Handelsman Shugerman, *January 6, Ambiguously Inciting Speech, and the Overt-Acts Rule*, 37 CONST. COMMENT. 275, 290–92 (2022) (exploring these distinctions in more detail and arguing that an "overt acts" requirement for a finding of incitement is a constitutional way of minimizing ambiguity).

164. Virginia v. Black, 538 U.S. 343, 359 (2003).

165. *See, e.g.*, Elena Moore, *JD Vance Hosts 'The Charlie Kirk Show,' Paying Tribute With Top White House Officials*, NPR (Sept. 15, 2025), https://www.npr.org/2025/09/15/nx-s1-5542176/jd-vance

On the flip side, cabining these exceptions will also protect organizations expressing contrary views in the future. Hate speech is not the same as incitement or calls to violence. Both sides should therefore be wary of recasting it as "stochastic terrorism" and arguing that speech that denigrates/dehumanizes certain groups causes others to engage in violence.[166]

IV. POLICY ARGUMENTS

In addition to legal constraints, numerous policy reasons counsel against restricting "disfavored" nonprofit expression or excluding nonprofits with "dangerous" views or that advocate for unpopular aims from the charitable tax subsidies. Namely, the values that underpin the First Amendment apply in a unique manner to the nonprofit sector, given its distinct role in our society.[167] To that end, even if Congress and the IRS *could* constitutionally deny exemption on the grounds that certain speech is not educational or that a given nonprofit's mission undermines public policy, they *should not* as a policy matter.

Before turning to those arguments, however, two words about scope and context. The literature on free speech is vast. This Article focuses on those defenses (and critiques thereof) relevant to the unique role that the sector plays, similar to literature discussing why freedom of speech principles are particularly important to a free press, given its role. Second, as described in Part I, scholars have offered numerous and competing theories to justify both the nonprofit sector's existence and the charitable tax subsidies.[168] Some—the "traditional subsidy" theories—focus on intangible "big picture" benefits as being the sector's raison d'être.[169] Other theories—the "economic subsidy" arguments—emphasize the role of the sector as a provider of public goods that would otherwise be under-produced due to market and political failures. It seems likely that even those who believe the economic arguments provide the better *initial* justification for the subsidies also recognize that the subsidies have second-order benefits, those that are

-charlie-kirk-show [https://perma.cc/A7LN-6PSQ] ("Vance said the administration intended to 'go after the NGO network that foments, facilitates and engages in violence . . . .'").

166. *See, e.g.*, Jones, *supra* note 10 (although Jones notes that hate speech is not the same as incitement, he does call it "stochastic terrorism" and proffers several other provocative justifications for denying exemption to hate groups).

167. Scholars have discussed certain of these reasons, such as enhancing pluralism and providing goods suffering from both market and government failure. *See, e.g.*, Mayer, *supra* note 18, at 1349. The relationship of the First Amendment to other justifications for the sector, however, remains un- or under-explored.

168. *See, e.g.*, Brennen, *supra* note 23.

169. *See* Fleischer, *supra* note 5, at 518.

celebrated by the traditional subsidy theorists. To that end, the following analysis of the "role" or "benefits" of the sector is relevant regardless of how one initially justifies the charitable tax subsidies.

The policy arguments for a hands-off approach to nonprofit expression fall into roughly two groups. First, even if there might be reasons to try to distinguish between good and bad speech, doing so is a fraught exercise with dangerous consequences for the charitable sector if we get it wrong. Second, there are affirmative, intrinsic benefits to allowing people to express heinous views. The expression of such views—not just a reluctant decision to tolerate such views out of necessity—is in and of itself valuable and necessary for the sector to fulfill its promise. We thus shouldn't even try to distinguish between good and bad speech.

A. Attempts to Limit Harmful Speech Will Sweep in Beneficial Speech

As an initial matter, even if refusing to subsidize certain types of speech has theoretical merit, the difficulty of drawing the appropriate line between harmful and beneficial speech creates two problems. First, some speech will be incorrectly categorized as harmful; second, other beneficial speech will be voluntarily stifled out of fear of crossing the line. Both undermine a crucial aspect of the interaction between underlying First Amendment principles and the nonprofit sector. For the latter to effectively offer creative and diverse solutions to society's problems, counter governmental power, and enhance pluralism and experimentation,[170] a strong "marketplace of ideas" must exist.[171] Trying to identify harmful speech or misinformation particularly risks suppressing the minority and dissenting views that are key to a healthy marketplace of ideas.[172]

1. The Sector's Role in Offering Solutions to Societal Problems

Consider, for example, the role the sector plays in offering solutions to societal problems. Doing this requires that the truth has, in First Amendment

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170. *Id.*

171. *See, e.g.*, Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); Heather Templeton Dill et al., Opinion, *We Disagree on Many Things, but We Speak With One Voice in Support of Philanthropic Pluralism,* CHRON. OF PHIL. (Apr. 13, 2023), https://www.philanthropy.com/opinion/we-disagree-on-many-things-but-we-speak-with-one-voice-in-support-of-philanthropic-pluralism/ [https://perma.cc/4HWB-PC77] (discussing the relationship of a marketplace of ideas and the role of the philanthropic sector).

172. *See* Mayer, *supra* note 18, at 1349 (arguing that limits on hate speech or fake news counteract the purposefully vague definitions of education and charitable).

litigator Greg Lukianoff's words, "a fighting chance."[173] Knowing what the problem is and what can fix it absolutely requires that truth and accuracy have the best chance of coming forward. And that means, perhaps counterintuitively, rejecting rules that attempt to separate fact from opinion or weed out "incorrect" information—including several tests that have been floated by scholars or policymakers as methods for combatting disfavored views and misinformation. Any such rules will inevitably be overinclusive in ways that undercut the sector's benefits.

Consider the ways that Congress, Treasury, or the IRS might distinguish inflammatory propaganda and misinformation from "truly" educational speech. To illustrate, take the Methodology Test, which exemplifies the type of test that might be used to accomplish this task. One factor that it uses to identify non-educational speech is the use of inflammatory and strong language that is designed to evoke emotion rather than reason. But limiting the manner in which nonprofits can communicate their message hamstrings them and their ability to attack societal problems. Consider the example discussed by the D.C. Circuit in *Big Mama Rag*: a picture of a skull and crossbones with the slogan "Smoking rots your lungs" versus a text-only ad with the tamer language that "Smoking is hazardous to your health."[174] Convincing the public that a problem exists, and encouraging them to pursue a given solution, often requires the use of emotion. If applied even-handedly, this type of test would foreclose groups with noncontroversial missions—such as anti-smoking groups, or groups that encourage people to wear sunscreen, obtain cancer screenings, adopt stray puppies, or eat less sugar—from using emotion to express their messages.[175]

A second factor that the Methodology Test considers is the use of distorted facts. Even if deployed in a viewpoint-neutral manner, determining whether facts are distorted or not can be incredibly difficult in many situations. Consider, for example, a nonprofit that opines on the origins of COVID-19 or the efficacy of medical transition for minors with gender dysphoria—questions that depend on complex scientific facts that everyday people are ill-equipped to judge.

Asking the IRS to evaluate the strength and sufficiency of a given set of facts is problematic for two reasons. As others have observed, almost

173. Greg Lukianoff, *Coronavirus and the Failure of the 'Marketplace of Ideas*,*'* FIRE (Mar. 13, 2020), https://www.fire.org/news/blogs/eternally-radical-idea/coronavirus-and-failure-marketplace-ideas [https://perma.cc/W536-RRTF].

174. Big Mama Rag, Inc. v. United States, 631 F.2d 1030, 1039 (D.C. Cir. 1980).

175. In many cases, in fact, emotion can facilitate learning and long-term memory. *See, e.g.*, Chai M. Tyng, Hafeez U. Amin, Mohamad N.M. Saad & Aamir S. Malik, *The Influences of Emotion on Learning and Memory*, 8 FRONTIERS PSYCH., Aug. 2017, art. no. 1454. This suggests that in some instances, discouraging the use of emotional language may impede learning.

anyone can cherry-pick facts that support their position. Someone without substantive knowledge might be able to determine whether a fact in isolation is distorted or not (for example, they might be able to confirm that a cited study argues that COVID-19 naturally mutated from animals to humans). But without substantive knowledge, they might be unable to determine whether that study is deployed inaccurately, such as might be the case if a group cites the single study out of 1,000 that argues X instead of Y, without acknowledging the contrary 999 studies.

Fully determining whether factual support for a given position is distorted therefore often requires expert knowledge. But experts are fallible humans like everyone else. They can sometimes be wrong—such as with lobotomies in the 1940s and '50s and the recovered memory and multiple personality disorder panic of the 1990s. Experts can also be subject to biases and peer pressure, just like everyone else.[176] The joint production of expert knowledge requires sustained effort and robust debate among numerous groups because it is often an evolving process. While this process tends toward the truth, it can take a while and yield some dead ends in the interim.

These reasons counsel humility in analyzing whether the IRS can accurately assess complex factual claims. Here, getting it "wrong" undermines the goals of the sector in several ways. It diminishes the sector's ability to offer alternative methods for tackling societal problems, and silences minority viewpoints (whose arguments are much less likely to be seen as factually valid). And by stifling information, it distorts the educational process. Thus, even reforms like imposing a *Daubert*-like

176. It is also plausible that there is pressure to not report accurate scientific findings that could theoretically be used for vile purposes by nefarious actors. For example, even though almost all monkeypox cases involve sexual activity between males, there is dispute about whether communicating that fact is stigmatizing and some concern that the link is being understated to the detriment of those most likely to contract it. *Compare Monkeypox Misinformation Is Stigmatising Gay and Bi Men*, RAINBOW PROJECT, https://www.rainbow-project.org/news/monkeypox-misinformation-is-stigmatising-gay-and-bi-men/ [https://perma.cc/8PJ3-9UU6] (criticizing messaging about monkeypox that emphasizes the ease with which it spreads through certain types of sexual contact as stigmatizing gay and bisexual men), *with* Marcelo Agudo Pujol, *Monkeypox and What Health Experts Are Not Saying About Sexual Transmission*, THINK GLOB. HEALTH (Aug. 9, 2022), https://www.thinkglobalhealth.org/article/monkeypox-and-what-health-experts-are-not-saying-about-sexual-transmission [https://perma.cc/9QV4-LF3Y] (critiquing current public health messaging around monkeypox and the LGBTQ+ community and contending that "linking monkeypox to sexual transmission would equip gay and bisexual men with the health information they need to protect themselves"), *and* Kai Kupferschmidt, Opinion, *We Can Fight Monkeypox Without Hysteria or Homophobia*, N.Y. TIMES (Aug. 4, 2022), https://www.nytimes.com/2022/08/04/opinion/monkeypox-communication.html [https://perma.cc/AK7K-RMWE] (acknowledging monkeypox is spread primarily between men having sex with men and arguing that messaging needs to acknowledge that fact so that "those most vulnerable to infection . . . have information that allows them to make decisions to stay healthy").

standard on the second prong of the Methodology Test[177] or as a test for determining when information furthers a public purpose are detrimental.[178]

2. *The Sector's Role in Offering Alternative Viewpoints and Furthering Social Change*

Next consider the sector's role in offering creative and diverse viewpoints, furthering social change, and countering government power. Trying to weed out harmful nonprofit expression or activities almost inevitably encompasses speech and activities which are merely unpopular—yet crucial to the sector's ability to achieve this second set of aims.[179] Consider a recent example from New Zealand.[180] Its Supreme Court recently upheld the denial of tax benefits to a group that promotes traditional conservative views about marriage and family on the grounds that "discriminatory" groups cannot be charitable organizations.[181] This seems like an over-extension of what it means to be "discriminatory." A group promoting the view that marriage is between a man and a woman and that children should be born to married parents likely holds an unpopular opinion, but is it "discriminatory" or "harmful"? An affirmative answer seems to imply that any value judgments about behavior are also discriminatory and harmful. Closer to home, any attempt to define anti-Semitic or Islamophobic speech would almost certainly sweep within it language over the Israeli-Palestinian conflict that should be protected.

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177. The *Daubert* framework provides a multi-factor test to determine when specialized expert testimony should be accepted by the court. Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993). These factors are whether the theory or technique being offered "can be (and has been) tested"; whether it has "been subjected to peer review and publication"; "the known or potential rate of error"; the "existence and maintenance of standards controlling the technique's operations"; and its "general acceptance." *Id.* at 594. For a thought-provoking argument in favor of using a *Daubert*-like standard to better define the second prong of the Methodology Test, see Jordanne Miller, Note, *Preventing Tax-Exempt Propaganda: The Case for Defining the Second Prong of the Methodology Test*, 68 CATH. L. REV. 551 (2019).

178. Moreover, encouraging groups to dress up hateful ideas with a veneer of facts can have unintended consequences. *See, e.g.*, NADINE STROSSEN, HATE: WHY WE SHOULD RESIST IT WITH FREE SPEECH, NOT CENSORSHIP 142–43 (2018). It obscures the intrinsically hateful message with a cloak of respectability, which can make it easier for such ideas to gain legitimacy. Consider, for example, the *Institute for Historical Review*, which intermixes Holocaust Denial writings with items criticizing Israel from mainstream sources (which, on May 19, 2026, included *The New York Times*, *New York Magazine*, *The Telegraph*, and Ron Paul). *See* INST. FOR HIST. REV., https://ihr.org [https://perma.cc/94QX-EFXD]. By making Holocaust denial look more academic, IHR is in some ways more dangerous than the openly and brazenly white supremacist group denied exemption in *National Alliance v. United States*, 710 F.2d 868, 871–73 (D.C. Cir. 1983).

179. Mayer, *supra* note 18, at 1351.

180. *Id.* at 1352.

181. *Id.*

This overreach undermines the purpose of the nonprofit sector as a purveyor of dissenting and minority viewpoints and a vector for social change and is untenable. Many social movements start out as unpopular—the Civil Rights Movement is a quintessential example, as is the more recent fight for marriage equality. In the 1980s, for example, polling data suggested that only about one in ten Americans supported same-sex marriage.[182] Even at that time, less than half of Americans supported interracial marriage; in the 1950s, that number was under one in twenty.[183] Both are legal now but were illegal in the past. Fighting to make them legal could have been seen as advocating for changes that undermined established public policy.[184] These examples illustrate that, by definition, advocating for societal change often means advocating against the accepted public policy of the day.

B. The Affirmative Value of Not Drawing a Line

But the risk of drawing the line in the wrong place is not the only reason to avoid drawing a line when it comes to nonprofit expression and activity. In addition, there are numerous reasons related to the sector's purpose to welcome all viewpoints—even if vile, heinous, hateful, or misleading. As this Section shows, most relate to the sector's role in serving as a counterweight to governmental power, fostering pluralism, and providing a forum for minority viewpoints.

1. Countering Governmental Power

One of the most common justifications for expansive free speech rights is to serve as a check on governmental power.[185] One concern is that giving the government the right to regulate speech allows it to stifle speech with which it disagrees—including not only speech that is directly critical of it, but also speech that simply advances contrary views.[186] Given the role of

182. Tom W. Smith, *Public Attitudes Toward Homosexuality*, NORC AT THE UNIV. OF CHICAGO (Sept. 2011), https://www.norc.org/content/dam/norc-org/pdfs/GSS_Public%20Attitudes%20Toward%20Homosexuality_Sept2011.pdf [https://perma.cc/Y9NM-G2L7].

183. Frank Newport, *In U.S., 87% Approve of Black-White Marriage, vs. 4% in 1958*, GALLUP (July 25, 2013), https://news.gallup.com/poll/163697/approve-marriage-blacks-whites.aspx [https://perma.cc/QWC6-4E6A].

184. *See, e.g.*, Gay Student Servs. v. Tex. A&M Univ., 737 F.2d 1317, 1322 (5th Cir. 1984) (Texas A & M unsuccessfully sought to deny recognition to gay student group in the 1970s on the grounds that its "activities run . . . counter to the traditions and standards of Texas A & M University").

185. Lee C. Bollinger, Commentary, *The Tolerant Society: A Response to Critics*, 90 COLUM. L. REV. 979, 980 (1990).

186. Brunson, *supra* note 10, at 80; Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. BAR FOUND. RSCH. J. 521.

the nonprofit sector as a third space and a counterweight to governmental power, we should be especially careful to not allow it to become a mouthpiece for the government.

To illustrate, consider a nonprofit whose purpose is to investigate the origins of the COVID-19 pandemic. After an investigation, it argues in favor of the lab-leak hypothesis and ties the source lab to funding from the U.S. government. Recall that in the early stages of the pandemic, the theory that the virus had escaped from a lab was considered a racist, xenophobic, right-wing conspiracy. The ability to deny this group exemption for spreading a "hateful" message would here allow the government to silence its critics and hide its mistakes.[187]

Similar considerations apply not just in the context of checking the government for factual accuracy or calling it to account for mistakes, but also when it comes to issues of contested social values.[188] In our pluralistic society, what is hateful, harmful, or contrary to the public interest from one perspective is a necessary alternative viewpoint and counterweight to the government imposition of a monoculture to the other side. What the Trump administration considers hate speech, progressives and supporters of Black Lives Matter and critical race theory view as crucial discussions of the role of race in society. And what the latter might consider harmful white supremacy, others may see as a necessary defense of a colorblind society.[189] Allowing unpopular beliefs is absolutely necessary to prevent the government from imposing social values top-down, and to prevent the start of a tit-for-tat spiral that can be used against minorities and to stifle dissent.[190]

A distinct but related concern is that a key feature of informed self-governance—which is also necessary to counteract governmental

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187. *See* Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 142–43 (1989) (discussing whether accommodating the expression of minority interests enhances social stability); Blasi, *supra* note 186.

188. *See* Greenawalt, *supra* note 187, at 145–46 (free speech is necessary for better decision-making in a deliberative democracy as well as trust in the decision-makers).

189. *See, e.g.*, Nadine Strossen, *The Interdependence of Racial Justice and Free Speech for Racists*, 1 J. FREE SPEECH L. 51, 63 (2021) (describing how various parties each consider "Black Lives Matter," "Blue Lives Matter," and "All Lives Matter" to be racist).

190. Strossen also reminds us that quite frequently, any attempt to censor hateful or unpopular ideals inevitably turns against minorities. *Id.* at 62–64. Indeed, the rhetoric of the current administration illustrates this very point. *See also* Stephen G. Calabresi, *Freedom of Expression and the Golden Mean*, 79 BROOK. L. REV. 1005, 1011 (2014) (warning, in 2014, that "[a]n effort to revoke the tax exempt status of the Boy Scouts . . . would rapidly lead to a counter effort by social conservatives to revoke the tax exempt status of groups that support, for example, gay rights"); Jacob Mchangama, *From Safety Valve to Pressure Cooker: When Silencing Speech Fuels Extremism*, COMM'N FOR COUNTERING EXTREMISM (July 2025), https://assets.publishing.service.gov.uk/media/689b34f5ebe5217ba73d0c1f /CE01_Jacob_Mchangama.pdf [https://perma.cc/UE6U-A67V] (describing the use of hate speech laws to stifle dissent).

overreach—is the ability of citizens to freely engage in debate. And a free debate means letting all views in, not just acceptable views. This is somewhat akin to the toleration principle discussed below—if one of the sector's roles is countering government and fostering pluralism, it needs to itself provide a structure for people to practice those skills.

2. *Informational Theory*

A second justification for tolerating vile, heinous, hateful, and misleading speech and activity is so that we accurately know what people think. And this in and of itself is educational. In some ways, this is like the reasons for subsidizing art. We value and subsidize art not because it conveys a truthful message, but because it tells us about human nature—what people feel, think, and believe.

This too counsels in favor of not denying subsidies even to groups that promulgate what would uniformly be considered hateful or harmful or clearly incorrect views, because we need an accurate picture of how widespread those beliefs are and how strongly they are held. Start with hate speech. As free speech litigator Greg Lukianoff has explained, "It is of course absolutely crucial to know if someone is a bigot."[191] This knowledge is necessary on two levels. Broadly, it is helpful to know about the tensions in our communities. Closer to home, it helps us decide whether to interact with that person, from hiring them to asking them to join your book club.

With respect to misinformation, take the Front Line COVID-19 Critical Care Alliance (FLCCC).[192] The FLCCC, which is tax-exempt, advocates for using Ivermectin to treat COVID. We should support the FLCCC's speech not because it might ultimately be correct, but because we need to know the extent to which people believe Ivermectin can cure COVID. (Note that this is a distinct argument from the humility argument discussed above.) Only by knowing the breadth and depth of this belief can we adequately counter it.[193] This does not necessarily mean that we counter it in the sense that accurate information about Ivermectin wins (which invokes the truth-seeking function of the marketplace). Perhaps we never convince some people that Ivermectin is ineffective, but knowing those beliefs allows us to find a work-around.

As applied to the nonprofit sector, if one role is to provide information about our society and foster creative and diverse solutions to society's problems, we need an accurate picture of what those problems are.

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191. Lukianoff, *supra* note 173.
192. Mayer, *supra* note 18, at 1293–94.
193. Lukianoff, *supra* note 173.

Likewise, if one goal is to enhance pluralism, then that means not picking and choosing among views. A counter to this argument is that we do not need to subsidize these groups to know people think this way. But if we are subsidizing groups with opposing views and not these views, then we get an unrepresentative view of what people think and we underappreciate the demons lurking in our society.

3. Toleration and Safety Valves

Additional reasons for allowing even hateful views and misinformation within the nonprofit ecosphere relate to its role in fostering pluralism. First, part of the sector's role in fostering pluralism should be helping citizens develop the skills necessary to live in a pluralistic society. A key aspect of promoting pluralism in speakers is promoting an appreciation for pluralism in listeners—that is, in fostering tolerance, which brings up the *tolerance theory* identified by Lee Bollinger. Bollinger argues that pluralism requires tolerating views with which we disagree—which is hard, given the natural temptation to punish people with whom we disagree. Tolerating the most offensive speech—such as extremely offensive racist hate speech—fosters toleration more generally.[194] By putting "aside our beliefs [and] overcoming the instinct to have things our own way, to control, to dominate," we can "live in a world of difference, and to do so comfortably."[195]

Another potential reason to affirmatively tolerate hateful speech and activity is that allowing people who hold those views to speak (and form nonprofits engaging in such speech) might act as a safety valve.[196] If people can express their opinions and emotions peacefully, they are less likely to resort to violence. Providing such a safety valve helps ensure a violence-free marketplace of ideas, which relates to the sector's role in enhancing pluralism and overcoming market failures. Relatedly, distrust of experts and our sorting into epistemic bubbles are at an all-time high. Americans of all political stripes are extraordinarily suspicious right now that their viewpoint is being suppressed. As a result, any whiff of the government picking and choosing acceptable viewpoints will simply anger people more, whereas a

194. *See, e.g.*, LEE C. BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA (1986).

195. Bollinger, *supra* note 185, at 986.

196. *See* Whitney v. California*,* 274 U.S. 357, 375 (1927) (Brandeis, J., concurring); Ashutosh Bhagwat, *Free Speech Without Democracy*, 49 U.C. DAVIS L. REV. 59, 111 (2015); Christian Bjørnskov & Jacob Mchangama, *Freedom of Expression and Social Conflict* (IFN Working Paper No. 1473, 2023), https://doi.org/10.2139/ssrn.4578663 [https://perma.cc/BW5L-NU7Z]; Steven G. Gey, *The First Amendment and the Dissemination of Socially Worthless Untruths*, 36 FLA. ST. U. L. REV. 1, 10–11 (2008); Greenawalt, *supra* note 187, at 142 (discussing whether accommodating the expression of minority interests enhances social stability); Mchangama, *supra* note 190.

broader embrace of viewpoints can avoid triggering more anger.[197] The underlying idea is that if people can peacefully express their views on controversial issues, they may be less likely to resort to violence to get their point across. Moreover, a broad understanding of free expression might make deliberation among groups *more* likely, not less, which in turn could either enhance each side's understanding of the other, or at least increase acceptance of the fact that people hold different views.

Not surprisingly, these arguments are contested. One could also imagine that such speech could plausibly create and/or exacerbate conflict.[198] Perhaps the most common current iteration of this argument is that hate speech marginalizes identifiable groups and people. This marginalization impedes full participation in the political process, erodes the respect each citizen deserves, and contributes to mental distress and social ostracization—all of which, in turn, could balloon into open social conflict. Another version of this argument is that unfettered free speech brings conflict and polarization out into the open, which could (1) cause latent conflicts to metastasize once the broader public becomes aware of them, and/or (2) allow other actors to exploit such conflicts for their own gain. Finally, allowing hate speech and the like could allow the recruiting of new members, who could then be encouraged to commit acts of violence.

Whether free speech does, in fact, serve as a safety valve is ultimately an empirical question. Although somewhat difficult to measure, a recent paper from Vanderbilt found a negative correlation between freedom of expression and increased social conflict, suggesting that in democracies, the safety valve effect is real.[199]

CONCLUSION

The nonprofit sector plays a crucial role in our society. It facilitates creative solutions to societal problems, fosters value pluralism, offers alternative viewpoints in arts and literature, and counters governmental power. Regardless of how narrowly Congress could have constructed the charitable tax subsidies, their current breadth—both legally and in application—renders them limited public forums. The charitable tax subsidies are not government speech, nor are they instances of the government subsidizing third parties to convey specific messages.

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197. I thank David Pozen for this point.
198. *See* Bjørnskov & Mchangama, *supra* note 196, at 4–7 (summarizing these counterarguments).
199. *Id.* at 16.

Instead, the statutes' generality and the neutral, procedurally focused rules that determine eligibility have created a system whereby the government is subsidizing expressive activity as a general matter, for the very purpose of generating a diversity of views. Precisely because of that breadth, the First Amendment precludes the government from denying the subsidies to groups of whose message it disapproves. It may not prohibit speech expressing specific views on DEI, climate change, the conflict in the Middle East, or any other topic—where those prohibitions are written into Sections 170 or 501 directly or imposed indirectly through conditions on grants and other programs. It may not use doctrines such as the fundamental public policy requirement or the Methodology Test to suppress disfavored views; in fact, the very subjectivity of those tests and their susceptibility to abuse likely renders them unconstitutional. Nor may it selectively apply otherwise constitutional rules, such as those against illegality, incitement, and supporting terrorism. These constitutional guardrails protect progressive and liberal nonprofits from current threats—and will also protect nonprofits with opposing views when the political winds shift.

More importantly, attempts to limit the nonprofit sector to groups whose viewpoints the government agrees with undermine the role of the sector. Such attempts limit minority voices and viewpoints that are necessary for the sector to effectively find solutions to societal problems, for they undermine the search for truth. Allowing the government to determine what messages get expressed turns the sector into its mouthpiece, rendering it impossible for the sector to counter governmental power and hold the government accountable for its mistakes. It also dampens pluralism, risking turning our society into a monoculture. And finally, it inhibits social change such as the civil rights movement. For these reasons, progressives and conservatives alike should be wary of calls to align the sector with government-approved viewpoints.