Why Are We Paying For Hate? Refashioning the Methodology Test For "Educational" Nonprofit Hate Groups

Ella Hillier*

TABLE OF CONTENTS

* J.D., May 2026, The George Washington University Law School; Editor-in-Chief, Federal Communications Law Journal, Volume 78; M.B.A. 2023, Bentley University; B.S. 2022, Business Economics-International Business, Bentley University. I would like to thank the entire Federal Communications Law Journal Editorial Board for their dedication in bringing this piece to fruition. A special thanks to Cody Ingraham and Christina Hitchcock, whose guidance throughout the writing process was invaluable, and to my Mom, whose tireless leadership in the nonprofit sector inspired this Note. Finally, to my family, friends, and mentors: I am so grateful for your endless encouragement and support throughout my law school journey.

I. INTRODUCTION

In the IRS Targeting Scandal of 2013, the Internal Revenue Service (IRS) was exposed for more rigorously assessing the 501(c)(3) status applications of groups whose names or documents included specific right-wing dog whistles, such as "Patriot" or "Tea Party."[1] The result: the first Trump Administration's Justice Department referred to the review as an "abuse of power," and many organizations impacted reached financial settlements with the IRS.[2] In addition, the IRS issued a formal apology for its "mistreatment" of the various conservative organizations.[3]

This "scandal" angered many far-right and anti-government groups who all sought to reap the benefits of tax-exempt status.[4] Among those benefits: access to deductible donations; expanded funding opportunities, such as grants reserved for charities; limited liability; and even lower postal rates.[5] 501(c)(3) status, which grants an exemption from federal taxation for nonprofit organizations, was originally created to benefit organizations that further the "public good."[6] So what allows hate groups to obtain this designation? The answer, at least what appears to be the answer in this case, is to protect freedom of speech as required by the First Amendment.

In 2023, the IRS reported over 1.48 million 501(c)(3) organizations, accounting for a clear majority of tax-exempt organizations.[7] Groups organized for charitable, educational, religious, or similar purposes all may apply and obtain 501(c)(3) status. The benefits associated with 501(c)(3) status are greater than for any other tax-exempt organization – most notably, these groups are not subject to any income tax, and donors may deduct their contributions from their personal income tax returns.[8] These added benefits, as well as the prestige that follows from being a recognized charity, creates

---

1. Note, too, that some left-leaning groups (admittedly not as many) were also affected by the heightened review. *See* Peter Overby, *IRS Apologizes for Aggressive Scrutiny of Conservative Groups*, NPR (Oct. 27, 2017, 3:08PM) https://www.npr.org/2017/10/27/560308997/irs-apologizes-for-aggressive-scrutiny-of-conservative-groups [https://perma.cc/4KJH-JX28].

2. *Id.*

3. *Id.*

4. *Id.*

5. *See Benefits and Disadvantages of Obtaining 501(c)(3) Tax Exemption*, MINNESOTA COUNCIL OF NONPROFITS, https://minnesotanonprofits.org/resources-tools/starting-a-nonprofit/benefits-and-disadvantages-of-obtaining-501c3-tax-exemption [https://perma.cc/6X5G-GR4U].

6. Paul Arnsberger et al., *A History of the Tax-Exempt Sector: An SOI Perspective*, STAT. INCOME BULL., Winter 2008, at 110 [https://perma.cc/R6M6-8EX4].

7. *Table 14. Tax-Exempt Organizations, Nonexempt Charitable Trusts, and Split-Interest Trusts, Fiscal Year 2023*, IRS, https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fwww.irs.gov%2Fpub%2Firs-soi%2F23dbs02t14eo.xlsx&wdOrigin=BROWSELINK [https://perma.cc/9NKR-DA46]; *see How Many Nonprofits Are There in the U.S.?*, USA FACTS (Nov. 16, 2023), https://usafacts.org/articles/how-many-nonprofits-are-there-in-the-us/ [https://perma.cc/CHT4-5J3Q].

8. *Compare* I.R.C. § 501(c)(3), *with* I.R.C. § 501(c)(4). 501(c)(4) organizations can participate in political lobbying but donations are not deductible to the donating taxpayer.

an incentive for groups to push the limits on what counts as a charity, or, as will be discussed in this Note, groups that identify as "educational."[9]

Some groups seeking 501(c)(3) designation are not what one would think of as an "educational" organization. This includes a variety of groups commonly understood as "hate groups."[10] White supremacist, anti-immigrant, anti-Muslim, anti-LGBTQ+, and far-right militia groups have all accessed some form of tax exemption by achieving 501(c)(3) status.[11] While this may feel like a distinction without a difference, prestige and the ability to fundraise is an essential component of the longevity of these groups, and federal tax-exempt designation provides an avenue for funding among an otherwise bleak landscape.[12]

This Note proposes two central advancements to the current test applied to educational nonprofits when determining whether the group qualifies for 501(c)(3) status. First, that nonprofit status generally should be recognized as a subsidy, and that with this designation, no First Amendment rights are violated with a test that is not viewpoint neutral. Second, that the IRS should maintain its current test for the term "educational" in the nonprofit context but amend the trigger for the test to exclude hate groups from reaping the benefits of tax exemption.

To do this, this Note will examine the history, development, and interplay between hate groups, nonprofit status, and free speech in the United States. Part II.A will discuss the definition of hate groups in different areas of government and public life and discuss their relationship with nonprofit status, particularly their attraction to nonprofit designation. Next, Part II.B will explain the history and origins of tax exemption for nonprofits in the United States. This includes a discussion of the Methodology Test, the test currently applied to applicants for educational nonprofits that advocate a specific viewpoint. Next, Part III will explain the development of First Amendment jurisprudence as it relates to hate speech, which is an integral feature of hate groups generally. A foundational element of First Amendment analysis in this area is the level of scrutiny applied by courts when assessing regulations that target speech. Part III.B will specifically discuss scrutiny doctrine under the umbrella of government funding and explain the difference between subsidies and government entitlements. Part IV will describe this Note's proposed solution and demonstrate its legal basis.

---

9. *See Bankrolling Bigotry: An Overview of the Online Funding Strategies of American Hate Groups*, THE GLOB. DISINFORMATION INDEX & THE INST. FOR STRATEGIC DIALOGUE 14 (2020) [https://perma.cc/7F2L-VVU7] [hereinafter *Bankrolling Bigotry*].

10. *Id.* at 8–9.

11. *Id.* at 14.

12. *Id.* at 5; *Funding Hate: How White Supremacists Raise Their Money*, ANTI-DEFAMATION LEAGUE 1 (Dec. 1, 2017), https://www.adl.org/sites/default/files/adl-report-funding-hate-how-white-supremacists-raise-their-money.pdf [https://perma.cc/WTZ3-UR5C] [hereinafter *Funding Hate*].

II. THE PROBLEM: ORGANIZED HATE GROUPS AND 501(C)(3) STATUS

A. Organized Hate Groups and their Use of 501(c)(3) Status

The meaning of a "hate group" may feel intuitive, but the definition is often harder to pin down. The KKK, The Proud Boys, or The Oath Keepers are typical examples of extremist groups, often lumped together as "hate groups."[13] Despite the vivid imagery associated with these groups, the federal government struggles to define them, and even more so to regulate them.[14]

Organizations across the public and private sectors have developed unique approaches to epitomize "hate groups." The Federal Bureau of Investigation, while not proposing a formal definition, investigates hate group activity, focusing on threats of violence, the ability to follow through on the threat, and when the threat would lead to a violation of federal law.[15] The Global Disinformation Index and the Institute for Strategic Dialogue, which conducted extensive study into hate groups and their use of the internet, defined the term "hate" as "belief or practices that result in attacking, maligning, delegitimising or excluding an entire class of people on the basis of immutable characteristics, including their ethnicity, religion, gender, sexual orientation or disability."[16] It used this definition of hate to categorize what groups should be considered "hate groups." Other groups, however, have ventured to formalize a definition. The Southern Poverty Law Center defines hate groups as "an organization or collection of individuals that – based on its official statements or principles, the statements of its leaders, or its activities – has beliefs or practices that attack or malign an entire class of people, typically for their immutable characteristics."[17] Similarly, the Anti-Defamation League determined that the mere presence of bigotry among members is not enough for an organization to earn hate group status; the group itself "must have some hate-based orientation/purpose."[18]

Each draws a central line: using speech to target swaths of people for an immutable characteristic, such as race, gender, ethnicity, or sexual orientation. These groups organize around this speech and aim to act on it, both through intimidation and violence against protected classes and spreading the word with hateful messaging.

---

13. *Hate Map*, S. POVERTY L. CTR. https://www.splcenter.org/hate-map/ [https://perma.cc/ZB4T-UBW2].

14. Hate groups are particularly difficult to regulate because hate speech is protected by the First Amendment. *See infra* Part III.

15. *Does the FBI Investigate Hate Groups in the United States?*, FBI, https://www.fbi.gov/about/faqs/does-the-fbi-investigate-hate-groups-in-the-united-states [https://perma.cc/JU2J-6A7L].

16. *See Bankrolling Bigotry*, *supra* note 9, at 7.

17. *Frequently Asked Questions About Hate and Antigovernment Groups*, S. POVERTY L. CTR. (June 4, 2024), https://www.splcenter.org/20220216/frequently-asked-questions-about-hate-and-antigovernment-groups#hate-group [https://perma.cc/L94P-PW2G].

18. *Hate Group*, ANTI-DEFAMATION LEAGUE, https://www.adl.org/glossary/hate-group [https://perma.cc/2RZT-AS6S].

In the modern age, hate groups use the internet to disseminate their fundraise, message, and recruit.[19] A study conducted by the Global Disinformation Index and the Institute for Strategic Dialogue, which followed over 70 different hate groups, found 191 instances of hate groups utilizing online fundraising mechanisms.[20] They also found that over a third of online fundraising platforms do not have any policies preventing hate speech or hate groups, and even the programs that do generally fail to enforce them.[21] Hate groups also cultivate their own online ecosystems to fulfill their messaging, recruiting, and fundraising needs, which thrive in the United States due to the legal barriers to restricting hateful speech.[22] These groups are often fueled by online disinformation.[23] They not only distribute inaccurate information throughout their platforms but also use disinformation as a basis for their hateful beliefs.[24]

When these groups obtain 501(c)(3) status, their perceived legitimacy and fundraising ability only continues to increase.[25] For example, the Global Disinformation Index study found that 70% of hate groups targeting the LGBTQ+ community had 501(c)(3) status, and that this positively correlated to fundraising capability for these groups.[26] These capabilities are heightened further by their savvy of internet ecosystems, spearheaded by hate groups' use of crowdsourcing.[27] Crowdsourcing, or crowdfunding, is a means of internet fundraising where users can post requests for donations for specific events or general causes.[28] Some crowdsourcing vendors, such as GoFundMe, offer specialized products and services for registered nonprofits.[29] These online platforms have inadvertently helped support a variety of hateful causes: for example, a white supremacists charged with assault at the "United the Right" rally in Charlottesville, Virginia in 2017 used an online funding platform to raise over $1,000 after his arrest.[30]

Research has also demonstrated an important relationship between hate groups and nonprofit status. Hate groups often present themselves as educational organizations to apply for, and ultimately obtain, federal tax

19. Alexander Tsesis, *Hate in Cyberspace: Regulating Hate Speech on the Internet*, 38 SAN DIEGO L. REV. 817, 833–34 (2001); *Funding Hate*, *supra* note 12.

20. *See Bankrolling Bigotry*, *supra* note 9, at 14.

21. *Id.*

22. Tsesis, *supra* note 19, at 838.

23. Oprah Cunningham, *Small Steps, Big Impact: Combating Hate Through Individual Actions*, THE LEADERSHIP CONF. ON CIV. AND HUM. RTS. (May 29, 2024), https://civilrights.org/blog/combating-hate-through-individual-actions/ [https://perma.cc/B9V2-DDXJ].

24. *Id.*

25. *See Bankrolling Bigotry*, *supra* note 9, at 14.

26. *Id.*

27. *Funding Hate*, *supra* note 12.

28. *Id.*

29. *GoFundMe Terms of Service*, GOFUNDME, https://www.gofundme.com/c/terms#:~:text=Description%20of%20the%20Services%20provided,will%20benefit%20from%20the%20funds [https://perma.cc/2P7K-CN6S].

30. *Funding Hate*, *supra* note 12, at 10–11.

exemption.[31] They are then able to leverage 501(c)(3) status to further fundraise and recruit, all under the guise of a federally-approved designation.[32] Altogether, 501(c)(3) status gives hate groups an opportunity not only to exist, but to thrive on both the web and in real life.

B. How Do Hate Groups Get Tax Exemption? 501(c)(3) Status for Educational Organizations

Selective tax exemption in the United States dates to the late 1800s.[33] The earliest reference to tax exemption for charitable organizations can be found in the Tariff Act of 1894, which outlined three main policy objectives: promoting charitable organizations through tax exemption; banning private inurement; and incentivizing giving.[34] First, the early legislators granted charitable organizations complete freedom from federal income taxation.[35] Second, the legislature required these organizations to be free from "private inurement" to ensure funds were applied to the public good.[36] Finally, to highlight the importance of giving, the early legislatures incentivized donations by providing tax deductions for charitable contributions, which was later codified in the Revenue Act of 1917.[37] While tax-exempt status for charitable organizations has evolved, these three principles are still central to the regulation of charitable organizations and are reflected in the tax code today.

Today, the code section governing tax exempt organizations is I.R.C. § 501.[38] Section 501(a), Exemption from Taxation, states generally that "an organization described in subsection (c)...shall be exempt from taxation under this subtitle...unless such exemption is denied under section 502 or 503."[39] Within Section 501, Section 501(c)(3) describes the broadest form of tax exemption, as defined by the code:

> Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no

31. *See Bankrolling Bigotry*, *supra* note 9, at 14.
32. *Id.*
33. Arnsberger, *supra* note 6, at 106.
34. *Id.*
35. *Id.*
36. Private inurement occurs when charitable funds are diverted to insiders of a nonprofit organization. It remains forbidden in current practice. *Id.* at 106; *see Inurement/Private Benefit: Charitable Organizations*, IRS https://www.irs.gov/charities-non-profits/charitable-organizations/inurement-private-benefit-charitable-organizations (last visited Jan. 1 2026) [https://perma.cc/79DV-A6ER].
37. Arnsberger, *supra* note 6, at 106.
38. Title 26 of the United States Code contains the United States Tax Code, but is generally cited as "I.R.C." rather than "26 U.S.C." This Note will reflect that practice.
39. I.R.C. § 501(a).

> part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.[40]

Several elements are worthy of note. First, and likely most obvious for its application to hate groups identifying as educational organizations, is the passage which grants nonprofit status for groups "organized and operated exclusively for. . .educational purposes."[41] This means that groups which are defined as "educational" qualify for tax exemption as described in section 501(a). It is also notable that the code explicitly excludes groups whose activities are "substantial[ly]...carrying on propaganda, or otherwise attempting...to influence legislation." This provision places a limitation on the activities that groups can participate in and still qualify for tax exemption.

Treasury Regulations, which are published by the Treasury Department to supplement the tax code, defines educational as "(a) The instruction or training of the individual for the purpose of improving or developing his capabilities; or (b) The instruction of the public on subjects useful to the individual and beneficial to the community."[42] This encompasses organizations that aim to generally educate the public, such as Khan Academy, Teach for America, or Girls Who Code.[43] However, "an organization may be educational even though it advocates a particular position or viewpoint so long as it presents a sufficiently full and fair exposition of the pertinent facts as to permit an individual or the public to form an independent opinion or conclusion."[44] In other words, a group that does advocacy work, like promoting substance abuse prevention, can obtain

40. I.R.C. § 501(c)(3).
41. *Id.*
42. Treas. Reg. §1.501(c)(3)-1 (last amended June 30, 2017).
43. *About Us*, KHAN ACAD., https://support.khanacademy.org/hc/en-us/sections/4404526433293-About-Us#:~:text=Khan%20Academy%20is%20a%20501(c)(3)%20nonprofit%20organization (Jan. 10, 2025); Teach for America, Inc., Return of Organization Exempt from Income Tax, Form 990 at 1 (2023) [https://perma.cc/9S6J-MGST]; *Girls Who Code Inc.*, PROPUBLICA, https://projects.propublica.org/nonprofits/organizations/300728021#:~:text=Designated%20as%20a%20501(c)(3)) [https://perma.cc/8LDY-5BHJ]; *About Us*, Girls Who Code, https://girlswhocode.com/about-us [https://perma.cc/7X3N-4XN7].
44. Treas. Reg. §1.501(c)(3)-1.

501(c)(3) status in certain circumstances.[45] Based on the IRS definition of lobbying as compared to general advocacy, groups' advocacy is supposed to be limited to building education and awareness.[46] This regulation lacked clarity as a standard in practice, so the Treasury Department published The Methodology Test in 1959.[47]

C. The Methodology Test

Pursuant to the Methodology Test, a court may find that an organization is not "educational" when it advocates a particular viewpoint if it meets any of the following criteria:

1. The presentation of viewpoints unsupported by facts is a significant portion of the organization's communications.

2. The facts that purport to support the viewpoints 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.[48]

Rev. Proc. 86-43, published in 1986, formalized these four factors as the Methodology Test and "remains the Service's official administrative

45. *D A R E America*, PROPUBLICA, https://projects.propublica.org/nonprofits/organizations/954242541#:~:text=Designated%20as%20a%20501(c)(3) [https://perma.cc/MM32-5WAH].

46. The IRS defines lobbying as "attempting to influence legislation," whereas advocacy is more general, even when it may be related to general legislative efforts. Examples of advocacy not considered lobbying include: organizing educational meetings, distributing education materials, or "otherwise consider public policy issues in an educational manner." *Lobbying*, IRS (Aug. 20, 2024) https://www.irs.gov/charities-non-profits/lobbying#:~:text=In%20general%2C%20no%20organization%20may,loss%20of%20tax%2Dexempt%20status [https://perma.cc/5KRM-WVPV].

47. Ward L. Thomas & Robert Fontenrose, *Education, Propaganda, and the Methodology Test*, EXEMPT ORGS.–CONTINUING PRO. EDUC. 87–88 (1997) [https://perma.cc/H9TS-D482]; Big Mama Rag, Inc. v. United States, 631 F.2d 1030, 1032 (D.C. Cir. 1980) (holding that the term "educational" was unconstitutionally vague).

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

pronouncement on the subject."[49] The 1986 also regulation added a catch-all to give the IRS some discretion, stating that "the Service will look at all the facts and circumstances…despite the presence of one or more of such factors" to deny tax-exempt status.[50] This test is to come into force when the topic of advocacy is "controversial."[51]

The Methodology Test has survived legal challenges, particularly in the context of groups which could fit the definitional framework of a hate group. In *National Alliance v. United States*, the IRS successfully denied 501(c)(3) status to National Alliance, which applied for 501(c)(3) status under the guise of being an "educational" organization.[52] The group regularly published racist stereotypes and smears about Black and Jewish Americans, presenting them as facts.[53] National Alliance argued that denying the group's 501(c)(3) application based on its speech violated the First Amendment.[54] The lower court agreed, and went further to hold that the Methodology Test was unconstitutionally vague.[55] The D.C. Circuit reversed, supporting the Methodology Test.[56] The court applied the Methodology Test to National Alliance and affirmed the revoking of its nonprofit status. In doing so, the court concluded that the information dispersed by National Alliance was not educational within the meaning of 501(c)(3) because their methodology did not clearly present a link between the information and the claims asserted.[57] They were, rather, outside any reasonable interpretation of "educational" as their publications failed each prong of the Methodology Test.[58]

This would seem to highlight the triumph of the Methodology Test, however, it is scarcely used in the modern context.[59] Scholarship cites two main reasons for this: lack of funding for the IRS and continued questions about the constitutionality of the test itself, particularly due to the test's vague trigger.[60] The Methodology Test is only triggered when an organization advocates "controversial" subject matter – an undefined term that leaves the IRS and the public with little guidance as to when and where it will actually

49. Thomas & Fontenrose, *supra* note 47, at 91.
50. Rev. Proc. 86-43, 1986-2 C.B. 729.
51. *Id.*
52. *See generally* National Alliance v. United States, 710 F.2d 868 (D.C. Cir. 1983).
53. *Id.* at 871-872.
54. *Id.* at 870.
55. *Id.*
56. *Id.* at 875 ("We observe that, starting from the breadth of terms in the regulation, application by IRS of the Methodology Test would move in the direction of more specifically requiring, in advocacy material, an intellectually appealing development of the views advocated. The four criteria tend toward ensuring that the educational exemption be restricted to material which substantially helps a reader or listener in a learning process. The test reduces the vagueness found by the Big Mama decision.").
57. *Id.*
58. *National Alliance*, 710 F.2d at 874.
59. Eric Franklin Amarante, *Why Don't Some White Supremacist Groups Pay Taxes?,* 67 EMORY L. J. ONLINE 2045, 2059–60 (2018).
60. *Id.*

be applied.[61] Therefore, this test is rarely applied, and it is more common for groups to lose their non-profit status by failing to file proper paperwork.[62]

III. CONSIDERATIONS IN DESIGNING A SOLUTION: THE FIRST AMENDMENT AND THE SUBSIDY DEBATE

A. The First Amendment Jurisprudence

The First Amendment of the Constitution states, in part, "Congress shall make no law…abridging the freedom of speech."[63] The Supreme Court has clarified this standard to limit the ability to regulate speech, including hate speech.[64] This Part will discuss the evolution of the doctrine as it pertains to hate speech as a generally protected category of speech. First, Section i will look at high bar for limiting speech as specified by *Brandenburg v. Ohio* and *Virginia v. Black*, and Section ii it will outline the prohibition on content-based restrictions affirmed by *R.A.V. v. City of St. Paul*. Section iii will outline the standard of review courts use when applying First Amendment jurisprudence.

i. The "Imminent Lawless Action" Standard

Brandenburg was a pivotal case in establishing the broad reach of the First Amendment in protecting hateful speech, placing a limit only where speech turns into incitement of "imminent lawless action."[65] In *Brandenburg*, a known leader of the Klu Klux Klan ("KKK") challenged the Ohio Criminal Syndicalism statute after he was arrested following a rally. Prior to the rally, a reporter observed KKK members brandishing weapons, burning crosses, and the leader urging that the group would seek "revengeance" against the government for "suppressing the white, Caucasian race."[66] The leader was charged under The Ohio Criminal Syndicalism statute, which made illegal

---

61. *Id.* Vaugness concerns arise from a constitutional principle known as the "vagueness doctrine." This is a due process principle that prevents arbitrary enforcement of statutes where the text is unclear or has an indefinite meaning. For further explanation, *see* A.G.A, *The Void-for-Vagueness Doctrine in the Supreme Court,* 109 U. PA. L. REV. 67 (1960).

62. Alex Reed, *Subsidizing Hate: A Proposal to Reform the Internal Revenue Service's Methodology Test*, 17 Fordham J. Corp. & Fin. L. 823 at 826 (2012); Amy Blackwood & Katie Roeger, *Revoked: A Snapshot of Organizations that Lost their Tax-Exempt Status*, URB, INST. (Aug. 9, 2011) https://www.urban.org/sites/default/files/publication/27486/412386-Revoked-A-Snapshot-of-Organizations-that-Lost-their-Tax-Exempt-Status.PDF. For example, the National Policy Institute, a white nationalist group, lost its nonprofit status in 2017 for failing to file a return with the IRS for three consecutive years, as is required by the IRS. *See* Bill Morlin, *White Nationalist Group Loses Tax-Exempt Status*, S. POVERTY L. CTR. (Mar. 15, 2017) https://www.splcenter.org/resources/hate-watch/white-nationalist-group-loses-tax-exempt-status/ [https://perma.cc/UVV6-QWM9].

63. U.S. CONST. amend. I.

64. Tsesis, *supra* note 19, at 838–39.

65. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

66. *Id.* at 445–46.

"criminal syndicalism."[67] In the statute, criminal syndicalism included "advocating the duty, necessity, or propriety of crime...as a means of accomplishing industrial or political reform."[68] The Court held that the statute, and thus the KKK leader's criminal prosecution, was unconstitutional because the government may not prevent speech even if it advocates for violence unless "such advocacy is directed to inciting or producing *imminent lawless action* and is likely to incite or produce such action."[69] Through the imminent lawless action standard, the Court adopted a distinction between general advocacy of violence, which is protected speech, and advocacy in preparation of violence, which is not.[70] In *Brandenburg*, the statements were deemed to be teaching an "abstract viewpoint," not directly calling upon a specific criminal act.[71] This standard is also referred to as the "fighting words" or "true threats" standard.[72]

Further, In *Virginia v. Black*, the Supreme Court struck down a Virginia law that made cross burning with the "intent to intimidate" for First Amendment concerns.[73] The Virginia law at issue provided that any cross burning created a prima facie case for the intent to intimidate, meaning that evidence of a burning cross was enough to prove intent to violate the law.[74] In this case, the KKK held a rally and burned a cross in front of the home of a Black family.[75] The Court conducted a lengthy analysis into the history of cross burning as a tool of intimidation by the KKK, but also as a celebratory symbol for the group.[76] While the Virginia legislature may have included the "intent to intimidate" mens rea requirement to ensure the law was consistent with *Brandenburg*, the Court nevertheless held the law to be unconstitutional: the prosecution had to prove that the cross burning was truly a threat of imminent, unlawful violence (as opposed to some other purpose, like a celebration).[77] A law which created a presumption of criminal intent based on speech alone violated the First Amendment.[78] The Court also used this case to further clarify the definition of "true threat" from *Brandenburg*, which it defined as "a serious expression" suggesting that the speaker intends to commit "an act of unlawful violence."[79]

The doctrine is clear. Speech, even particularly hateful speech, that does not incite imminent violence is protected by the First Amendment.

---

67. *Id.* at 144.
68. *Id.*
69. *Id.* at 447 (emphasis added).
70. Tsesis, *supra* note 19, at 839–40.
71. *Id.* at 840.
72. Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942) (discussing "fighting words"); Virginia v. Black, 538 U.S. 343, 359 (2003) (discussing "true threats").
73. *Virginia*, 538 U.S. at 366–67.
74. *Id.* at 348.
75. *Id.* at 349–50.
76. *Id.* at 352–58.
77. *Virginia*, 538 U.S. at 359.
78. *Id.*
79. *Id.* at 359.

ii. Content-based Restrictions

R.A.V. v. City of St. Paul further expanded the imminent lawless action standard to prevent content-based speech restrictions. In *R.A.V.*, several teens were arrested for burning a cross on the lawn of a Black family.[80] They were charged with a crime based on a local statute that read:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.[81]

The petitioner challenged the statute as unconstitutional for restricting freedom of speech, specifically calling the law "substantially overbroad and impermissibly content based and therefore facially invalid under the First Amendment."[82] The Court agreed, writing "the government may not regulate use based on hostility – or favoritism – towards the underlying message expressed."[83] Thus, content-based limitations on speech are impermissible.

The Court's decision in *R.A.V.* further highlighted the Court's skepticism towards criminalizing speech and revealed a throughline: Courts will limit speech only to prevent the unique and specific consequence of violence.[84] Even now, the Court prioritizes an "uninhibited marketplace of ideas" over the harm speech can inflict on minority communities.[85] With the high bar of the incitement standard and little-to-no content-based limitations, speech that attacks members of protected classes, however untrue or ugly, cannot be contained by statute.

iii. Appropriate Standards of Review

When the Supreme Court reviews a law or regulation for an alleged violation of the First Amendment, it has adopted various tiers of scrutiny to determine whether the law is constitutional.[86] One such approach is

80. R.A.V. v. City of St. Paul, 505 U.S. 377, 380 (1992).
81. *Id.*
82. *Id.*
83. *Id.* at 386.
84. *Id.* at 388; Tsesis, *supra* note 19, at 852.
85. 303 Creative v. Elenis, 600 U.S. 570, 585 (2023) (internal citation omitted); Tsesis, *supra* note 19, at 853 (discussing the way hate speech that is protected under current First Amendment jurisprudence decreases social wellbeing and causes harm to the dignity of the targets of such speech).
86. Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1278– 79 (2007).

commonly referred to as strict scrutiny. For a law to survive strict scrutiny, there must be a compelling government interest in restricting a right through legislation, and the law is narrowly tailored to restrict the right as little as possible.[87] In free speech cases in particular, this test is broadly applied: the Court has generally recognized the First Amendment as especially important and should not be limited when other options are available.[88]

It is very difficult for a statute to survive strict scrutiny. Recently, the Supreme Court struck down a Colorado law that prevented public businesses from discriminating on the basis of, in relevant part, sexual orientation.[89] In *303 Creative*, a website content creator challenged the law preemptively because it would have required her to build wedding websites for LQBTQ+ couples, which she opposed on personal grounds.[90] The Court here pointedly used strict scrutiny, inquiring whether the law "would serve a compelling governmental interest and that no less restrictive alternative exists to secure that interest."[91] There, the Court weighed the compelling interest of eliminating discrimination in places of public accommodation against the burden that the law could impose on freedom of expressive speech.[92] Rather than discussing alternatives, the Court focused on the importance of the First Amendment free speech clause throughout the history of the United States.[93] The Court has also moved towards this type of balancing test for content-based limitations on speech, however is extremely skeptical of any viewpoint limitation.[94] Content-based regulation will almost certainly be subject to strict scrutiny review.[95]

It is important to note that in some contexts, courts have latitude in categorizing the rights at issue, thus determining the appropriate level of scrutiny.[96] For example, where the right at issue is the receipt of certain government funds, invoking the First Amendment does not guarantee that

87. *See* United States v. Carolene Products Co., 304 U.S. 144, 155 n.4 (1938).

88. Fallon, Jr., *supra* note 83, at 1278 (discussing the evolution of the doctrine as developed by Justice Harlan).

89. *See 303 Creative*, 600 U.S 570. While this case was about compelling rather than restricting speech, it demonstrates how the modern Court approaches the tiers of scrutiny.

90. *Id.* at 580.

91. *Id.* at 583– 84, 586.

92. *Id.* at 590– 92.

93. *Id.* at 602– 03.

94. *See* John Inazu, *First Amendment Scrutiny: Realigning First Amendment Doctrine Around Government Interests*, 88 BROOK. L. REV. 1, 21– 22 (2023).

95. *See id.* at 22.

96. Regan v. Taxation with Representation, 461 U.S. 540, 547-48 (1983) (quoting Madden v. Kentucky, 309 U.S. 83, 87-88 (1940) ("The broad discretion as to classification possessed by a legislature in the field of taxation has long been recognized... [The] passage of time has only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a legislature in formulating sound tax policies. Traditionally classification has been a device for fitting tax programs to local needs and usages in order to achieve an equitable distribution of the tax burden. It has, because of this, been pointed out that in taxation, even more than in other fields, legislatures possess the greatest freedom in classification.").

courts will apply strict scrutiny.[97] Rather, courts may use a lower standard of review, often referred to as rational basis.[98] Under this level of scrutiny, there need not be a compelling government interest, but just a legitimate reason for the government to restrict certain conduct.[99]

B. The Subsidy Debate: Subsidy versus Benefit or Entitlement

The interplay between tax benefits, their function as a form of subsidy, and freedom of speech concerns have been regarded as a "notoriously tricky question of constitutional law."[100] While the government "may not deny a benefit to a person on a basis that infringes his…freedom of speech *even if he had no entitlement to that benefit*," the government is also not required "to subsidize activities that it does not wish to promote."[101] The subsidy debate affects the level of scrutiny that a Court should apply to cases where the government may infringe upon otherwise protected speech. Courts have found that the government cannot deny a *benefit* to a speech-producing organization based on the viewpoint of the speech but has significantly more leeway in making such determinations when a *subsidy* is at issue.[102]

A government benefit, or entitlement, is something that the government must provide to people who meet certain requirements.[103] Two recent cases that have forced the Supreme Court to confront what it means for funds to be a "public benefit" are *Matal v. Tam* and *Iancu v. Brunetti*. In *Matal v. Tam*, the Supreme Court found that the prohibition of "disparaging" trademarks violates the First Amendment freedom of speech principle that "speech may not be banned on the ground that it expresses ideas that offend."[104] There, the government argued in part that a trademark is essentially a form of government subsidy.[105] While the Court did not agree that a trademark was a subsidy, it laid out factors to help make that determination. The topmost factor is what the recipient gains from the government–a subsidy is associated with a cash or similar benefit.[106] There, the distinction between owed government

97. *Id.* at 549 ("We have held in several contexts that a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny."); *see infra* Part III.B.

98. *Regan*, 461 U.S. at 547– 48 (quoting Madden v. Kentucky, 309 U.S. 83, 87-88 (1940)) ("Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.").

99. *See* United States v. Carolene Products Co., 304 U.S. 144, 155 n.4.

100. Matal v. Tam, 582 U.S. 218, 239 (2017) (emphasis added).

101. *Id.* at 240.

102. Camelot Banquet Rooms, Inc. v. U.S. Small Bus. Admin., 24 F.4th 640, 633 (7th Cir. 2022); *Regan*, 461 U.S. at 547– 48**.**

103. GOVERNMENT ACCOUNTABILITY OFFICE, A GLOSSARY OF TERMS USED IN THE FEDERAL BUDGET PROCESS (2005).

104. *Matal*, 582 U.S. at 223.

105. *Id.* at 234.

106. *Id.* at 240.

benefits and a subsidy was fundamentally *financial*. Under this view, a trademark could not be a subsidy because other, non-cash rights were attached. The importance of trademarks for consumer confidence, and the fact that they come with "important legal rights and benefits," all led the Court to find that a trademark is a government benefit, and therefore standard First Amendment principles applied and the Court applied strict scrutiny.[107]

Further, in *Iancu v. Brunetti*, the Court held that The Lanham Act's prohibition on registration of "immoral or scandalous" patents violated the First Amendment because it based decisions for granting a patent on a viewpoint.[108] Similarly to *Matal*, the patent not only implicated speech, but came with special rights and privileges that could not be denied to an otherwise worthy applicant based on the viewpoint expressed. Therefore, the patent was a form of government benefit that could not be denied on the basis of speech or viewpoint.[109] Like how regulations limiting speech must be viewpoint neutral, limitations on government benefits must be neutral as well.[110]

Alternatively, Courts have not required grants of government subsidies to be done on a viewpoint-neutral basis. *Regan v. Taxation with Representation* embodied this sentiment by the Court. There, Taxation with Representation, an organization aimed at promoting changes to the tax code, challenged its denial of 501(c)(3) status, which it was denied for engaging in substantial amounts of political lobbying.[111] The Court was confronted with the difference between a subsidy and a benefit, admitting that the government cannot deny a benefit simply on the basis of their exercising their freedom of speech rights.[112] But, the Court strongly distinguished subsidies from general public benefits–with subsidies, those denied are still able to exercise their speech rights, but in the benefit context, denial could inhibit their ability to do so.[113] In fact, the Court shut down the idea of this being speech infringement outright, with Justice Rehnquist writing that he rejects the "notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State."[114] The Court unanimously held that Congress may decide not to subsidize certain speech without infringing upon the First Amendment protections afforded to the speech itself.[115]

---

107. *Id.* at 226, 224 ("[trademark designation] helps consumers identify goods and services that they wish to purchase, as well as those they want to avoid.").

108. In this case, the plaintiff appealed his denial of a trademark for his clothing brand, "FUCT." The trademark was denied under section 2(a) of the Latham Act which prohibited "immoral or scandalous" trademarks. Iancu v. Brunetti, 588 U.S. 388 (2019).

109. *See Iancu*, 588 U.S. at 393.

110 . *See id.; supra* Part III.A.ii.

111. *Regan*, 461 U.S. at 541, 545.

112. *Id.* at 545.

113. *Id.*

114. *Id.* at 546.

115. The Court gave two additional insights of importance: first, this case may have come out differently if Congress "were to discriminate invidiously in its subsidies in such a way as to aim at the suppression of dangerous ideas," and the concurrence noted that in the case of lobbying, the availability of 501(c)(4) status prevents any further constitutional issues. *See id.* at 548; 552–553.

This framework has also been upheld outside of the taxation context, and, notably, in the same general time frame in which *Matal* and *Iancu* were decided. For example, in *Camelot Banquet Rooms, Inc. v. United States SBA*, an adult entertainment establishment challenged the Small Business Association's ("SBA") denial of Paycheck Protection Program ("PPP") Loans during the COVID-19 pandemic based on the company's expressive nature.[116] Rather than seeing the denial as "viewpoint discrimination" as urged by Camelot Banquet Rooms, the Seventh Circuit concluded that the SBA had the authority to decide which types of business would be eligible for the PPP loan.[117] With this settled, it was also the SBA's choice to exclude adult entertainment establishments from the program.[118] The court held that "excluding the entire category or subject matter...from a government subsidy program does not amount to viewpoint discrimination and does not violate the Free Speech Clause."[119] The Court took two essential steps: first determining that the PPP program was a subsidy, and second, holding that the government's discretion to deny subsidizing certain organizations did not violate the First Amendment.[120]

The issue in subsidy cases is not whether the organization may *participate* in its desired speech (in fact, it is free to do so), it is "whether Congress is required to provide it with public money" when they do.[121] The Court clearly stated that Congress does not.

IV. ANALYSIS

Hate groups, by promoting violence and hatred towards their victims, should not be deemed as educational under the 501(c)(3) analysis. Groups that attack and promote violence may try to find a "hook," something to make them appear educational, but under the Methodology Test they are more likely to be denied 501(c)(3), saving the taxpayers from footing the bill for hate. In practice, they are generally not educational within the existing definition and would likely fail the Methodology Test if it were applied to them. As the Methodology Test states, groups cannot be educational if they fail to meet any of four factors, which ensure that facts are presented in an accurate, unbiased fashion. The test itself is not the problem. Rather, this test is not utilized effectively because the "trigger," or the indicator that tells the IRS when to apply the test, is vague: it is unclear what makes an organization "controversial," which kneecaps the Test and leaves it particularly ripe for

116. Camelot Banquet Rooms, Inc. v. U.S. Small Bus. Admin., 14 F.4th 624, 627 (7th Cir. 2021). The plaintiffs, a group of adult entertainment establishments, were granted an injunction in the lower court disallowing the government from denying their eligibility for the loan program. The SBA appealed and the Seventh Circuit stayed the injunction. *Id.* at 627-28.

117. *Id.* at 633.

118. *Id.*

119. *Id.* at 649.

120. *Id.*

121. *Regan*, 461 U.S. at 551.

abuse.[122] With strained resources, clarity is essential for effective enforcement.[123] Vagueness, simply for the purpose of being viewpoint neutral, is not necessary because of 501(c)(3)'s special status as a subsidy.

A. Alternative Proposed Solutions and their Shortfalls

Scholars and lawmakers alike have considered how to best prevent hate groups from obtaining the benefits of 501(c)(3) status. For example, Eric Amarante in his article, *Why Don't Some White Supremacist Groups Pay Taxes?,* suggested limiting the definition of "educational" so only traditional schools, universities, or enumerated educational organizations would receive federal tax exemption.[124] This would eliminate advocacy groups from counting as "educational," period.[125] This solution would not be beneficial as it would eliminate significantly more 501(c)(3)s than just hate groups. It is an overly broad solution because it would unnecessarily stifle other advocacy groups. What about organizations that advocate *for* protected classes? Would the adverse consequences be worth such a narrow recasting of the term "educational"? With the availability of a more tailored solution, this Note suggests no.

Alternatively, terrorist organizations are banned from obtaining 501(c)(3) status under the current test, so another way the IRS could limit hate groups from obtaining nonprofit status is through terrorist designation. For this to work, hate groups would need to receive "terrorist" designation, which is problematic in its own right.[126] This has recently been explored by the House of Representatives, which failed to pass H.R. 9495 on November 12, 2024.[127] This bill sought to, among other things, give the executive branch

122. A vague term leaves applicants unsure if they fall into the "controversial" category and therefore cannot determine if their organization will be subject to the Test. Vaugeness also creates a potential weaponization problem whereby the Executive branch may take different approaches to what would be "controversial," and could then define the term in new ways to target nonprofit organizations based on their policy objectives. Such concerns were somewhat realized in the IRS Targeting Scandal. *See* Overby, note 1.

123. While that will not be addressed here, the IRS could look to other organizations that regulate speech-driven content, such as the Federal Communications Commission (FCC). The FCC, like the IRS, has an Enforcement Bureau, but it also provides consumers the opportunity to file complaints. With monitoring, this could potentially be a way that the IRS could expand its enforcement reach. This would admittedly require greater resources, but could help to address the enforcement problem, which remains despite this Note's proposed solution. Future scholarship could address this issue.

124. Amarante, *supra* note 59, at 2068 (citing "traditional schools, distance-learning organizations, and museums, zoos, planetariums, symphony orchestras, and other similar organizations" as educational) (internal citation and quotations omitted).

125. *Id.* at 2066– 67.

126. The federal government struggles to categorize and label domestic terrorist groups as "terrorists" because they cannot be formally charged with "domestic terrorism." While domestic terrorism is likely interrelated with hate groups, it will not be discussed in this Note in more depth because of the unrelated legal implications of designation. LISA N. SACCO, CONG. RSCH. SERV., R47885 UNDERSTANDING AND CONCEPTUALIZING TERRORISM: ISSUES FOR CONGRESS 1 (2023).

127. Stop Terror-Financing and Tax Penalties on American Hostages Act, H.R. 9495, 118th Cong. (2024).

broad authority to strip current tax-exempt status from groups deemed to be "terrorist organizations." Though the intended outcome is not known, some speculated that the goal of this legislative was to target groups deemed by the Trump administration as political enemies, including the NAACP and pro-Palestine organizations.[128] Due to the heightened risk of Executive abuse and lacking legal basis, this too would not be an effective solution to the problem of hate groups obtaining federal nonprofit status.

An efficient, effective, and legally sound solution to this problem goes back to its root: the Methodology Test.

B. Charitable Status is A Subsidy

To move forward on this issue, 501(c)(3) status must be treated as a subsidy because it is, in fact, a subsidy. The basic argument for tax-exemption being a subsidy is this: when an organization does not have to pay income tax, it has more disposable income to spend on its charitable efforts. The heightened liquidity from not paying a tax is essentially the same as the government handing an organization cash to conduct its activities. The result in both scenarios the same–the organization having more cash on hand. The debate on this issue becomes much less nuanced when looking at groups, like 501(c)(3) educational groups, that often rely on donations.[129] Donors contribute post-tax dollars to an organization and want the entirety of their donation to go to the charitable organization, not back to the government in the form of a tax. Freedom from taxation allows the groups to net the entirety of what they receive, producing the aforementioned result: more cash on hand to continue their work. Think of two groups, a nonprofit (N) and a typical corporation (C). Now imagine both groups receive $100 in a taxable year. N, who is tax exempt as a 501(c)(3), will retain $100 of the $100 received. C, subject to a 21% corporate tax rate, will only retain $79 of the $100 received.[130] N received a "free" $21 from the government, which equates to the government injecting an extra $21 into N's activities. Put in other words, N was subsidized, in the amount of $21, as a result of their nonprofit designation.

Courts have already treated 501(c)(3) status as a subsidy. The Court in *Matal* discussed that subsidies are a special area of First Amendment case law, applying specifically to cash or cash-equivalent benefits to

128. *See Oppose H.R. 9495: Protect Nonprofit Organizations*, NAACP, https://naacp.org/actions/oppose-hr-9495-protect-nonprofit-organizations (last visited Jan. 24, 2025) [https://perma.cc/TEE6-BVCX].

129. Ellen Aprill & Lloyd Hitoshi Mayer, *Tax Exemption is Not a Subsidy – Except for When It Is*, TAX NOTES FED. (Sept. 20, 2021), https://www.taxnotes.com/featured-analysis/tax-exemption-not-subsidy-except-when-it/2021/09/17/7830q ("Often, references to the subsidy afforded nonprofit or tax-exempt organizations are in fact referring primarily to nonprofit organizations exempt under section 501(c)(3) and rely at least implicitly on the charitable contribution deduction, which has been consistently treated as a subsidy. That is, tax exemption is included as an additional subsidy without much thought.") [https://perma.cc/H8WP-VJ4B].

130. This hypothetical assumes the 2025 corporate tax rate of 21%. I.R.C. § 11(b).

organizations.[131] Further, the Court in *Regan* based its opinion on the premise that tax exemption under 501(c)(3) is a subsidy.[132] As a subsidy, Congress can choose what activity it funds.[133] Groups are not entitled to taxpayer money simply because they are exercising their First Amendment rights.[134] As the Court noted, "where governmental provision of subsidies is not 'aimed at the suppression of dangerous ideas,' its 'power to encourage actions deemed to be in the public interest is necessarily far broader.'"[135] While the IRS and Treasury have been less consistent on this front,[136] it is clear that 501(c)(3) status is a subsidy from both the perspective of case law and financial logic. Therefore, the special rules applied to subsidies should apply in all areas of the nonprofit application process, particularly when it comes to denials. With this, the IRS can amend the Test or, as this Note proposes, the trigger in a way that is consistent with First Amendment jurisprudence in this area–it need only survive the appropriate rational basis review.

C. The Trigger For The Methodology Test Should Be Amended To Apply When A Group Implicates Or Targets An Immutable Characteristic in Its Educational Functions

The IRS has not promulgated new guidance relating to the Methodology test since 1986.[137] And yet, the IRS and the Treasury Department, through Treasury Regulations and other means, has the authority to interpret its existing legislation.[138] This is well within the bandwidth of the Treasury Department to accomplish. Further, *National Alliance* demonstrated the effectiveness of the Methodology Test when it is actually applied.[139] The test itself is not the problem; its underutilization is. Updating the trigger for the Methodology Test with specific, targeted language could rectify and prevent hate groups' abuse of charitable status. Further, the Treasury Department does not need to tailor its trigger around surviving First Amendment strict scrutiny, were the new trigger to be challenged. This is

131. *Matal*, 582 U.S. at 240.

132. *Regan*, 461 U.S. at 544 ("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. The system Congress has enacted provides this kind of subsidy to nonprofit civic welfare organizations generally, and an additional subsidy to those charitable organizations that do not engage in substantial lobbying.").

133. *Id.* at 545.

134. *Id.*

135. *Id.* at 550.

136. Aprill & Hitoshi Mayer, *supra* note 129.

137. Thomas & Fontenrose, *supra* note 47.

138. I.R.C. § 7805(a) ("the Secretary shall prescribe all needful rules and regulations for the enforcement of this title, including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue"); *Regan*, 451 U.S. at 548-49. *Regan* suggests that an act of Congress is required to dictate what Congress is willing to subsidize. This Note will not focus on the "who" in the solution, but it is worth noting that the Treasury Department may be able to make this change unilaterally by promulgating new regulations.

139. *National Alliance*, 710 F.2d at 874-75.

because 501(c)(3) status is a subsidy, and subsidies would undergo rational basis review. The current test's attempts at remaining neutral make it easily abused, hard to enforce, and arguably unconstitutionally vague.[140] Instead, Treasury should amend the trigger in a way that is both constitutional and prevents the hate group problem.

Luckily, the court in *Regan* seemed to chart a path for a constitutional trigger for the Methodology Test. It suggests that lawmakers may paint with a broad brush when deciding how public funds should be used.[141] However, it outlined some limitations on content regulation within the subsidy sphere: denial of 501(c)(3) status cannot aim to suppress "dangerous ideas."[142] In addition, Congress could not deny a subsidy based on an immutable characteristic, such as race or national origin.[143] The new trigger must color between these lines, basing the limitation on something akin to lobbying, i.e., a type of otherwise protected speech that tax funds will not pay for. Rather than calling on the Methodology Test only when an organization is "controversial," the new trigger could invoke specific elements associated with hate groups.

To prevent hate groups from obtaining 501(c)(3) status, the Treasury Department needs to find language that can best capture such groups. As most other government entities have not ventured to define hate groups, it would be understandable why the IRS would not want to be the first. Instead, it could focus on the qualities that hate groups have in common: people organizing around their prejudice towards various minority groups, usually promoting their own traits, expressing these viewpoints to intimidate the groups they target, and having the purpose of promoting such bigotry through their speech and resulting action. With this common understanding in place, the IRS can focus the scope of the activating language. The updated trigger should be more specific, causing the Test to apply when a group "implicates or targets an immutable characteristic in its educational functions." This, rather than the current "controversial" standard, is superior because it excels where current standard fails: it is clear, therefore the IRS and applicants alike will know exactly when they will be subject to the Methodology Test, and, by using similar language to definitions of hate groups, ensures that hate groups will fall into the bucket subject to the Methodology Test.

While this implicates content-based speech rights, the test need not pass strict scrutiny muster because the Court should not apply strict scrutiny. This test stays within the bounds of outlined in *Regan*: it does not deny a subsidy based on the characteristics of the speaker, nor does it suppress dangerous ideas. Instead, it provides an added layer of review for groups that discuss common targets of hate speech to ensure that their educational materials are truly educational. This Note's proposed new trigger for the Methodology Test, or any new trigger that would not be viewpoint neutral within the bounds of *R.A.V.*, would likely fail a standard strict scrutiny test. Under the Court's

140. Amarante, *supra* note 59, at 2064.
141. *Regan*, 451 U.S. at 550.
142. *Id.* (citing Cammarano v. United States, 358 U.S. 498, 513 (1959)).
143. *Id.* at 548.

current application of strict scrutiny demonstrated in *303 Creative* and *Iancu*, the test would be seen as unconstitutional pursuant to the First Amendment freedom of speech clause for an essential reason: the government cannot restrict speech or deny government entitlements based on specific viewpoints. But, because 501(c)(3) status is differentiated as a subsidy, it is immune from such analysis.

Under the appropriate rational basis test applied in *Regan*, there need only be a clear government interest that is related to the outcome. The goal here is clear: prevent groups that are not spreading truthful, educational materials, such as hate groups, from taking advantage of nonprofit status through 501(c)(3) designation. Altering the trigger to exclude such groups is clearly related to this goal and would likely survive this level of scrutiny. Congress had already made the decision only to subsidize groups that are "educational" and groups that fail the Methodology Test fall outside of that scope. This does not limit the free speech rights of hate groups. For instance, if they chose to continue under a formal organizational structure, they could organize as standard corporation a pay the standard corporate tax rate on their earnings. Like in *Regan*, the groups are free to continue exercising their speech rights, but the rest of the country will not have to pay for it.

While this new trigger may increase the number of groups that have their 501(c)(3) applications scrutinized, it will not negatively impact groups that do other important advocacy work. Groups like Planned Parenthood, the ACLU, and the Human Rights Campaign would be subject to the Methodology Test in the same way the group from *National Alliance* was.[144] Groups that do positive advocacy work would need to ensure that their educational materials are supported by facts, the language they use is not overly inflammatory or disparaging, and they use tried-and-true educational methods. Overall, increased use of the Methodology Test benefits everyone: it will limit the ability for hate groups to access the benefits of nonprofit status, as many would likely fail the Methodology Test, and would maintain the quality of educational materials coming from other advocacy groups. Because the Methodology Test is the essential next step, the updated trigger proposed here cannot unilaterally be misused to remove tax exemption groups from doing fact-based advocacy work.

V. CONCLUSION

Hate groups enjoy the protections of the First Amendment in the United States, but that does not make their preachings "educational," and thus eligible for 501(c)(3) charitable nonprofit status. Many hate groups, affiliated with a variety of causes, currently enjoy 501(c)(3) status and the financial benefits associated. 501(c)(3) status is supposed to be for charities and

144. Planned Parenthood Federation of America, Form 990, 1 (2023) [https://perma.cc/P4PC-P524]; ACLU Foundation, Form 990, 1-2 (2023) [https://perma.cc/4N8X-BVQP]; Human Rights Campaign Foundation, Form 990, 1-2 (2023) [https://perma.cc/AWK5-A8UY].

organizations that benefit the public in some way, and groups that advocate hatred seem to fall outside of that category.

One of the only tools at IRS's disposal to prevent educational organizations from obtaining 501(c)(3) status is the Methodology Test. IRS currently has little guidance on when to use the test, making an otherwise effective tool obsolete. The current trigger–when a group is "controversial"–is vague and makes the Methodology test unworkable, and the rationale behind it, remaining content neutral, is unnecessary. The First Amendment free speech principles are fundamentally different when the government is subsidizing activity, and Congress has already made clear it only intended to subsize truly educational organizations. Therefore, an updated trigger for the Methodology Test that more specifically targets harmful speech is the best way to add clarity to the test and limit the ability for hate groups to take advantage of charitable status. The trigger does not have to be viewpoint neutral because it need only pass rational basis muster.

The IRS should be able to plainly call out the groups that have been abusing nonprofit status by their common features, targeting certain groups with hateful speech. This is why the new trigger should be when a group "implicates or targets an immutable characteristic in its educational functions." By cutting out the vague language and focusing on hate groups, the IRS can ensure that taxpayer money no longer goes to fund hate.