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WHY DON'T SOME WHITE SUPREMACIST GROUPS PAY TAXES?

*Eric Franklin Amarante**

ABSTRACT

A number of white supremacist groups enjoy tax-exempt status. As such, these hate groups do not have to pay federal taxes and people who give money to these groups may take deductions on their personal taxes. This recognition not only results in potential lost revenue for government programs, but it also serves as a public subsidy of racist propaganda and operates as the federal government's imprimatur of white supremacist activities. This is all due to an unnecessarily broad definition of "educational" that somehow encompasses the activities of universities, symphonies, and white supremacists. This Essay suggests a change in the Treasury regulations to restrict the definition of educational organizations to refer only to traditional, degree-granting institutions, distance learning organizations, or certain other enumerated entities. With this change, we would no longer allow white supremacists to call themselves charities, remove the public subsidy of such reprehensible organizations, and eliminate the government's implicit blessing of hate groups.

INTRODUCTION

"ACLU Defends Nazis' Right to Burn Down ACLU Headquarters."¹ Like many jokes, this Onion² headline is funny because it's true. At the risk of ruining a joke by explaining it, Nazi groups often test the limits of free speech and the ACLU has never found an example of speech it didn't want to defend.³ But the ACLU and white supremacist groups share more than just a zealous belief in the freedom of speech. Just like a number of white

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¹ www.theonion.com/article/aclu-defends-nazis-right-to-burn-down-aclu-headquarters
1648

² The Onion is a popular satirical newspaper. <http://www.theonion.com/>.

³ Amber Phillips, *A History of the ACLU defending the Confederate flag, the tea party, the KKK and Rush Limbaugh*, THE WASHINGTON POST, June 19, 2015, available at https://www.washingtonpost.com/news/the-fix/wp/2015/06/19/a-history-of-the-aclu-defending-confederate-veterans-the-kkk-and-rush-limbaugh/?utm_term=.ff408d5a7c03.

supremacist groups, the ACLU is a tax-exempt, 501(c)(3) charitable organization.⁴

One white supremacist group that enjoys tax-exempt status is the National Policy Institute (“NPI”). This benignly named group is dedicated to “the heritage, identity, and future of people of European descent in the United States, and around the world.”⁵ In less polite language, it’s a white power group. NPI was, until very recently, a 501(c)(3) organization. This means that it didn’t have to pay federal taxes and people who sent money to NPI may be able to take deductions on their personal taxes.⁶ From the perspective of the Internal Revenue Service (the “IRS”), a donation to the ACLU was treated exactly the same as a donation to NPI.

NPI is run by Richard Spencer, one of the leading voices of the alt-right and probably the most vocal white supremacist of our time. Spencer is enjoying what I will optimistically call his 15 minutes of fame. He is a frequent interview subject in the mainstream press, often called upon to explain President Trump’s appeal to white supremacists. While you may have heard him interviewed on *All Things Considered*⁷ or seen him on *PBS Newshour*,⁸ he is probably most well known for his Nazi-inspired celebration of Trump’s election, with Spencer leading a group in chants of “hail Trump, hail our people, hail victory” at an alt-right conference in Washington, D.C.⁹

In the wake of this controversy, on March 13, 2017, the IRS revoked the 501(c)(3) status of NPI.¹⁰

One might assume that the revocation was for ideological reasons. After all, NPI’s primary activity is to disseminate pseudo-scientific racist rants.¹¹

⁴ Please note that this essay oversimplifies the structure of the ACLU. The “ACLU” referred to in this Essay is The ACLU Foundation, a 501(c)(3) organization dedicated to litigation and public education efforts. The “ACLU” is a 501(c)(4) member organization that engages in legislative lobbying. Donations to a 501(c)(4) are not tax deductible.

⁵ <http://www.npiamerica.org/>

⁶ I.R.C. § 170(a)(1).

⁷ *‘We’re Not Going Away’: Alt-Right Leader on Voice in Trump Administration*, from *All Things Considered*, November 17, 2016, available at www.npr.org/2016/11/17/502476139/were-not-going-away-alt-right-leader-on-voice-in-trump-administration.

⁸ *How a white nationalist leader wants to go mainstream with his racist movement*, *PBS Newshour*, December 14, 2016, available at www.pbs.org/newshour/bb/white-nationalist-leader-wants-go-mainstream-racist-movement/.

⁹ See Daniel Lombroso and Yoni Applebaum, *‘Hail Trump!’: White Nationalists Salute the President-Elect*, *THE ATLANTIC*, November 21, 2016.

¹⁰ Matt Pearce, *IRS strips tax-exempt status from Richard Spencer’s white nationalist nonprofit*, *LA Times*, March 13, 2017, available at <http://www.latimes.com/nation/la-na-richard-spencer-taxes-20170223-story.html>.

¹¹ The NPI website states that NPI is “an independent research and educational foundation.” See www.npiamerica.org.

As part of the modern white supremacist movement, NPI's carefully curated brand of racism might sound familiar.¹² In the parlance of modern white supremacists, NPI is pro-white, not anti-black or anti-immigrant; and NPI members are not racists, they are "race realists." And although NPI is apparently unable to tamp down the urge for spontaneous Nazi salutes, it generally avoids obviously racist symbolism such as swastikas and burning crosses.¹³ The leaders exchanged their Ku Klux Klan hoods for business suits, and eschew racial epithets in favor of quasi-academic language. The group embraces school segregation not because they don't want their children to go to school with black children, but because "Darwinian evolution endowed different groups with different distributions of aptitude and ability."¹⁴ Similarly, they blame the mass incarceration of black men not on a discriminatory criminal justice system, but a genetic defect.¹⁵ In other words, NPI points to the legacies of systemic U.S. racism (e.g., poor school performance, low personal wealth, and high incarceration rates) as evidence of an inherent deficiency in non-white¹⁶ populations.

Suffice it to say that Richard Spencer and NPI do not hide their racism. This brand of racism may have a modern veneer, but it shares the ultimate goals of Madison Grant's eugenics¹⁷ and the terrorism of the Ku Klux Klan. To state what is painfully obvious to anyone with a modicum of awareness, racism has persisted and evolved,¹⁸ with groups like NPI merely serving as white supremacy's most recent torchbearer.¹⁹

But the IRS did not revoke NPI's tax-exempt status because of its hateful rhetoric and retrograde beliefs. It might have. Indeed, about a quarter of a century ago, the IRS revoked Bob Jones University's 501(c)(3) status because the school prohibited interracial dating and marriage among

¹² See generally, Pete Simi & Robert Futrell, *Negotiating White Power Activist Stigma*, 56 SOCIAL PROBLEMS 1, 89 (2009).

¹³ See generally Simi & Futrell, *supra* note 11.

¹⁴ Raymond Wolters, *Why School Reform Failed*, available at www.npiamerica.org/research/why-school-reform-failed

¹⁵ Byron Roth, *The War on Human Nature*, available at www.npiamerica.org/research/category/the-war-on-human-nature.

¹⁶ Ta-Nehisi Coates is the most recent author to question whether "white" has any meaning. See generally, *BETWEEN THE WORLD AND ME* (2015). From a legal perspective, the meaning of "white" has proven malleable enough to encompass a dramatically disparate number of ethnic groups. See Ian Haney-Lopez, *WHITE BY LAW* (1996). NPI uses the word "white" to mean "people of European descent." See www.npiamerica.org.

¹⁷ See *THE PASSING OF THE GREAT RACE* (1916).

¹⁸ See Robert Futrell & Pete Simi, *The [Un]surprising Alt-Right* ("The collective surprise at White supremacists' arrival on the national stage reflects a lack of attention to the varied and persistent forms of racial extremism that have long simmered in America.")

¹⁹ *Id.*

its students.²⁰ The Supreme Court upheld the revocation, holding that the school's practices were "against a compelling government public policy"²¹ and emphasizing the government's "fundamental, overriding interest in eradicating racial discrimination in education."²²

If Bob Jones University's rules against interracial dating and marriage were against a compelling public policy, perhaps NPI's goal of racial segregation could be used to revoke NPI's tax-exempt status. Although the *Bob Jones* holding has been limited to segregation in education, it is certainly not a stretch to think segregation in general is "against a compelling government public policy."²³ But the IRS did not make this argument and NPI's tax-exempt status was revoked for a much more mundane reason: NPI failed to file necessary paperwork.²⁴ Tax-exempt organizations are required to file annual information returns and if an organization fails to file a form for three consecutive years, the organization's 501(c)(3) status is automatically revoked. Sadly, this administrative oversight is easily remedied, and it is a near-certainty that not only will NPI regain tax-exempt status (if it so desires), but it may also get that tax-exempt status retroactively reinstated.²⁵

This begs the question: why do we give tax-exempt status to a group formed to promote segregation and disseminate racist propaganda? The answer is a complicated mix of absurdly broad Treasury regulations, unconstitutionally vague tests, and budgetary constraints. But before addressing why we bestow tax-exemption to groups like NPI, the following section will argue why we should care.

I. WHY SHOULD WE CARE?

One might reasonably ask why we should care about the tax treatment of a privately-run organization. After all, your neighbor's tax bracket is none of your business. Indeed, some argued (apparently convincingly) that

²⁰ *Bob Jones University v. United States*, 461 U.S. 574 (1983).

²¹ Incidentally, more than three decades after revocation, the school has regained tax-exempt status by, in part, renouncing its former anti-miscegenation policies. See Nathaniel Cary, *Bob Jones University to regain nonprofit status*, THE GREENVILLE (S.C.) NEWS, February 16, 2017.

²² *Bob Jones*, 461 U.S. 604.

²³ *Id.*

²⁴ Michael Kunzleman, *White Nationalist Group's Tax-Exempt Status Revoked by US*, March 14, 2017, available at <https://www.usnews.com/news/us/articles/2017-03-14/irs-revokes-white-nationalist-groups-tax-exempt-status>

²⁵ See *Automatic Revocation – How to Have Your Tax-Exempt Status Retroactively Reinstated*, available at www.irs.gov/charities-non-profits/charitable-organizations/automatic-revocation-how-to-have-your-tax-exempt-status-retroactively-reinstated.

the tax returns of presidential candidates are outside the public's legitimate interests. Given an apparent collective will to remain ignorant of our president's taxes, why should we concern ourselves with the taxes of NPI and other white supremacist groups?

This Essay argues three reasons the public should care about the tax-exemption of white supremacist groups: first, tax-exemption represents potential lost revenue for federal government programs; second, tax-exemption acts as a public subsidy of the actions of white supremacists; and finally, tax-exempt status serves as the federal government's imprimatur of white supremacist activities.

If the federal government were foregoing tax revenue simply because of an overly permissive tax-exempt regime, it would be a compelling reason to care about the tax status of NPI and other white supremacist organizations. Tax-exempt organizations, as the name implies, are not required to pay federal taxes.²⁶ The impact of this exemption is difficult to calculate, but the size of the tax-exempt sector may be illustrative. In 2013 alone, nonprofit organizations reported \$2.26 trillion in revenues and \$5.17 trillion in assets.²⁷ By one estimate, this amounts to approximately five percent of America's gross domestic product.²⁸ However, it would be folly to use these numbers to calculate the potential tax revenue foregone due to tax exemption. After all, tax-exempt entities have no incentive to engage in tax planning, and may therefore report revenues without negative consequences. One would certainly expect the revenue reported by tax-exempt organizations to look different if they were subject to federal tax. Further, tax-exempt organizations that spend most of their funds on their charitable programming would have little taxable income, due to the deductibility of expenses.²⁹ Perhaps all we can say is that there is a significant amount of activity that remains untaxed due to the tax-exemption and the failure to tax these organizations may result in less revenue for the federal government, thereby shifting the burden to tax

²⁶ 26 U.S. Code § 501(a) "An organization described in [501(c)(3)] shall be exempt from taxation."

²⁷ This number represents reporting nonprofits, and only accounts for 35% of the nonprofit organizations registered with the IRS. Urban Institute, National Center for Charitable Statistics. <http://www.urban.org/research/publication/nonprofit-sector-brief-2015-public-charities-giving-and-volunteering>.

²⁸ Tax-Exempt Organizations: Better Compliance Indicators and Data, and More Collaboration with State Regulators Would Strengthen Oversight of Charitable Organizations, United States Government Accountability Office, December 2014, Page 1 (GAO Report).

²⁹ Daniel Halperin, *Is Income Tax Exemption for Charities a Subsidy?*, 64 TAX L. REV. 283, 289 (2011) ("[T]axation of income would not seriously concern those organizations that spend nearly all their funds on current activities.").

payers.

Beyond the foregone tax revenue, another the reason we should care about the exemption of white supremacist groups is that 501(c)(3) status might be considered a public subsidy. Although theorists have not found consensus on why we exempt certain groups from taxes,³⁰ the most widely embraced theory posits that we should subsidize charitable activity because it provides necessary goods to needy populations, promotes pluralism and diversity, and relieves the burdens of the federal government.³¹ Although the subsidy theory doesn't have universal theoretical support, despite the Supreme Court's oblique endorsement,³² it is the leading theory of tax-exemption.³³ And to the extent tax-exempt status is a subsidy, then we should be concerned with the IRS indiscriminately bestowing status upon

³⁰ Mark A. Hall & John D. Colombo, *The Donative Theory of the Charitable Tax Exemption*, 52 OHIO STATE LAW JOURNAL 1379, 1381 (1991) ("It is extraordinary that no generally accepted rationale exists for the multi-billion dollar exemption from income and property taxes that is universally conferred on 'charitable' institutions"); Rob Atkinson, *Tax Favors for Philanthropy: Should our Republic Underwrite De Toqueville's Democracy*, 6 WILLIAM & MARY POLICY REVIEW 3 ("Tax theorists have long debated the rationales for the federal income tax system's favorable treatment of philanthropy. The debate has certainly become more sophisticated, but it has nonetheless failed to produce anything near full convergence of opinion." This is despite the fact that such favorable treatment can trace its roots to the dawn of 17th century England. Linda Sugin, *Rhetoric and Reality in the Tax Law of Charity*, 84 FORDHAM L. REV. 101, 101 (2016) ("The definition of charity in American law originates from England's Statute of Charitable Uses. Passed in 1601, the statute coincidentally produced a legal definition of charity."). *But see* Nina J. Crimm, *An Explanation of the Federal Income Tax Exemption for Charitable Organizations: A Theory of Risk Compensation*, 50 FLORIDA LAW. R. 419, 425 (1998) ("The seeds of the tax exemption notion for American 'charitable' organizations can be traced to fourteenth century England.").

³¹ This theory's roots are found in legislative history. See H.R.Rep. No 75-1860, at 19 (3d Sess. 1938) ("The exemption from taxation ... is based upon the theory that the Government is compensated for the loss of revenue by its relief from financial burden which would otherwise have to be met by appropriations from public funds."). Whether or not the tax-exemption is the most efficient means to promote this activity is beyond the scope of this Essay, as are discussions of the other, rather compelling, theories of tax-exemption such as a market failure theory (See Henry Hansmann, *The Rationale for Exempting Nonprofit Organizations from Corporate Income Taxation*, 91 YALE L. J. 54 (1981)), a risk theory (See Crimm, *Id.*) and the nonprofit sector's promotion of altruism (see Rob Atkinson, *Altruism in Nonprofit Organizations*, 31 B.C. L. REV. 501 (1990)).

³² See *Regan v. Taxation With Representation*, 461 U.S. 540, 544 (1983) ("The system Congress has enacted provides [a] subsidy to non profit civic welfare organizations generally, and an additional subsidy to those charitable organizations that do not engage in substantial lobbying. In short, Congress chose not to subsidize lobbying as extensively as it chose to subsidize other activities that non profit organizations undertake to promote the public welfare.").

³³ See Hall & Columbo, *supra* note 28 at 1383, footnote 7 ("We follow the prevailing view that the charitable exemption constitutes an implicit government subsidy.").

hate groups. This practice results in our collective tax dollars subsidizing opinions and practices that are antithetical to American public policy.

Finally, many argue that the federal government's bestowal of tax-exempt status carries an implicit governmental approval of the organization's activities.³⁴ The award of tax-exempt status not only relieves the organization of the burden of federal taxation, but it also allows donors to deduct their contributions from their personal tax liability. By allowing this tax deduction, we have created an implied equivalence between donations to tax-exempt organizations and paying taxes. For most tax-exempt entities, this makes sense. Organizations that provide shelter to the homeless, for example, provide a service that many believe ought to be provided by the government. Thus, perhaps payments to such organizations should be treated as if they were payments to the government (i.e., taxes). But sheltering the homeless is a far cry from advocating segregation and promulgating racist propaganda. If tax-exemption serves as an implied governmental approval of the activities of tax-exempt organizations, many would consider it unacceptable to allow the exemption to apply to white supremacist groups, which espouse a belief system that is fundamentally anti-American.³⁵

II. HOW WHITE SUPREMACIST GROUPS GET TAX-EXEMPTION

A. *An Elusive Tax-Exempt Purpose*

The IRS is not supposed to grant tax-exempt status unless the applicant proves it is organized and operated "exclusively" for "religious, charitable, scientific, testing for public safety, literary or educational purposes."³⁶ Although "exclusively" has been interpreted to mean *primarily*, the test and its enumerated purposes remain. Thus, the question is clear: which enumerated purpose does promoting white supremacy fall within?

Although proponents of white supremacy often display a zeal that borders on the religious, most white supremacist organizations do not purport to be a religion. Similarly, such organizations do not purport to further scientific purposes or test for public safety. Due to an elusive

³⁴ See Lynn Lu, *Flunking the Methodology Test: A Flawed Tax-Exemption Standard for Educational Organizations that "Advocate a Particular Position or Viewpoint,"* 29 N.Y.U. REV. L. & SOC. CHANGE 377, 379 (2004) ("Tax-exempt status ... may be perceived as a symbol of governmental tolerance, if not outright approval, of activities that do not receive direct public funding.").

³⁵ *Bob Jones*, 461 U.S. 604.

³⁶ There are a number of other requirements—including the restriction against political activity, the limitation on lobbying, the prohibition against private inurement or significant private benefit—but discussion of these requirements is beyond the scope of this Essay.

definition of “charity,”³⁷ one might conceivably argue that such organizations are “charitable.” But we need not engage in this definitional odyssey³⁸ because the IRS awards tax-exempt status to white supremacist for another reason: they qualify as educational.

B. Wait... How is White Supremacy Educational?

NPI supports and disseminates a wide variety of publications “dedicated to the revival and flourishing of [white] people.”³⁹ It “hosts regular public events and conferences; ... publish[es] books, journals, essays, and blogs; [and] produce[s] videos and podcasts.”⁴⁰ Subject matter aside, one could make a colorable, if cynical, argument that these activities are educational. And it is this argument that provides the basis for tax-exemption for white supremacists. But how does the IRS determine that racist propaganda is educational? An investigation into the IRS’s determination process is illustrative.

1. What is Educational?

As straightforward as it might seem to the layperson, the determination of whether an organization is dedicated to “educational” purposes is fraught with definitional issues that strongly reek of unconstitutionality. According to Treasury regulations, “educational” relates to either “[t]he instruction or training of the individual for the purpose of improving or developing his capabilities” or “[t]he instruction of the public on subjects useful to the individual and beneficial to the community.”⁴¹ Because this definition fails

³⁷ Charity can mean anything from “selfless, other regarding love” (based on the etymological definition of “charity”) to “an organization set up to provide help and raise money for those in need” (See Oxford English Dictionary definition of “Charity”).

³⁸ The Treasury Regulations state that “[t]he term ‘charitable’ is used in section 501(c)(3) in its generally accepted legal sense and is, therefore, not to be construed as limited by the separate enumeration in section 501(c)(3) of other tax-exempt purposes which may fall within the broad outlines of ‘charity’ as developed by judicial decisions. Such term includes: Relief of the poor and distressed or of the underprivileged; advancement of religion; advancement of education or science; erection or maintenance of public buildings, monuments, or works; lessening of the burdens of Government; and promotion of social welfare by organizations designed to accomplish any of the above purposes, or (i) to lessen neighborhood tensions; (ii) to eliminate prejudice and discrimination; (iii) to defend human and civil rights secured by law; or (iv) to combat community deterioration and juvenile delinquency.” See *Nationalist Movement v. C.I.R.*, 102 T.C. 558, 576-77 (1994).

³⁹ www.npiamerica.org/

⁴⁰ *Id.*

⁴¹ Treas. Reg. § 1-501(c)(3)-1(d)(3). Despite the apparent dearth of community

to provide much direction to the IRS, the Treasury Regulations provide four examples of organizations that should qualify as educational.⁴² The first example describes characteristics that would qualify as “educational” by any reasonable standard:

a primary or secondary school, a college, or a professional or trade school, which has a regularly scheduled curriculum, a regular faculty, and a regularly enrolled body of students in attendance at a place where the educational activities are regularly carried on.⁴³

So far, there is no obvious controversy. This regulation describes what are colloquially and legally recognized as *schools*. And if we're going to give tax-exemption to any educational organizations, one would naturally assume a school should qualify. The third example is also uncontroversial, as it describes entities that provide educational materials “by means of correspondence or through the utilization of television or radio.”⁴⁴ The fourth example, while certainly curious, is similarly uncontroversial, noting that “[m]useums, zoos, planetariums, symphony orchestras, and other similar organizations” should qualify as educational.⁴⁵

Of the four examples of educational organizations described in the regulations, the controversy lies in the second example. Here, the regulations provide that an organization dedicated to “presenting public discussion groups, forums, panels, lectures, or other similar programs” will qualify as educational.⁴⁶ This broad category encompasses a number of organizations, often referred to as advocacy groups, that may or may not fit the colloquial definition of “education.” Indeed, this category is broad enough to conceivably include white supremacist groups.

This uncomfortable breadth drove the IRS to impose a greater burden upon certain groups, implementing a test of questionable constitutionality on so-called “advocacy” organizations. The idea was to capture

benefits evident in white supremacist literature, the IRS has taken a permissive view and “has demonstrated a willingness to assume the existence of both individual and societal benefits, absent any glaring indications to the contrary.” See Alex Reed, *Subsidizing Hate: A Proposal to Reform the Internal Revenue Service's Methodology Test*, 17 FORDHAM JOURNAL OF CORPORATE AND FINANCIAL LAW 823-828 (2012) (citing Tommy F. Thompson, *The Availability of the Federal Educational Tax Exemption for Propaganda Organizations*, 18 U.C. Davis L. Rev. 487, 497 (1985)).

⁴² Treas. Reg. § 1-501(c)(3)-1(d)(3).

⁴³ *Id.*, example 1.

⁴⁴ *Id.*, example 3.

⁴⁵ *Id.*, example 4.

⁴⁶ *Id.*, example 2.

organizations that might technically fit in the broad educational category, but were actually disseminating propaganda under the guise of education. To do so, the regulations dictate that if an organization advocates a “particular position or viewpoint,”⁴⁷ it must prove that it “presents a sufficiently full and fair exposition of the pertinent facts as to permit an individual or the public to form an independent opinion or conclusion.”⁴⁸ The regulation closes by noting that if an organization’s “principal function is the mere presentation of unsupported opinion,” then the organization does not qualify for tax-exempt status.⁴⁹

Unfortunately for the IRS, this inquiry, known as the “full and fair exposition” test, was found unconstitutionally vague. Applying the test, the IRS denied tax-exemption to a feminist organization on the grounds it promoted lesbianism without providing a full and fair exposition.⁵⁰ The organization appealed this ruling, and the D.C. Circuit held that the “full and fair exposition” test was unconstitutionally vague because it provided no objective standard to determine what organizations were subject to the test and no objective standard to ascertain if an organization met the test.⁵¹

In an effort to inject some objectivity to the “full and fair exposition” inquiry, the IRS developed a test that reviewed the organization’s methodology, or basis, for the materials presented. This test asks whether such opinions have a sound factual basis by identifying the following factors as indicators that an organization is not educational:⁵²

- (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.⁵³

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* For a comprehensive review of the evolution of this test, see Reed, *supra* note 37.

⁵⁰ See *Big Mama Rag v. U.S.*, 631 F. 2d 1030 (D.C. Cir. 1980)

⁵¹ *Id.*

⁵² Internal Revenue Manual 4.76.11.4.

⁵³ *Id.*

The primary appeal of this test, known as the Methodology Test, is that it avoids any investigation into the substance of the organization's position. It would be unwise, if not unconstitutional, to base a tax-exemption determination on whether the IRS approved of the content of the opinions forwarded by a particular entity. So rather than assessing the subject matter, the Methodology Test focuses on the "method used by an organization in advocating its position."⁵⁴ Thus, even if an organization forwards minority opinions or non-mainstream viewpoints, it might qualify as educational if it can prove that it arrived at such opinions and viewpoints through a sound methodology.

Unfortunately, the Methodology Test suffers from the same deficiency that plagued the full and fair exposition test: unclear instructions on when the test is applicable. Similar to the "full and fair exposition" test, the Methodology Test fails to provide an objective standard to determine what organizations are subject to the test. As several commentators have pointed out, there is no clear standard to determine when the test is triggered. Professor Colombo identifies the absurdity of the test by noting "even traditional educational institutions such as universities engage in a considerable amount of viewpoint-pushing."⁵⁵ And yet, such "traditional educational institutions" are not subject to the Methodology Test.

The closest we have in the way of guidance is a statement in the Internal Revenue Manual that the test should apply when an organization advocates a particular position on "controversial" subjects.⁵⁶ Unfortunately, there is no definition of "controversial" and this determination is left entirely to the IRS. If one was concerned about the vagueness of when, precisely, the Methodology Test is triggered, a limitation to "controversial" subjects is not likely to assuage any fears. To make the point painfully clear, these criteria are "hopelessly unclear, if not unconstitutionally vague, because they fail to articulate a principled and objective basis for the distinction between advocacy and non-advocacy."⁵⁷

Thus, the initial determination of whether an organization "advocates" is based entirely on whether the IRS believes the organization is advocating a position on "controversial" subjects. Professor Lu notes that this subjectivity results in "an incoherent, ill-advised scheme that leaves a politically and socially, if not numerically, significant range of

⁵⁴ Rev. proc. 86-43

⁵⁵ John D. Colombo, *Why is Harvard Tax-Exempt? (and Other Mysteries of Tax Exemption for Private Educational Institutions)*, 35 Ariz. L. Rev. 841, 853 (1993).

⁵⁶ IRM 7.25.3.7.11.5.

⁵⁷ See Lu, *supra* note 32 at 382

organizations vulnerable to discrimination.”⁵⁸ Citing the court decision that struck down the “full and fair exposition” test, Lu makes a convincing argument that such unfettered discretion is unconstitutional.⁵⁹

To date, however, the Methodology Test has not been challenged. So despite the questionable constitutionality of the Methodology Test, it stands as the means by which the IRS should determine whether an advocacy organization’s materials qualify as educational.

2. Applying a Questionably Constitutional Test

Even under the most charitable application of the Methodology Test, NPI’s literature fails to qualify as educational. This is despite the fact that, as noted above, the modern white supremacist movement takes great pains to avoid overtly “inflammatory language” and cloaks its claims in facially scientific terms. The real difficulties for modern white supremacist groups are the Methodology Test’s requirements of a “factual foundation for the viewpoint it advocates”⁶⁰ and an avoidance of conclusions based on “strong emotional feelings” rather than “objective evaluations.”⁶¹

Many of NPI’s publications contain unsupported viewpoints or positions. For example, one article published by NPI asserts that disparate intelligence quotient (“IQ”) results among the races serve as proof of a genetic difference in mental ability among the races.⁶² Setting aside the offensive suggestion that non-white people have less mental capacity than white people, this conclusion ignores the following facts: (i) such results fail to hold constant environmental and socioeconomic factors and (ii) IQ scores rise about three points per decade in most developed nations, strongly disproving any potential genetic cause.⁶³ The thesis of this particular article is, at best, unsupported by facts (prong one of the Methodology Test), and at worst, promulgating distorted facts (prong two of the Methodology Test). Another article on NPI’s website, entitled *The Great Erasure*, asserts that immigration patterns across the world have created a situation in which “the White race faces complete erasure from the

⁵⁸ *Id.* at 383.

⁵⁹ *Id.* at 402, citing *Big Mama Rag*, 631 F. 2d 1030 (D.C. Cir. 1980) (noting that the assertion that advocacy is the same as controversial “cannot withstand First Amendment scrutiny. It gives IRS officials no objective standard by which to judge which applicant organizations ... have been deemed advocates and held to the ‘full and fair exposition’ standard.”).

⁶⁰ Rev. Proc. 86-43.

⁶¹ *Id.*

⁶² See www.npiamerica.org/research/category/the-war-on-human-nature

⁶³ See James R. Flynn, *Are We Getting Smarter? Rising IQ in the Twenty-First Century*, CAMBRIDGE UNIVERSITY PRESS (2012).

Earth.”⁶⁴ Not only does this assertion lie upon a questionable factual basis (prong one of the Methodology Test), but it is also difficult to call this anything other than a conclusion based upon “strong emotional feelings” rather than objective evaluations (prong three of the Methodology Test).⁶⁵ I could go on, but it should come as no surprise that a group founded to promote white supremacy would publish works based on distorted facts and come to conclusions based on strong emotional feelings.

Given that many of NPI’s publications practically beg to fail the Methodology Test, why would the IRS grant such an organization 501(c)(3) status? And to be clear, NPI is not the only hate-based organization that enjoys favorable tax treatment. Similar groups litter the list of approved tax-exempt organizations. For example, the New Century Foundation, a tax-exempt entity, hosts the hate-filled *American Renaissance* website,⁶⁶ which features articles with titles such as “It’s About Erasing White People”⁶⁷ and “Why the Left Wants a Non-White America.”⁶⁸ Another tax-exempt organization, the Vdare Foundation, claims that the diversity of races and cultures in the United States will ultimately result in demise of the country.⁶⁹ The number of white supremacist groups that enjoy tax-exempt status leads one to incredulously ask how they passed the Methodology Test. Certainly, a cursory review of the material promulgated by these organizations would no doubt find them “controversial” and therefore subject to the test. And once subject to the Methodology Test, one would assume the IRS would find the material is either unsupported by facts (the first factor of the Methodology Test), presents distorted facts (the second factor of the Methodology Test), makes use of inflammatory and disparaging terms (part of the third factor of the Methodology Test), and expresses conclusions based on strong emotional feelings rather than objective evaluations (also part of the third factor of the Methodology Test). It is impossible to believe that the IRS has vetted the foundation of these organizations’ materials and found that they provide a “full and fair exposition of facts.” Indeed, it is more likely that the IRS did not engage in this inquiry due to several practical obstacles: the test’s questionable unconstitutionality and the IRS’s inadequate budget.

⁶⁴ <http://www.npiamerica.org/research/category/the-great-erasure>

⁶⁵ For a more complete discussion of how white supremacist advocacy organizations fail the Methodology Test, see Reed, *supra*, note 37.

⁶⁶ www.amren.com

⁶⁷ www.amren.com/commentary/2017/03/left-wing-anti-white-racism-beauchamp-vox

⁶⁸ www.amren.com/commentary/2017/03/left-wants-non-white-america

⁶⁹ www.vdare.com

III. PRACTICAL PROBLEMS AND POTENTIAL SOLUTIONS

A. The IRS's Dwindling Budget and the Unconstitutionality of The Methodology Test

It is not difficult to imagine a regime that refuses to grant favorable tax treatment to hate-based organizations. In fact, you needn't exercise your imagination, because the IRS denied tax-exempt status to two white supremacist organizations—The Nationalist Movement⁷⁰ and The National Alliance⁷¹—because they failed the Methodology Test. But lately, the IRS has been reluctant to more aggressively police tax-exempt applications. This Essay suggests two potential reasons for this hesitancy: budget limitations and the questionable constitutionality of the Methodology Test.

Regardless of whether the IRS is the proper agency to determine appropriateness of tax-exemption,⁷² budgetary constraints have rendered it wholly incapable of conducting a meaningful investigation into the worthiness of aspiring tax-exempt entities in an efficient manner. Over the past decade, the IRS budget has steadily declined,⁷³ resulting in a stark reduction in staffing and a general inability to engage in meaningful enforcement actions.⁷⁴ With little hope for relief in the future,⁷⁵ it might not be reasonable to expect the IRS to ramp up investigations into white supremacists enjoying tax-exemption. This is especially true given the

⁷⁰ 102 T.C. 558 (1994), affirmed per curium, 37 F.3d 216 (5th Cir. 1994), cert. denied, 513 U.S. 1192 (1995).

⁷¹ 710 F.2d 868 (D.C. Cir. 1983). Note that the IRS held that the organization failed the full and fair exposition requirement, but the appellate court simply held that the organization would meet no reasonable definition of educational. The constitutionality of the Methodology Test therefore remained untested.

⁷² This is an interesting inquiry that is beyond the scope of this Essay. Suffice it to say that there is a strong argument to be made that the IRS, designed as a tax-collecting entity, was never meant to serve any oversight role.

⁷³ Not including 2016, which saw a “nominal increase in IRS funding ... though funding was essentially flat in inflation-adjusted terms.” See Chuck Marr and Cecile Murray, *IRS Funding Cuts Compromise Taxpayer Service and Weaken Enforcement*, Center on Budget and Policy Priorities, April 4, 2016, available at www.cbpp.org/research/federal-tax/irs-funding-cuts-compromise-taxpayer-service-and-weaken-enforcement.

⁷⁴ Tax-Exempt Organizations: Better Compliance Indicators and Data, and More Collaboration with State Regulators Would Strengthen Oversight of Charitable Organizations, United States Government Accountability Office, December 2014, Page 1. “Staffing has declined by about 10,000 full-time equivalents since fiscal year 2010, and performance has been uneven.” Id.

⁷⁵ President Trump's 2017 budget promises a 14.1% cut in the IRS budget. See Alan Rappeport, *Under Trump, an Already Depleted I.R.S. Could Face Deep Cuts*, NY Times, March 2, 2017.

questionable constitutionality of the Methodology Test.

As noted above, a number of scholars have questioned the constitutionality of the Methodology Test.⁷⁶ These arguments are persuasive. Even if one ignores the troubling subjectivity of the threshold question of whether an organization's activities are controversial, the test is rife with subjective inquiries. What objective standard, for example, is the IRS expected to apply to determine if a particular organization's publications are based upon "strong emotional feelings"?⁷⁷ And how, precisely, is the IRS to determine that a particular organization fails to consider the background or training of the intended audience?⁷⁸ It is not a stretch to say that the Methodology Test "imposes an intolerable risk of arbitrary and discriminatory enforcement"⁷⁹ because, despite its careful formulation, the test asks the IRS to engage in an inquiry that is so subjective as to be unconstitutionally vague. It is, in fact, deficient for the same reason that the "full and fair exposition" test was found deficient. Perhaps the only reason that the test has not been ruled unconstitutional is simply because the IRS no longer uses it to deny tax-exemption.

B. Exemption for All

As the previous section noted, the IRS is the unenviable position of applying a test of questionable constitutionality in the face of crippling budgetary constraints. Given this reality, the IRS had two potential options: (i) continuing to bestow 501(c)(3) status to every organization that purports to be educational, or (ii) more aggressively using the questionably constitutional Methodology Test.

Of these options, the IRS appears to have taken the path of least resistance: granting 501(c)(3) status to any organization that claims to have an educational purpose. This "exemption for all" practice is reflected not only in the fact that white supremacist organizations continue to enjoy tax-exemption despite publishing controversial materials that lack full and fair exposition of facts, but also due to the absolute lack of complaints or appeals of tax-exempt application denials. As Professor Reed notes, the Methodology Test "has been relegated to an administrative anachronism—an object of historical curiosity lacking much, if any, practical application in

⁷⁶ See Reed, *supra* note 37, citing Laura B. Chisholm, *Exempt Organization Advocacy: Matching the Rules to the Rationales*, 63 IND. L.J. 201 (1988), Brian A. Hill, *First Amendment Vagueness and the Methodology Test for Determining Exempt Status: Nationalist Movement v. Commissioner*, 48 TAX LAW. 569 (1995), Lu, *supra* note 32, and Thompson, *supra* note 37.

⁷⁷ See Rev. Pro. 86-43.

⁷⁸ See *Id.*

⁷⁹ Lu, *supra* note 32 at 384.

today's world.”⁸⁰ By avoiding the Methodology Test altogether, the IRS has forfeited the right to identify impermissible advocacy. Thus, organizations that publish hateful screeds on race are able to self-identify as educational, avoid paying federal taxes, and allow donors to take tax deductions.

Perhaps the IRS saw no other way forward. It could have continued along the lines of the *Nationalist Movement* and *National Alliance* cases, refusing to grant tax-exempt status to white supremacist groups for failure to provide a full and fair exposition of facts, but the IRS would certainly have faced a constitutional challenge.

The IRS therefore faced a difficult choice, a difficulty it identified in the *National Alliance* case, which notes “[t]he statute commands the Internal Revenue Service . . . to steer between Scylla and Charybdis: exemption to all or exemption, in effect, only to degree-granting academic institutions.”⁸¹ By briefly embracing the Methodology Test (as evidenced by the denials in the *Nationalist Movement* and *National Alliance* cases), the IRS tried to plot “a carefully-charted middle course.”⁸²

Perhaps the IRS was right, and perhaps the Methodology Test is a good compromise between exemption to all and exemption to only traditional educational institutions. But even if this was a good compromise, by completely jettisoning the Methodology Test, the IRS has effectively steered toward the shore of exemption to all. Thus we have a system that, in effect, gives organizations the option to self-proclaim an educational purpose. And this—due to budget constraints or a fear of lawsuits—is the current practice of the IRS.

The reluctance to employ the Methodology Test is in line with the IRS's general movement away from scrutiny of 501(c)(3) applicants. Indeed, the IRS appears to have foregone virtually any meaningful review of tax-exempt applications. One example is the adoption of the Form 1023-EZ, a streamlined application for tax-exemption for certain entities. This form is available to approximately 70% of all tax-exempt applicants, but lacks the rigor of the traditional application and fails to provide any information for the IRS to review.⁸³ Further, even without the Form 1023-EZ, the tax-exempt application process has become little more than a rubber stamp. In 2015, the IRS approved about 93 percent of all tax-exempt applications.⁸⁴ And while that percentage seems high (perhaps unacceptably so), it misleadingly suggests that seven percent of applications were denied. But

⁸⁰ Reed, *supra* note 37.

⁸¹ *National Alliance v. U.S.*, 710 F. 2d 868, 875-76 (1983).

⁸² *Id.*

⁸³ See George K. Yin, *The IRS's Misuse of Scarce EO Compliance Resources*, 146 TAX NOTES 267 (2015).

⁸⁴ See IRS Data Book, Table 24.

the number of entities that did not receive tax-exempt status includes about 6,500 applications that were withdrawn or incomplete.⁸⁵ Of the 101,962 applications received by the IRS in fiscal year 2015, only 67 were disapproved.⁸⁶ These numbers strongly suggest that there is little scrutiny applied to tax-exempt applications.

While the IRS appears to have failed us, it cannot justifiably be faulted. The agency was given the unreasonably difficult task of determining a constitutionally sound way to differentiate between impermissible advocacy and charitable educational materials. Without delving into the substance of the purported educational materials (i.e., without engaging in a constitutionally-suspect endeavor), such a task might be impossible. The course struck by the IRS—effectively, a regime that provides “exemption for all”—might be the most prudent way forward for a critically underfunded agency faced with a near impossible task.

C. Potential Solutions

Commentators have struggled to identify solutions to the current problem. Professor Reed suggests that the issue might be resolved with a more aggressive implementation of the Methodology Test. Recognizing the unconstitutionality of the Methodology Test, Professor Lu calls for the development of a bright-line rule based upon the *Bob Jones* decision. Each of these proposals is discussed below, but this Essay proposes a different approach. Rather than rely upon a constitutionally questionable test or resort to more modest bright-line rule, we should change the Treasury regulations to recognize only traditional, degree-granting institutions, distance learning organizations, or certain enumerated entities. In other words, we should no longer grant tax-exemption to advocacy groups. With this change, we would no longer allow white supremacists to call themselves charities, remove the public subsidy of such reprehensible organizations, and eliminate the government's implicit blessing of hate groups. This section will discuss the proposals of Reed and Lu as well as this proposal and some potential issues with this proposal.

1. Use the Methodology Test or the *Bob Jones* Public Policy Test

Professor Reed suggests that there is no problem other than a lack of initiative by the IRS.⁸⁷ According to Reed, aggressive use of the

⁸⁵ In 2015, there were 6,523 applications that were either withdrawn by organization, incomplete, did not include the required information, IRS correction disposals, and others.

⁸⁶ *Id.*

⁸⁷ Reed, *supra* note 37 at 863.

Methodology Test at the application stage would identify advocacy organizations at the outset and weed out hate groups seeking tax-exempt status.⁸⁸ Although Reed recognizes that this might burden applicants, he justifies this burden by noting that such organizations have “the right to appeal a proposed revocation,” whereas “the taxpayers who indirectly subsidize these organizations have no such recourse.”⁸⁹ Reed also suggests that the IRS should more aggressively scrutinize the use of junk science and discredited factual data to root out organizations that cloak their hate under quasi-scientific language.⁹⁰

The primary issue with Reed’s suggestion is the questionable constitutionality of the Methodology Test. Reed acknowledges this, noting that aggressive use of the Methodology Test “would be subject to challenge under the void-for-vagueness and overbreadth doctrines.”⁹¹ Reed also acknowledges the difficulties of “[p]olicing the line between data that is merely unpopular and data that has been conclusively discredited.”⁹² While I am sympathetic to Reed’s call for more aggressive policing of white supremacist groups, I cannot ignore the questionable constitutionality of the Methodology Test.⁹³ Thus, I suspect that any victories gained via a more assertive implementation of the Methodology Test would be short-lived, as I believe the first well-argued constitutional challenge would succeed.

In contrast to Reed’s proposal, Professor Lu persuasively suggests that the IRS should employ a standard that has enjoyed limited success before the Supreme Court. Borrowing a test from *Bob Jones*, Lu argues that the IRS should only act to prohibit “charitable status for activities that are illegal or that violate fundamental public policy.”⁹⁴ Lu would limit this test to those activities that have been articulated as against fundamental public policy by each governmental branch. Thus, due to the compelling public policy against racial discrimination in schools, any school with such practices shall not qualify as tax-exempt. This test makes *Bob Jones* an easy case, as the policy against racial discrimination in schools has been “clearly

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 865 (“Hate groups ... may be tempted to rely on outdated or misleading data to create an illusion of factual support for their otherwise unfounded positions. For that reason, an organization’s use of data that has been conclusively discredited should be viewed as a type of factual distortion implicating the methodology test’s second factor.”)

⁹¹ *Id.*

⁹² *Id.* at 869.

⁹³ See Colombo, *supra* note 78 at 852 (“[A]ll the written commentary to date agrees ... that the ‘full and fair exposition’ test places too much discretion in the hands of the IRS without adequate objective guidelines for exercising it... Nor have commentators found the methodology test much of an improvement.”)

⁹⁴ Lu, *supra* note 32 at 416.

expressed by all three branches of the government.”⁹⁵

While this is an attractive option, there are some potential issues. The first is that it has a fairly limited application. Lu acknowledges these limitations, noting that “it is unclear what other policies are as fundamental as the prohibition against discrimination on the basis of race.”⁹⁶ Lu also identifies concerns of “unwarranted government intrusions into private affairs” and the IRS’s broad authority of enforcement morphing into “determinations of public policy.”⁹⁷ Finally, it also does not directly address the concern at the heart of this Essay: is advocacy of white nationalism against public policy? Although clearly related, it is not obvious that racial discrimination in schools is the equivalent of promulgating white supremacist propaganda. Although Lu’s proposal addresses the unconstitutionality of the Methodology Test, to the extent we are troubled by the tax-exemption of white supremacist groups, this solution might not be helpful.

2. Eliminate the Exemption for Advocacy Groups

I suggest an approach that is simultaneously more modest and more radical than both proposals. Rather than follow Reed’s suggestion to impose the Methodology Test with more vigor or Lu’s proposed public policy test, I suggest that the solution is obvious: simply restrict the educational label to those organizations that fit the traditional definition of school. That is, rather than adopting the “exemption to all” approach,⁹⁸ the IRS should grant tax-exemption to educational institutions that fit the first, third, or fourth examples of educational organizations listed in the Treasury regulations. This would include schools, as they are defined colloquially,⁹⁹ entities that educate from a distance, or “museums, zoos, planetariums, symphony orchestras, and other similar organizations.”¹⁰⁰ In other words, I suggest amending the regulations to eliminate the troublesomely broad definition of “educational” that includes advocacy organizations.¹⁰¹

This approach is more modest in that it does not require either an aggressive implementation of a questionably constitutional test or the

⁹⁵ *Id.* at 417.

⁹⁶ *Id.* at 418. Lu suggests that gender and sexual orientation might also qualify.

⁹⁷ *Id.* at 421-22.

⁹⁸ *National Alliance v. U.S.*, 710 F. 2d 868, 875-76 (1983).

⁹⁹ Hall & Colombo, *supra* note 28 at 847 (“Within this definition fall ‘schools’ as one might colloquially think of them.”)

¹⁰⁰ *Id.*

¹⁰¹ That is, example 2 of Treas. Reg. 1.501(c)(3)-1(d)(i) (“An organization whose activities consist of presenting public discussion groups, forums, panels, lectures, or other similar programs.”).

development of any new tests to determine what, precisely, constitutes “educational.” It is a more radical proposal in that it requires an amendment to the Treasury Regulations. To do so, we would have to engage in lengthy and politically-fraught rulemaking procedures. Hope for a change in the regulations is unrealistic, given the lack of political and financial power currently enjoyed by the IRS. Indeed, such a change might only exist in the realm of fantasy. It is, however, an attractive solution to the problem of an overly broad definition of education.

In addition to the issues of implementing this proposal, this solution has some potential substantive problems. First, it is important to note that under this proposal, many socially-acceptable, well-loved, and highly respected organizations might find themselves without a tax-exemption. That is, not all advocacy groups engage in hate speech, and white supremacist organizations are not the only entities that are tax-exempt due to the broad definition of education that includes groups whose activities “consist of presenting public discussion groups, forums, panels, lectures, or other similar programs.” For example, non-partisan think tanks such as the Brookings Institution¹⁰² qualify for tax-exemption under this category while providing valuable resources to the general public.

The question we have to ask ourselves is how important it is to incentivize groups like the Brookings Institution (or any other think tank that enjoys exempt status under the broad definition of education). If we deem such groups important, and we would like them to qualify for tax-exemption, then we might consider including them in the fourth category of educational institutions.¹⁰³ Recall that the fourth category—identifying “[m]useums, zoos, planetariums, symphony orchestras, and other similar organizations” as educational—is something of a catch-all for organizations that did not fit in the previous examples. Apparently, the drafters were concerned that the first three examples of educational organizations were lacking, leaving out certain socially-valued activities that should receive tax-exempt treatment because of their educational value. A planetarium, for example, is not (normally) a degree-granting institution and it does not necessarily have a curriculum. It may not hold lectures or fora, and it may not engage in distance learning. But clearly, the drafters were concerned about excluding planetariums (and museums and symphonies) from the educational institution tax-exemption. So they took a reasonable measure: they added them to a non-exhaustive list.

In a similar manner, we could add nonpartisan think tanks to the fourth category. And for that matter, we could list any other categories of organizations that do not clearly fit into any of the remaining definitions.

¹⁰² www.brookings.edu

¹⁰³ Treas. Reg. § 1-501(c)(3)-1(d)(3), example 4.

The difficulty will be in the definition. And in the name of free speech, any definition should avoid an inquiry into the suitability of the message. So if we're hoping to exclude organizations that simply promote propaganda, we may be forced to adopt something akin to the Methodology Test. And if the preceding sections were convincing, this test carries some serious constitutional questions.

This proposal presents a dilemma akin to the one identified in *National Alliance*: exemption for all or exemption for just degree-granting academic institutions.¹⁰⁴ But the proposal frames the dilemma thusly: exemption for all organizations that claim to be educational (the current system), or exemption for only degree-granting academic institutions, distance learning institutions, and the enumerated entities in the fourth category (museums, symphonies, planetariums, and similar organizations). Ultimately, for this proposal to be acceptable, we need to determine if tax-exemption for white supremacist groups is upsetting enough to sacrifice tax-exemption for other advocacy groups.

Finally, it is important to note that this proposed solution is not a cure-all. It requires the continued vigilance of the IRS to ensure that institutions operating in a manner contrary to public policy do not receive tax-exempt status. After all, a school with an antimiscegenation policy would qualify as a school under the proposed definition despite its retrograde policies. The only way to weed out actively racist organizations that fit this more narrow definition of "education" would be to police against organizations that operate contrary to public policy.

Despite the issues, the appeal of this approach is that it removes unfettered discretion from the IRS and no longer requires the agency to engage in an unconstitutional inquiry regarding an organization's advocacy. And more to the point of this Essay, it would no longer allow white supremacist organizations to qualify as tax-exempt charities.

CONCLUSION

While the ACLU and NPI might share an unbounded devotion to freedom of speech, that is where the similarities end. Or rather, that is where the similarities should end. But due to an ineffective and toothless vetting process for tax-exempt entities, both enjoy 501(c)(3) status. The IRS's inability to identify hate groups in the tax-exempt application process not only results in a public subsidy of the activities of hate groups, but also cheapens the tax-exempt status of all charities. One must ask: can 501(c)(3) status have any meaning if it purports to cover a group that includes both

¹⁰⁴ *National Alliance v. U.S.*, 710 F. 2d 868, 875-76 (1983).

the ACLU and NPI? What is the point of a classification that has no meaningful boundaries?

There is no easy fix. The 501(c)(3) statute was adopted from ancient English law with little fanfare, debate, or thought. Enforcement of this poorly-considered law was entrusted to the IRS, an agency that, at best, is underfunded, and, at worst, is poorly suited to determine tax-exemption. The addition of potentially perilous constitutional issues creates the current mess: a poorly-vetted group of so-called charities that rob the country of potential revenue and make a mockery of the word “educational.”

The solution is to eliminate the regulations that stretch the definition of educational. No longer should tax exemption depend on “the discretion of IRS agents applying unclear Treasury regulations and IRS procedures.”¹⁰⁵ To solve this problem, we need to address the vagueness of the regulations. By limiting “educational” to mean traditional schools, distance-learning organizations, and “museums, zoos, planetariums, symphony orchestras, and other similar organizations,”¹⁰⁶ the IRS would no longer be forced to bestow tax-exempt status on hate groups and the public would no longer subsidize such groups.

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¹⁰⁵ Lu, *supra* note 32 at 382.

¹⁰⁶ Treas. Reg 1.501(c)(3)-1(d)(i)