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NONPROFITS, TAXES, AND SPEECH

*Lloyd Hitoshi Mayer**

Federal tax law is of two minds when it comes to speech by nonprofits. The tax benefits provided to nonprofits are justified in significant part because they provide nonprofits great discretion in choosing the specific ends and means to pursue, thereby promoting diversity and pluralism. But current law withholds some of these tax benefits if a nonprofit engages in certain types of political speech. Legislators have also repeatedly, if unsuccessfully, sought to expand these political speech restrictions in various ways. And some commentators have proposed denying tax benefits to groups engaged in other types of disfavored speech, including hate speech and fake news. These latter proposals have recently become more prominent as additional facts come to light about the role of nonprofits in supporting white supremacy and in disseminating misleading information about COVID-19 treatments.

This Article explores the existing and proposed limitations on speech by tax-exempt nonprofits given the constitutional restrictions on such limitations and the policy justifications for existing nonprofit tax benefits. It explains why the current limits on political campaign intervention and lobbying by charities are both justified given the subsidy provided to charities and their supporters under existing federal tax law and existing and longstanding constitutional case law. It further concludes that any expansion of these limits on charities to cover other types of speech, including hate speech and fake news, would be inconsistent with the existing broad definitions of the purposes that charities can pursue as well as, in some circumstances, constitutionally suspect. The Article also concludes that limits on speech by non-charitable tax-exempt nonprofits, including the existing limit on political campaign intervention for some of these nonprofits, are both unwise as a policy matter and, in some circumstances, constitutionally suspect given the lack of a subsidy for such speech by these nonprofits.

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INTRODUCTION

On October 22, 2019, the Internal Revenue Service (IRS) wrote Identity Evropa saying “We’re pleased to tell you we determined you’re exempt from federal income tax under Internal Revenue Code (IRC) Section 501(c)(3).”¹ What made this letter unusual is that Identity Evropa was the successor to a white supremacist organization with the same name that helped plan the deadly August 2017 Unite the Right rally in Charlottesville, Virginia.² Yet that history either escaped the IRS’s attention or in its view did not provide sufficient grounds to deny Identity Evropa’s application for recognition of exemption. And Identity Evropa is not alone. A recent report by the Anti-Defamation League identified eight extremist or hate groups as benefitting from tax-exempt status, and other reports indicate there may be dozens more.³

The IRS has also determined that the Front Line COVID-19 Critical Care (FLCCC) Alliance qualifies as a tax-exempt charity under section 501(c)(3).⁴ This is the organization that was at the forefront of

1. Letter from I.R.S. to Identify Evropa (Oct. 22, 2019), https://apps.irs.gov/pub/epostcard/dl/FinalLetter_82-5224878_IDENTITYEVROPA_06192019_01.tif [<https://perma.cc/BST6-HTFZ>]. The effective date of the exemption was April 2, 2018, the apparent date of Identity Evropa’s incorporation in Arizona. *See id.*; Form 990 Return of Organization Exempt From Income Tax at 1, I.R.S. (2019), https://apps.irs.gov/pub/epostcard/cor/825224878_201905_990_2020100517350944.pdf [<https://perma.cc/LSV2-MMRG>]. Ironically, this version of Identity Evropa ended its legal existence on May 31, 2019, or before the IRS issued its letter, although not before the organization had received and spent over \$150,000. *See* Form 990 Return of Organization Exempt From Income Tax, *supra*, at 1.

2. *See* Anna Schecter, *White Nationalist Leader Is Plotting to ‘Take Over the GOP,’* NBC (Oct. 17, 2018, 4:53 AM), <https://www.nbcnews.com/politics/immigration/white-nationalist-leader-plotting-take-over-gop-n920826> [<https://perma.cc/B55G-VQA9>].

3. *See Extremist and Hate Groups May Be Abusing Non-Profit Status*, ADL (May 3, 2022), <https://www.adl.org/resources/report/extremist-and-hate-groups-may-be-abusing-non-profit-status> [<https://perma.cc/2SLW-P7J6>]; *Dollars Against Democracy: Domestic Terrorist Financing in the Aftermath of Insurrection: Virtual Hearing Before the Subcomm. on Nat’l Sec., Int’l Dev. & Monetary Pol’y of the H. Comm. on Fin. Servs.*, 117th Cong. 10, 11 (2021) (statement of Daniel Rogers, Co-Founder and Chief Technology Officer, Global Disinformation Index) [hereinafter Rogers Statement] (“a large fraction” of the groups they studied had federal tax-exempt status, including all anti-Muslim groups, three-quarters of anti-immigrant groups, and 70 percent of anti-LGBTQ groups); Jim Axelrod et al., *Alleged Hate Groups Get Tax Breaks as Registered Charities*, CBS NEWS (Dec. 1, 2020, 4:26 PM), <https://www.cbsnews.com/news/alleged-hate-groups-tax-breaks-registered-charities/> [<https://perma.cc/FM2H-EMAT>]; Samuel D. Brunson, *Addressing Hate: Georgia, the IRS, and the Ku Klux Klan*, 41 VA. TAX REV. 45, 78 (2021) (identifying four white supremacist groups as tax-exempt under section 501(c)(3)).

4. FLCCC Donation Page, FLCCC ALL., <https://covid19criticalcare.com/network-support/support-our-work/> [<https://perma.cc/Q3RP-D4E9>] (identifying the FLCCC Alliance as “a 501c3 non-profit organization” and providing a copy of its latest IRS Form 990). Unless otherwise noted, section references in this Article are to sections of the Internal Revenue Code, 26 U.S.C.

promoting the use of the parasite medicine ivermectin to treat COVID-19.⁵ It took this position despite unequivocal statements from the American Medical Association, the Food and Drug Administration, and numerous other medical authorities that ivermectin should not be used to treat or prevent COVID-19 outside of clinical trials.⁶ And there is no indication that the IRS plans to revisit its determination that the FLCCC Alliance qualifies as a charity for federal tax purposes, or its similar determinations for groups ranging from Holocaust deniers to 9/11 conspiracy promoters.⁷

Why do groups that engage in divisive or misleading speech qualify for exemption from federal income tax and to receive tax deductible charitable contributions? Is the IRS asleep at the switch or misapplying existing law? Or does the Constitution and its protection of speech limit the ability of the IRS and Congress to condition tax benefits on not engaging in the “wrong” kind of speech?⁸ And if not, do the policy reasons for providing those benefits to nonprofits support or oppose imposing additional speech-related conditions on them?

Part I of this Article explores the current speech-related limits that federal tax law imposes on nonprofits that seek tax exemption and other tax benefits, past failed proposals to expand those limits, and current proposals for additional limits. It considers both the limits applicable to or proposed for the most tax-favored subset of nonprofits—charities—and the limits for less tax-favored but still tax-exempt nonprofits such as social welfare organizations, labor unions, and business associations. Part II explores the constitutional restraints on such limits under existing case law, focusing primarily on the Free Speech Clause but also considering the Free Exercise of Religion Clause and

5. See Hannah Knowles et al., *Doctors Dismayed by Patients Who Fear Coronavirus Vaccines but Clamor for Unproven Ivermectin*, WASH. POST (Sept. 1, 2021, 8:30 AM), <https://www.washingtonpost.com/health/2021/09/01/ivermectin-covid-treatment/> [<https://perma.cc/E3J4-MUJ5>].

6. *Why You Should Not Use Ivermectin to Treat or Prevent COVID-19*, FDA (Dec. 12, 2021), <https://www.fda.gov/consumers/consumer-updates/why-you-should-not-use-ivermectin-treat-or-prevent-covid-19> [<https://perma.cc/2NBR-MYA3>]; Press Release, American Medical Association, AMA, Apha, ASHP Statement on Ending Use of Ivermectin to Treat COVID-19 (Sept. 1, 2021), <https://www.ama-assn.org/press-center/press-releases/ama-apha-ashp-statement-ending-use-ivermectin-treat-covid-19> [<https://perma.cc/V2F2-LYCT>] (for a statement on ending use of ivermectin to treat COVID-19); see also Siana M. Sidik, *The Hunt for Drugs for Mild COVID: Scientists Seek to Treat Those at Lower Risk*, NATURE (July 18, 2022), <https://www.nature.com/articles/d41586-022-01923-5#> [<https://perma.cc/Q67R-M5YV>] (reporting on a study that found ivermectin did not speed recovery from COVID-19 under the conditions tested).

7. See *infra* notes 93–95 and accompanying text.

8. See U.S. CONST. amend. I.

the Equal Protection Clause. Part III describes the policy justifications for the tax benefits enjoyed by nonprofits that are relevant to the question of what speech limitations, if any, should accompany those benefits.

Part IV then considers whether the existing and proposed limits are constitutional and advisable as a policy matter. It concludes that the existing limits on political speech by charitable nonprofits are constitutional and justified to maintain a level (tax) playing field for all speakers, nonprofit and not, and that the prohibition on political campaign intervention is further justified by the legal requirement that charities provide public, not private, benefit. At the same time, it concludes that neither of these justifications are available to support limits on political speech by noncharitable nonprofits that are not eligible to receive tax deductible contributions, especially given that investment income received by those nonprofits is taxable to the extent of their political spending.⁹ The lack of these justifications may also make these limits constitutionally vulnerable. As for the small subset of noncharitable nonprofits that are eligible to receive tax deductible contributions, it appears they are either foreclosed from political speech by their tax exemption—qualifying purposes or, for unclear reasons, choose not to engage in this type of speech.

As for proposed limitations for charities on other forms of political speech, as well as for hate speech and fake news, Part IV concludes that such limits are inconsistent with the broad legal definition of “educational” as a purpose qualifying a nonprofit as a charity, absent speech promoting violence or other illegal activity or speech expressing views completely unsupported by facts or only supported by highly distorted facts. It also concludes that such limits would be constitutionally suspect because of the difficulty of providing a sufficiently clear definition of the prohibited or limited speech. To the extent the permitted purposes of noncharitable nonprofits are consistent with political or educational (defined broadly) speech, such limitations on these types of nonprofits are not justified as a policy matter, raise constitutional vagueness concerns, and may also be unconstitutional because they are not tied to a government subsidy. Finally, limitations on solicitations and other forms of speech are for similar reasons not

9. As discussed below, there is a limited exception to this taxability that should be eliminated. See *infra* note 294 and accompanying text.

justified and are constitutionally suspect, except for provisions closely related to federal tax law compliance.

The bottom line is that while the current limitations on political speech by charities are correct as a matter of policy and permitted as a matter of constitutional law, the current limits on political speech by noncharitable nonprofits are both not justified and constitutionally suspect. And any expansion of the political speech limits or imposition of new limits relating to hate speech, fake news, solicitation, or other speech is not justifiable as a policy matter and would be vulnerable to constitutional challenges. Therefore, absent a radical narrowing of what nonprofits qualify as charitable or for tax exemption more generally, any expansion of speech limitations tied to federal tax benefits would be both unwise and constitutionally vulnerable.

It is particularly appropriate to present this paper as part of the Festschrift Symposium Honoring Professor Ellen Aprill. One of the many areas where Professor Aprill has made her mark is with respect to the federal tax rules governing the speech of tax-exempt organizations, especially with respect to political speech. The reader will therefore notice that not only have I cited her articles and other works throughout, but that she likely is the most cited scholar in this piece. These numerous and varied citations demonstrate her profound influence and contributions in this area of law, even though it has been only a portion of her work.

I. NONPROFIT TAX BENEFITS AND LIMITS ON SPEECH

Federal law in the United States has for more than one hundred years both exempted most nonprofits from income tax and, for charities, allowed donors to deduct their contributions.¹⁰ Qualification for these tax benefits is based on the purpose or purposes of organizations, as demonstrated by their legal formation documents and their activities, and their avoidance of certain prohibited activities.¹¹ Many state laws have followed suit, with limited state tax benefits available for almost all nonprofits and more expansive ones available for

10. See I.R.C. § 170(c)(2) (deduction); I.R.C. § 501(a), (c) (exemption); BORIS I. BITTKER & LAWRENCE LOKKEN, FEDERAL TAXATION OF INCOME, ESTATES & GIFTS ¶ 100.1.1 (July 2022), 1997 WL 440008 (history of exemption); Nicolas J. Duquette, *Founders' Fortunes and Philanthropy: A History of the U.S. Charitable-Contribution Deduction*, 92 BUS. HIST. REV. 553, 553, 558–59 (2019) (history of deduction).

11. See I.R.C. §§ 170(c), 501(a), (c); Treas. Reg. § 1.501(c)(3)-1 to (29)-1.

charities.¹² At the same time, first through regulations and case law and then by statute, federal law and some state laws have partially withheld these benefits if a nonprofit engages in disfavored speech.¹³ That disfavored speech has usually been limited to speech focusing on political issues, including legislation and the election of public officials.¹⁴ But on occasion legislators and others have proposed extending that disfavoring to other kinds of speech, including most recently to deny these tax benefits to groups promulgating hate speech or false information.¹⁵

In the first iterations of the federal income tax, Congress did not include any explicit speech-related restrictions on the deductibility of contributions or tax exemption provided for nonprofit organizations.¹⁶ Nevertheless, legislators and others may have assumed that qualification for those benefits also implicitly imposed some speech restrictions.¹⁷ And regardless of the initial understandings, Congress and some state legislatures have since codified restrictions relating to lobbying and elections for some nonprofits and relating to charitable solicitation in at least once instance,¹⁸ and Congress has seriously considered proposals to expand those restrictions to other types of speech.¹⁹ This part summarizes the existing and proposed tax-related speech limits on nonprofits, starting with advocacy, including lobbying, and then turning to election-related speech, hate speech, fake news, solicitation, and other types of speech.

12. See *50-State Chart of Nonprofit State Tax Exemptions*, HARBOR COMPLIANCE (July 28, 2022), <https://www.harborcompliance.com/information/nonprofit-income-sales-use-tax-exemptions-by-state> [https://perma.cc/T63D-C5K6] (state income tax and sales tax exemptions); W. HARRISON WELLFORD & JANNE G. GALLAGHER, UNFAIR COMPETITION? THE CHALLENGE TO CHARITABLE TAX EXEMPTION 121–22 (1988) (state income tax exemptions); Mark J. Cowan, *Nonprofits and the Sales and Use Tax*, 9 FLA. TAX REV. 1077, 1093–95 (2010) (state sales and use tax exemptions); Janne Gallagher, *The Legal Structure of Property-Tax Exemption*, in PROPERTY-TAX EXEMPTION FOR CHARITIES 3, 3–6 (Evelyn Brody ed., 2002) (state property tax exemptions); Bazil Facchina et al., *Privileges & Exemptions Enjoyed by Nonprofit Organizations*, 28 U.S.F. L. REV. 85, 100 (state inheritance and succession tax exemptions); *id.* at 103–05 (other state tax exemptions) (1993).

13. See *infra* Section I.A (advocacy, including lobbying); *infra* Section I.B (election-related).

14. See *id.*

15. See *infra* Section I.C (hate speech); *infra* Section I.D (fake news); *infra* Section I.E (solicitations); *infra* Section I.F (other speech).

16. See *infra* note 20 and accompanying text.

17. See *infra* notes 21–23 and accompanying text.

18. See *infra* notes 24, 35, 53 and accompanying text.

19. See *infra* notes 38–40 and accompanying text.

A. Advocacy

The initial IRC provisions providing exemption from the federal income tax for most nonprofits and deductibility of contributions for donors to charitable nonprofits did not explicitly place any speech-related conditions on these benefits.²⁰ The Treasury Department nevertheless concluded in 1919 that the term “educational,” as used in the provision allowing donors to deduct contributions to charities, did not include disseminating controversial or partisan propaganda.²¹ In 1930, Judge Learned Hand, writing for a unanimous panel of the U.S. Circuit Court of Appeals for the Second Circuit in *Slee v. Commissioner*,²² extended this reasoning to the provision providing charities with exemption from the federal income tax:

Political agitation as such is outside the statute [granting income tax exemption to charitable organizations], however innocent the aim, though it adds nothing to dub it “propaganda,” a polemical word used to decry the publicity of the other side. Controversies of that sort must be conducted without public subvention; the Treasury stands aside from them. . . .

. . . So far . . . as [the nonprofit’s] political activities were general, it seems to us, regardless of how much we might be in sympathy with them, that its purposes cannot be said to be “exclusively” charitable, educational or scientific. . . . Of the purposes it defines “educational” comes the closest, and when people organize to secure the more general acceptance of beliefs which they think beneficial to the community at large, it is common enough to say that the public must be “educated” to their views. In a sense that is indeed true, but it would be a perversion to stretch the meaning of the statute to such cases; they are indistinguishable from societies to

20. See War Revenue Act of 1917, Pub. L. No. 65-50, § 1201(2), 40 Stat. 300, 330 (1917) (charitable contribution deduction); Revenue Act of 1913, Pub. L. No. 63-16, § II(G)(a), 38 Stat. 114, 172 (1913) (exempting various types of nonprofits, including charities, from the federal income tax); Duquette, *supra* note 10, at 558 (charitable contribution deduction first enacted by Congress in 1917); Lloyd H. Mayer, *A (Partial) Defense of § 501(c)(4)’s “Catchall” Nature*, 21 N.Y.U. J. LEGIS. & PUB. POL’Y 439, 443 (2018) (previous federal corporate income tax statutes only applied to “for profit” entities).

21. See T.D. 2831, 21 Treas. Dec. Int. Rev. 241, 285 (1919); Tommy F. Thompson, *The Availability of the Federal Educational Tax Exemption for Propaganda Organizations*, 18 U.C. DAVIS L. REV. 487, 536–37 (1985).

22. 42 F.2d 184 (2d Cir. 1930).

promote or defeat prohibition, to adhere to the League of Nations, to increase the Navy, or any other of the many causes in which ardent persons engage.²³

Congress then codified these holdings in the mid-1930s by explicitly conditioning both deductibility of contributions and tax exemption for charities on charities not engaging in lobbying as a “substantial part” of their activities.²⁴ The very limited legislative history of these amendments indicates that the primary concern of at least some Senators was the potential for donors to use charities as vehicles for promoting the donors’ private interests.²⁵ But the actual limitation is broader in that it applies to all lobbying, regardless of motivation, leading IRS commentators to conclude that it may have been based on “a general sentiment that lobbying by charities should be restricted.”²⁶ For these purposes, lobbying is defined as attempts to influence legislation either directly—by contacting government officials involved in the legislative process—or indirectly—by contacting members of the public to urge them to contact those government officials.²⁷ The limit on lobbying by charities also places them and their donors roughly on par with businesses and their owners, who are prohibited from deducting lobbying expenses as ordinary and necessary business expenses.²⁸

In 1969, Congress imposed an even stricter lobbying prohibition on private foundations, a subset of charities, because of concerns about

23. *Id.* at 185.

24. See Revenue Act of 1934, Pub. L. No. 73-216, § 23(o), 48 Stat. 680, 690 (tax exemption); Revenue Act of 1935, Pub. L. No. 74-407, § 102(c), 49 Stat. 1014, 1016 (deductibility of contributions); Oliver C. Houck, *On the Limits of Charity: Lobbying, Litigation, and Electoral Politics by Charitable Organizations Under the Internal Revenue Code and Related Laws*, 59 BROOK. L. REV. 1, 16–23 (2003).

25. See 78 Cong. Rec. 5827, 5861 (1934) (statement of Sen. David Reed), <https://www.congress.gov/73/crecb/1934/04/02/GPO-CRECB-1934-pt6-v78-2-1.pdf> [<https://perma.cc/3Y6L-TFV5>]; Houck, *supra* note 24, at 16–23 (discussing Senator Reed’s concerns, which he attributed to the Senate Finance Committee as a whole); William J. Lehrfeld, *The Taxation of Ideology*, 19 CATH. U.L. REV. 50, 63–64 (1969) (same).

26. Judith E. Kindell & John F. Reilly, *Lobbying Issues*, in EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION (CPE) TECHNICAL INSTRUCTION PROGRAM FOR FISCAL YEAR 1997, at 261, 265 (1996), <https://www.irs.gov/pub/irs-tege/eotopicp97.pdf> [<https://perma.cc/8MBS-JE84>].

27. See I.R.C. § 170(c)(2)(D) (“attempting to influence legislation”); I.R.C. § 501(c)(3) (same); Treas. Reg. § 1.501(c)(3)-1(c)(3)(ii) (attempting to influence legislation includes urging members of the public to contact legislative branch members for the purpose of influencing legislation); Rev. Rul. 67-293, 1967-2 C.B. 185, 1967 WL 15085 (same); Kindell & Reilly, *supra* note 26, at 273 (same).

28. See I.R.C. § 162(e).

the undue influence of these entities.²⁹ In 1976, it also created an optional regime that charities could choose to elect into for determining the amount of permitted lobbying instead of being subject to the substantial part limit, while keeping in place the latter limit as the default rule.³⁰ Congress appears to have intended the elective regime to somewhat soften the default rule,³¹ as the IRS discovered when its initial, relatively narrow proposed regulations interpreting the elective regime generated a political backlash that led it to issue final regulations with more generous rules.³² Nevertheless, both the default rule and elective regime continue to limit the amount of lobbying by charities as a condition on the federal tax benefits they receive.³³ At the same time, the IRS has concluded that noncharitable, tax-exempt nonprofits are generally not limited with respect to lobbying if that lobbying furthers the permitted purposes of such organizations.³⁴

Several states have incorporated similar limits on lobbying into their tax exemption statutes. For example, New York imposes the same limitation on lobbying as federal tax law for charity exemption from sales and use tax.³⁵ Several other states effectively impose such a limit because tax exemption is dependent on federal tax exemption

29. See Tax Reform Act of 1969, Pub. L. No. 91-172, § 101(b), 83 Stat. 487, 512–15 (enacting I.R.C. § 4945(d)(1)); H.R. REP. NO. 91-413, pt. 4, at 19–43 (1969); S. REP. NO. 91-552, at 6 (1969); Miriam Galston, *Lobbying and the Public Interest: Rethinking the Internal Revenue Code's Treatment of Legislative Activities*, 71 TEX. L. REV. 1269, 1277–78 (1993) (describing the limit on lobbying by private foundations); Thomas A. Troyer, *The 1969 Private Foundation Law*, 27 EXEMPT ORG. TAX REV. 52, 60 & nn.54–55 (2000) (noting that certain controversial grants by the Ford Foundation, including ones relating to school decentralization, appear to have provided support for the 1969 prohibition on private foundations engaging in lobbying); Myron Walker & Tim Rothermel, Note, *Political Activity and Tax Exempt Organizations Before and After the Tax Reform Act of 1969*, 38 GEO. WASH. L. REV. 1114, 1127–29 (1969) (discussing the background of the 1969 prohibition).

30. See Tax Reform Act of 1976, Pub. L. No. 94-455, § 1307(a)(1), 90 Stat. 1520, 1720–21 (enacting I.R.C. § 501(h)); Galston, *supra* note 29, at 1278–79 (describing the elective regime).

31. See Editor's Note, *Deductions for Lobbying by Public Charities: Constitutional Issues, Public Policy, and the Tax Reform Act of 1976*, in 5 RESEARCH PAPERS SPONSORED BY THE COMMISSION ON PRIVATE PHILANTHROPY AND PUBLIC NEEDS: REGULATION 2915, 2915 (1977) (the 1976 change “loosens” the restrictions on lobbying by charities).

32. See Kindell & Reilly, *supra* note 26, at 283–84 (describing reaction to proposed regulations); James J. McGovern et al., *The Revised Lobbying Regulations A Difficult Balance*, 48 TAX NOTES 1425, 1427–29 (1988) (same).

33. Galston, *supra* note 29, at 1278–80.

34. *Id.* at 1276–77; Kindell & Reilly, *supra* note 26, at 336–37.

35. N.Y. TAX LAW § 1116(a)(4) (McKinney 2019) (sales and use tax exemption). Other states with similar provisions include Colorado, Louisiana, New Jersey, and Utah. See COLO. REV. STAT. ANN. § 39-26-102(2.5) (2022) (relating to sales tax); LA. STAT. ANN. § 47:121(5) (1981) (corporate income tax exemption); N.J. STAT. ANN. § 54:32B-9(b) (West 2018) (sales and use tax exemption); UTAH CODE ANN. § 59-2-1101(6)(a)(ii) (West 2023) (property tax exemption).

under section 501(c)(3).³⁶ And in two states, courts have interpreted the relevant statute as implicitly incorporating a limit on political or lobbying activities.³⁷

The 1980s and 1990s saw several attempts by members of Congress to expand the lobbying limitation in various ways, primarily driven by Republicans seeking to “defund the Left.”³⁸ The most prominent proposal was included in bipartisan tax reform legislation; that proposal would have expanded the limitation to reach a broad range of advocacy and education activities, including “conducting seminars and other similar programs, . . . conducting research to educate Congress or the general public about public policy issues, [and] producing books and pamphlets.”³⁹ At the same time, various members of Congress tried to impose similar, speech-related conditions on government funding and participation in the Combined Federal Campaign through which federal employees can direct that a portion of their compensation be contributed to participating nonprofits.⁴⁰ The only proposal that became law was the “Simpson Amendment” to the Lobbying Disclosure Act of 1995, which prohibits nonprofits that are tax-exempt as social welfare organizations under section 501(c)(4) from lobbying if they receive federal funds.⁴¹ (As detailed later, federal tax law grants

36. See CONN. GEN. STAT. § 12-412(8) (2022) (sales and use tax exemption); KY. REV. STAT. § 139.495(1)(a) (West 2020) (sales and use tax limited exemption); N.M. STAT. ANN. § 7-9-60(A) (2021) (gross receipts tax deduction); VT. STAT. ANN. tit. 32, § 9743(3) (2022).

37. See *Workmen’s Circle Educ. Ctr. of Springfield v. Bd. of Assessors*, 51 N.E.2d 313, 316 (Mass. 1943) (property tax exemption); *N.J. Ass’n of Sch. Bus. Offs., Inc. v. Hamilton Township*, 22 N.J. Tax 467, 483–84 (2005) (property tax exemption).

38. See Mary Ziegler, *Sexing Harris: The Law and Politics of the Movement to Defund Planned Parenthood*, 60 BUFF. L. REV. 701, 711–13 (2012) (describing defund-the-Left efforts).

39. USA Tax Act of 1995, S. 722, 104th Cong. § 201(a) (proposed I.R.C. § 253(h)).

40. See Faith S. Kahn, *Pandora’s Box: Managerial Discretion and the Problem of Corporate Philanthropy*, 44 UCLA L. REV. 579, 639 n.239 (1997) (describing congressional hearings focused on banning advocacy oriented charities from the Combined Federal Campaign); Timothy C. Layton, Note, *Welfare for Lobbyists or Non-Profit Gag Rule: Can Congress Limit a Federal Grant Recipient’s Use of Private Funds for Political Advocacy*, 47 SYRACUSE L. REV. 1065, 1066–68 (1997) (describing the “Istook amendment” that sought to bar federal grant recipients from spending more than 5 percent of their non-federal funds on “political advocacy,” defined more broadly than lobbying under federal tax law).

41. See Lobbying Disclosure Act of 1995, Pub. L. No. 104-65, § 18, 109 Stat. 691, 703–04 (1995) (codified at 2 U.S.C. § 1611); Amy E. Moody, *Conditional Federal Grants: Can the Government Undercut Lobbying by Nonprofits Through Conditions Placed on Federal Grants*, 24 B.C. ENV’T AFF. L. REV. 113, 115–16 (1996) (describing the Simpson Amendment). The original provision applied to federal funds constituting “an award, grant, contract, loan, or any other form,” see Lobbying Disclosure Act of 1995 § 18, but the next year Congress amended the provision to remove “or any other form.” Balanced Budget Downpayment Act of 1996, Pub. L. No. 104-99, § 129(a), 110 Stat. 26, 34.

exemption under section 501(c)(4), but not deductibility of contributions under section 170, to organizations that promote “social welfare,” which is defined as “promoting in some way the common good and general welfare of the people of the community.”⁴²) While initially controversial, opposition to the Simpson Amendment reportedly faded when a workaround became apparent: creating two section 501(c)(4) organizations with common control, one that receives federal funds, and so is subject to the prohibition, and one that does not, and so is not.⁴³

B. Election-Related

The 1919 Treasury regulation and the 1930 *Slee* decision also suggested that political campaign intervention—that is, supporting or opposing candidates for elected public office—was inconsistent with deductibility of contributions and tax exemption for charities.⁴⁴ But Congress did not codify an express prohibition on such activity for charities until 1954, in what has come to be known as the “Johnson Amendment” (after its proponent, then-Senator Lyndon Johnson).⁴⁵ There is disagreement over whether the codification merely made explicit what had always been understood or represented a change in the law.⁴⁶ Regardless, and despite much criticism, numerous congressional attempts to repeal or amend it, and promises by then-President

42. Treas. Reg. § 1.501(c)(4)-1(a)(2)(i); see *infra* notes 260–267 and accompanying text.

43. Moody, *supra* note 41, at 138–39.

44. See *supra* notes 21–23 and accompanying text.

45. See Internal Revenue Code of 1954, Pub. L. No. 83-591, § 501(c)(3), 68 Stat. 3, 163; 100 CONG. REC. 9578, 9602, 9604 (1954), <https://www.congress.gov/83/crecb/1954/07/02/GPO-CRE-CB-1954-pt7-9-1.pdf> [<https://perma.cc/2PL6-EXY6>] (agreeing to Senator Johnson’s proposal to include the prohibition as an amendment). Congress added the prohibition to the charitable contribution deduction statute, and related estate and gift tax provisions, in 1969. Tax Reform Act of 1969, Pub. L. No. 91-172, § 201(a)(1), (d)(4), 83 Stat. 487, 553–62 (amending I.R.C. §§ 170(c)(2), 2055(a), 2106(a)(2), 2522); NINA J. CRIMM & LAURENCE H. WINER, POLITICS, TAXES, AND THE PULPIT: PROVOCATIVE FIRST AMENDMENT CONFLICTS 114 & n.184 (2011).

46. Compare 9 MERTENS LAW OF FEDERAL INCOME TAXATION *Religious, Charitable, Scientific, Literary and Educational Organizations* § 34.05 (rev. vol. 1983) (“[The 1954 codification] merely expressly stated what had always been understood to be the law. Political campaigns did not fit within any of the specified purposes listed in the section.”), with Houck, *supra* note 24, at 27–29 (detailing the history of the Johnson Amendment, including indications both from Senator Johnson’s counsel and the IRS Commissioner that federal tax law did not prohibit political campaign intervention prior to the amendment). See also Judith E. Kindell & John F. Reilly, *Election Year Issues*, in EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION (CPE) TECHNICAL INSTRUCTION PROGRAM FOR FISCAL YEAR 2002, at 335, 336 (2001), <https://www.irs.gov/pub/irs-tege/eotopici02.pdf> [<https://perma.cc/8MBS-JE84>] (noting that in 1934 Congress had considered but ultimately rejected a limit on participation in partisan politics when it enacted the limitation on lobbying).

Trump to “destroy” it, the prohibition remains in place.⁴⁷ In fact, in 1987 Congress both clarified the provision in minor ways and added an excise tax regime to provide additional penalties—beyond revocation of exemption—for violations.⁴⁸ But while the prohibition has now been in place for almost seventy years, it appears (based on the limited publicly available information) that IRS enforcement of it has been spotty.⁴⁹

In contrast to this rule for charities, the IRS has concluded that most non-charitable, tax-exempt nonprofits are permitted to engage in political campaign intervention if their other, exempt purpose—furthering activities represent their primary activity.⁵⁰ And in the 1970s, Congress enacted section 527 to clarify that organizations engaging primarily in political campaign intervention, including candidate campaign committees and political parties, are tax-exempt with respect to contributions they receive for such activity.⁵¹ But unlike donations to charities, donations to these noncharitable nonprofits are not deductible as charitable contributions, except for donations to veterans’ organizations.⁵²

47. See, e.g., Free Speech Fairness Act, S. 330, 116th Cong. §§ 1–2 (2019) (proposed amendment); H.R. 172, 115th Cong. § 1 (2017) (proposed repeal); Tom Gjelten, *Another Effort to Get Rid of the ‘Johnson Amendment’ Fails*, NPR (Mar. 22, 2018, 5:21 PM), <https://www.npr.org/2018/03/22/596158332/another-effort-to-get-rid-of-the-johnson-amendment-fails> [<https://perma.cc/XB8Z-RZ58>].

48. Revenue Act of 1987, Pub. L. No. 100-203, § 10711(a), 1010 Stat. 382, 464.

49. See Ellen P. Aprill & Lloyd H. Mayer, *21st Century Churches and Federal Tax Law*, U. ILL. L. REV. (forthcoming 2023) (manuscript at 47–48), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4346286 [<https://perma.cc/9CVE-ZY2S>] (summarizing enforcement data from the 2000s); Lloyd H. Mayer, *Grasping Smoke: Enforcing the Ban on Political Activity by Charities*, 6 FIRST AMEND. L. REV. 1, 4–5, 8–17 (2007) (incomplete data indicates limited enforcement of the prohibition, but also limited violations); Jonathan T. McCants, *Religious Organizations in an Election Year Will the Johnson Amendment Be Repealed or Just Ignored?*, 28 TAX’N EXEMPTS 39, 41–43 (2016) (concluding that enforcement of the prohibition, against at least religious charities, has “waxed and waned” and has now reached an “all-time low”).

50. See Kindell & Reilly, *supra* note 46, at 340 n.56. It is unclear if the primary activity requirement applies to all categories of tax-exempt organizations. See, e.g., Ellen P. Aprill, *A Case Study of Legislation vs. Regulation: Defining Political Campaign Intervention Under Federal Tax Law*, 63 DUKE L.J. 1635, 1664–65 (2014) (discussing ambiguous, nonprecedential IRS rulings on this point with respect to some types of tax-exempt organizations).

51. See Act of Jan. 3, 1975, Pub. L. No. 93-625, § 10, 88 Stat. 2108, 2116–19 (codified as amended at I.R.C. § 527); S. REP. NO. 93-1357, at 25–26 (1974); H.R. REP. NO. 93-1502, at 104 (1974).

52. See I.R.C. § 170(c). Donations to certain domestic fraternal entities exclusively for charitable and similar purposes, and to cemetery companies, are also deductible under section 170, but commentators generally conclude that political campaign intervention does not further charitable or similar purposes and that cemetery companies are not allowed to engage in political campaign intervention. See, e.g., Ellen P. Aprill, *Amending the Johnson Amendment in the Age of Cheap*

Several states have incorporated similar limits on election-related speech into their tax exemption statutes. For example, New York imposes the same prohibition as federal tax law on charity exemption from sales and use tax.⁵³ Several other states effectively impose such a limit because tax exemption is dependent on federal tax exemption under section 501(c)(3).⁵⁴ And in one state a court has interpreted a property tax exemption statute as implicitly incorporating a limit on political activity.⁵⁵

As others have detailed, the federal tax law rules and their interactions with federal and state election laws have at times been controversial.⁵⁶ In the 1990s, politicians and their legal advisors discovered that it was possible to create an organization that was not subject to federal and state election law disclosure requirements but nevertheless qualified as tax-exempt under section 527, which also exempted the organization from any federal tax law–required disclosures otherwise applicable to tax-exempt organizations.⁵⁷ Most notably, this meant these so-called stealth PACs did not have to publicly disclose the names and other identifying information of their significant donors.⁵⁸

Speech, 2018 U. ILL. L. REV. 1, 6 n.33 [hereinafter *Aprill, Amending the Johnson Amendment*]. Some but not all veterans' organizations that are chartered under federal law are also prohibited from engaging in political campaign intervention or lobbying or both by their charters. Ellen P. Aprill, *Governmental and Semi-Governmental Federal Charitable Entities* 37 n.373 (Loy. L. Sch. Working Paper, Paper No. 01, 2022), <https://ssrn.com/abstract=4031074> [<https://perma.cc/U96Y-FFDE>].

53. See N.Y. TAX LAW § 1116(a)(4) (McKinney 2019) (sales and use tax exemption). Other states with similar provisions include Colorado, New Jersey, and Utah. See COLO. REV. STAT. ANN. § 39-26-102(2.5) (2022) (relating to sales tax); N.J. STAT. ANN. § 54:32B-9(b) (West 2018) (sales and use tax exemption); UTAH CODE ANN. § 59-2-1101(6)(a)(i) (West 2023) (property tax exemption).

54. See *supra* note 36 and accompanying text.

55. See *Workmen's Circle Educ. Ctr. of Springfield v. Bd. of Assessors*, 51 N.E.2d 313, 316 (Mass. 1943).

56. E.g., Richard Briffault, *The 527 Problem . . . and the Buckley Problem*, 73 GEO. WASH. L. REV. 949 (2005); Elizabeth Kingsley & John Pomeranz, *A Crash at the Crossroads: Tax and Campaign Finance Laws Collide in Regulation of Political Activities of Tax-Exempt Organizations*, 31 WM. MITCHELL L. REV. 55 (2004); Gregg D. Polsky & Guy-Uriel E. Charles, *Regulating Section 527 Organizations*, 73 GEO. WASH. L. REV. 1000 (2005); Carrie E. Miller, Note, *Parting the Dark Money Sea: Exposing Politically Active Tax-Exempt Groups Through FEC-IRS Hybrid Enforcement*, 57 WM. & MARY L. REV. 341 (2015).

57. See, e.g., COMMON CAUSE, UNDER THE RADAR: THE ATTACK OF THE "STEALTH PACS" ON OUR NATION'S ELECTIONS 3–5 (2000), <http://web.archive.org/web/20011129075319/www.commoncause.org/publications/utr/stealth.pdf>; R. SAM GARRETT ET AL., SECTION 527 POLITICAL ORGANIZATIONS: BACKGROUND AND ISSUES FOR FEDERAL ELECTION AND TAX LAWS 5–10 (2008); Frances R. Hill, *Probing the Limits of Section 527 to Design a New Campaign Finance Vehicle*, 86 TAX NOTES 387, 390–95 (2000).

58. COMMON CAUSE, *supra* note 57, at 5; Briffault, *supra* note 56, at 959.

Congress addressed this issue in 2000, when it imposed a disclosure regime on 527s that mirrored federal election law disclosure requirements for political committees, including with respect to donor identities.⁵⁹ This led donors who wanted to avoid public disclosure while still supporting political campaign intervention, and those who wanted to accommodate them, to shift that activity and those donations to other types of tax-exempt organizations, arguably assisted by Supreme Court decisions reducing the range of communications reachable by federal and state election laws.⁶⁰ Those organizations are not required to publicly disclose their significant donors and, in a recent change, are also not required to disclose their significant donors to the IRS as part of their annual tax filings.⁶¹ Critics have labeled this flow of funds “dark money” and alleged it undermines democracy by hiding the financial supporters of organizations that support or oppose candidates, while others have defended this practice, arguing that disclosure chills financial support for candidate-related speech.⁶²

Regardless of the merits of these arguments, this shift has put pressure on the primary activity requirement for these noncharitable nonprofits, particularly section 501(c)(4) social welfare organizations.⁶³ This pressure led to a botched effort by the IRS to subject applications from such organizations to greater scrutiny, which was found to have—whether intentionally or not—unduly burdened mostly conservative organizations (often referred to as the “Tea Party scandal”), causing negative congressional and public attention for the IRS.⁶⁴ These developments have in turn led to various proposals to

59. Act of July 1, 2000, Pub. L. No. 106-230, § 2, 114 Stat. 477, 479; GARRETT ET AL., *supra* note 57, at 9–10; Polsky & Charles, *supra* note 56, at 1022.

60. See Ellen P. Aprill, *The Section 527 Obstacle to Meaningful Section 501(c)(4) Regulation*, 13 PITT. TAX REV. 43, 76 (2015) (growth in election-related spending by non-charitable, tax-exempt organizations); Miriam Galston, *Outing Outside Group Spending and the Crisis of Nonenforcement*, 32 STAN. L. & POL’Y REV. 253, 256–58 (2021) (same, and discussing possible effect of recent Supreme Court decisions).

61. See T.D. 9898, 85 Fed. Reg. 31959, 31965–66 (May 28, 2020) (final regulations eliminating reporting of significant donors to the IRS for noncharitable, tax-exempt organizations other than I.R.C. § 527 organizations); Galston, *supra* note 60, at 288 (no disclosure of donors required).

62. See Elizabeth Waitzman, *Free Ride on the Freedom Ride: How “Dark Money” Nonprofits Are Using Cases from the Civil Rights Era to Skirt Disclosure Laws*, 100 TEX. L. REV. 115, 117, 139–44 (2021) (summarizing these arguments).

63. Lloyd H. Mayer, *When Soft Law Meets Hard Politics: Taming the Wild West of Nonprofit Political Involvement*, 45 J. LEGIS. 194, 207–08 (2019).

64. See Lily Kahng, *The IRS Tea Party Controversy and Administrative Discretion*, 99 CORNELL L. REV. 41, 42–44 (2013); Jennifer Mueller, *Defending Nuance in an Era of Tea Party Politics: An Argument for the Continued Use of Standards to Evaluate the Campaign Activities of 501(c)(4) Organizations*, 22 GEO. MASON L. REV. 103, 116–19 (2014); Heath C. DeJean,

either tighten or loosen the political campaign intervention limitation on these noncharitable nonprofits, as well as to make other changes to the tax and election law rules applicable to them.⁶⁵

C. Hate Speech

The recent increased prominence of white supremacist and other organizations often characterized as hate groups led to the discovery that several of these groups have successfully sought recognition from the IRS as tax-exempt charities.⁶⁶ The IRS has been long aware of such groups seeking this status, and in few instances has successfully refused this recognition.⁶⁷ But the IRS has also recognized several other alleged hate groups as tax-exempt charities under section 501(c)(3), including groups that unapologetically work for the benefit of the “white race,” to maintain whites as the majority race in the United States, and similar goals.⁶⁸ This recognition led to a 2019 congressional hearing to explore stripping these groups of that status.⁶⁹ However, to date it appears no member of Congress has introduced legislation along these lines nor has there been any executive branch action aimed at removing that status from these groups.

Comment, *High-Stakes Word Search: Ensuring Fair and Effective IRS Centralization in Tax Exemption*, 75 LA. L. REV. 259, 280–83 (2014).

65. See, e.g., THE BRIGHT LINES PROJECT, <https://brightlinesproject.org/> [<https://perma.cc/2HMN-VHYA>] (“Advocating for Better Rules Defining Political Activity For Nonprofits”); April, *The Section 527 Obstacle to Meaningful Section 501(c)(4) Regulation*, *supra* note 60, at 77–80; Roger Colinvaux, *Social Welfare and Political Organizations: Ending the Plague of Inconsistency*, 21 N.Y.U. J. LEGIS. & PUB. POL’Y 481, 500–16 (2018); David S. Miller, *Reforming the Taxation of Exempt Organizations and Their Patrons*, 67 TAX LAW. 451, 479–80 (2014); Miller, *supra* note 56, at 374–83.

66. See, e.g., Axelrod et al., *supra* note 3; Eden Stiffman, *Dozens of “Hate Groups” Have Charity Status, Chronicle Study Finds*, CHRON. OF PHILANTHROPY (Dec. 22, 2016), <https://www.philanthropy.com/article/dozens-of-hate-groups-have-charity-status-em-chronicle-em-study-finds/> [<https://perma.cc/2Q48-Z2DH>].

67. See Nat’l All. v. United States, 710 F.2d 868 (D.C. Cir. 1983); Nationalist Movement v. Comm’r, 102 T.C. 558, *aff’d*, 37 F.3d 216 (5th Cir. 1994); Nationalist Found. v. Comm’r, 80 T.C.M. (CCH) 507 (2000).

68. See Michael Kunzelman, *White Nationalists Raise Millions with Tax-Exempt Charities*, SEATTLE TIMES (Dec. 22, 2016, 9:50 AM), <https://www.seattletimes.com/nation-world/white-nationalists-raise-millions-with-tax-exempt-charities/> [<https://perma.cc/DHP2-Y2UV>].

69. House Committee on Ways and Means, *W&M Oversight Subcommittee Hearing on How the Tax Code Subsidizes Hate*, YOUTUBE (Sept. 19, 2019), <https://www.youtube.com/watch?v=l62HVbqnNh8> [<https://perma.cc/YG3Q-P8UF>]; Michael Theis, *Lawmakers Clash over Whether to End Tax-Exempt Status for ‘Hate Groups’*, CHRON. OF PHILANTHROPY (Sept. 20, 2019), <https://www.philanthropy.com/article/lawmakers-clash-over-whether-to-end-tax-exempt-status-for-hate-groups/> [<https://perma.cc/23VQ-NYFL>].

To prevent these groups from obtaining or maintaining tax-exempt status under section 501(c)(3), it would be necessary to define “hate group” and consider whether, as defined, such groups could be denied that status because they fail to further an “educational” purpose or based on other grounds. The first issue when considering the tax status of these groups is therefore developing a definition of “hate group.” Several organizations, including the FBI, have definitions.⁷⁰ These definitions vary on several dimensions, including whether purposes or activities or both are considered, what characteristics of targeted groups are relevant, and what attitude or actions against the targeted groups are problematic. For example, the FBI definition, used for data collection purposes, provides that a hate group is an “organization whose primary purpose is to promote animosity, hostility, and malice against persons of or with a race, religion, disability, sexual orientation, ethnicity, gender, or gender identity which differs from that of the members or the organization.”⁷¹ In contrast, the Southern Poverty Legal Center has a broader definition that it uses to publicly identify alleged hate groups: “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.”⁷² That said, the various definitions have in common that a hate group somehow attacks or expresses hostility toward the targeted populations, including through speech.⁷³

70. See *infra* notes 71–73 and accompanying text.

71. FBI UNIFORM CRIME REPORTING PROGRAM, HATE CRIME DATA COLLECTION GUIDELINES AND TRAINING MANUAL 9 (2022), <https://www.oregon.gov/osp/Docs/UCR%20Hate%20Crime%20Data%20Collection%20Guidelines%20Training%20Manual.pdf> [<https://perma.cc/6HQU-77LQ>].

72. See *Frequently Asked Questions About Hate and Antigovernment Groups*, S. POVERTY L. CTR. (Feb. 16, 2022) <https://www.splcenter.org/20200318/frequently-asked-questions-about-hate-groups> [<https://perma.cc/Z4Z4-53XH>] (definition provided in response to the question “What is a hate group?”). The SPLC’s broad definition has proven particularly controversial. See, e.g., *Coral Ridge Ministries Media, Inc. v. Amazon.com, Inc.*, 6 F.4th 1247 (11th Cir. 2021), *cert. denied sub nom. Coral Ridge Ministries Media, Inc. v. S. Poverty L. Ctr.*, 142 S. Ct. 2453 (2022) (affirming motion to dismiss a defamation claim by nonprofit against SPLC for labeling the nonprofit a hate group).

73. For additional examples, see *Hate Group*, ADL (May 3, 2017), <https://www.adl.org/resources/glossary-terms/hate-group> [<https://perma.cc/96XE-XZP3>] (“An organization whose goals and activities are primarily or substantially based on a shared antipathy towards people of one or more other different races, religions, ethnicities/nationalities/national origins, genders, and/or sexual identities.”); *Coral Ridge Ministries Media, Inc. v. Amazon.com, Inc.*, 406 F. Supp. 3d 1258, 1271 (M.D. Ala. 2019), *aff’d*, 6 F.4th 1247 (11th Cir. 2021) (ministry suing the SPLC and others for being identified as a hate group proposed the following definition: “A hate group is

These organizations generally seek classification as charities on the grounds that they are furthering “educational” purposes, one of the listed purposes in section 501(c)(3) (and section 170(c)(2), which provides the deductibility of contributions to charities).⁷⁴ The Treasury Department has defined “educational” broadly for these purposes:

The term *educational*, as used in section 501(c)(3), relates to:

- (a) The instruction or training of the individual for the purpose of improving his capabilities; or
- (b) The instruction of the public on subjects useful to the individual and beneficial to the community.

An organization may be educational even though it advocates a particular position or viewpoint so long as it presents a sufficiently full and fair exposition of the pertinent facts as to permit an individual or the public to form an independent opinion or conclusion. On the other hand, an organization is not educational if its principal function is the mere expression of unsupported opinion.⁷⁵

The two sentences at the end of this definition have provided the IRS with a basis for denying recognition of tax-exempt section 501(c)(3) status to some purported educational organizations, including alleged hate groups.⁷⁶ The IRS applies those sentences through a “methodology test” that it developed in the wake of failing to sustain against constitutional challenge the denial of exemption for a group that promoted feminism.⁷⁷ That test identifies four factors indicating “that the method used by the organization to advocate its viewpoints or positions is not educational” and that the IRS has now incorporated into a Revenue Procedure:

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.

legally and commonly understood as one that engages [in] or advocates crime or violence against others based on their characteristics.”).

74. I.R.C. §§ 170(c)(2), 501(c)(3). The term “educational” is also used in similar provisions relating to federal estate and gift taxes. I.R.C. §§ 2055(a)(2), 2106(a)(2)(A)(ii), 2522(a)(2), (b)(2).

75. Treas. Reg. § 1.501(c)(3)-1(d)(3).

76. See, e.g., *Nat’l All. v. United States*, 710 F.2d 868, 869–70 (D.C. Cir. 1983).

77. See *Big Mama Rag, Inc. v. United States*, 631 F.2d 1030, 1039–40 (D.C. Cir. 1980).

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 by 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.⁷⁸

Explaining the methodology test in internal training materials, the IRS stated that the “presence of any of the [four] factors . . . made by an organization is indicative that the method used by the organization to advocate its viewpoints is not educational,” but “all the facts and circumstances must be considered.”⁷⁹ So, in theory the test could lead to denial of recognition as educational for many organizations, but in practice the IRS appears to have only relied on it in a relatively small number of instances over the past thirty-five years.⁸⁰

Scholars who have considered whether the IRS could deny recognition of tax-exempt section 501(c)(3) status to alleged hate groups under current law have tended to focus on the second prong. For example, Alex Reed took this approach in proposing that the IRS interpret the second prong “as prohibiting the use of discredited factual

78. Rev. Proc. 86-43, 1986-2 C.B. 729, 1986 WL 297205.

79. Ward L. Thomas & Robert Fontenrose, *Education, Propaganda, and the Methodology Test*, in EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION TECHNICAL INSTRUCTION PROGRAM FOR FISCAL YEAR 1997, at 83, 91, 92 (1997), <https://www.irs.gov/pub/irs-tege/eotopich97.pdf> [<https://perma.cc/ZV2C-RZA8>].

80. See *Nat'l All.*, 710 F.2d at 873–74 (white supremacist group); *Nationalist Movement v. Comm'r*, 102 T.C. 558, 591–94 (1994) (white supremacist group); *Nationalist Found. v. Comm'r*, 80 T.C.M. (CCH) 507 (2000) (white supremacist group); *Families Against Gov't Slavery v. Comm'r*, 93 T.C.M. 958 (2007) (group alleging government conspiracy to kidnap Hollywood celebrities); I.R.S. Priv. Ltr. Rul. 2015-19-034 (Feb. 11, 2015) (foreclosure and home loan modifications group); I.R.S. Priv. Ltr. Rul. 2014-30-014 (Apr. 30, 2014) (group seeking to protect victims of microwave, mind control, and other types of attacks); I.R.S. Chief Couns. Advisory 200620001 (May 19, 2006), 2006 WL 1321249 (credit counseling organization); I.R.S. Non-Docketed Serv. Advice Rev. 4040E (Apr. 16, 2004), 2004 WL 2203372 (group engaged in criticism of an unidentified government project); I.R.S. Non-Docketed Serv. Advice Rev. 0343R (July 19, 2002), 2002 WL 32864703 (group communicating about human rights); I.R.S. Non-Docketed Serv. Advice Rev. 0266R (Apr. 22, 1996), 1996 WL 33674854 (pro-life group). The IRS and the Tax Court also applied the methodology test to determine if a private foundation's communications were “educational” and so fell within an exception to the general prohibition on private foundations engaged in lobbying. *Parks v. Comm'r*, 145 T.C. 278, 317–21 (2015), *aff'd sub nom. Parks Found. v. Comm'r*, 717 F. App'x 712 (9th Cir. 2017); see also Jasper L. Cummings, Jr., Special Report, *Private Foundations and Two-Sided Lobbying*, 72 EXEMPT ORG. TAX REV. 637, 638–39 (2016) (criticizing the use of the methodology test in this context).

data” even as he criticized the methodology test as unconstitutional overall.⁸¹ Similarly, Jordanne Miller proposed that the IRS should apply the second prong using the *Daubert* factors relating to expert testimony.⁸² In contrast, Tommy Thompson argued that under current law only illegal actions such as violence against the targeted groups, or speech that advocated illegal activity, could justify denial of tax-exempt status.⁸³

Some scholars have also proposed modifying current law to make it more amenable to denying alleged hate groups section 501(c)(3) status. For example, Corey Brettscheider has proposed modifying the general “public benefit” requirement for section 501(c)(3) organizations to make being a hate group inconsistent with that requirement.⁸⁴ It might also be possible to deny section 501(c)(3) status on the ground that engaging in hate speech as a significant activity either demonstrates a substantial non-exempt purpose or is contrary to fundamental public policy.⁸⁵ But to date it appears neither Congress nor the executive branch have pursued any of these proposals or other grounds for denying tax-exempt status for alleged hate groups. The IRS also does not appear to have increased its oversight of alleged hate groups under

81. Alex Reed, *Playing Devil’s Advocate: The Constitutional Implications of Requiring Advocacy Organizations to Present Opposing Viewpoints*, 37 N.Y.U. REV. L. & SOC. CHANGE 591, 609 n.104 (2013).

82. Jordanne Miller, Comment, *Preventing Tax-Exempt Propaganda: The Case for Defining the Second Prong of the Methodology Test*, 68 CATH. U. L. REV. 551, 553, 565–67 (2019). Miller specifically recommended adopting the Supreme Court’s definition of “scientific knowledge,” which requires derivation from the scientific method and support by appropriate validation, using five factors (“(1) whether the theory or technique can be and has been tested; (2) whether the theory or technique has been subject to peer review and publication; (3) the known or potential rate of error; (4) the existence and maintenance of standards controlling the technique’s operation; and (5) whether the technique or theory has reached general acceptance within the relevant community”) to guide the inquiry of whether an inference or assertion was sufficiently truthful to qualify as such knowledge. *Id.* at 566; see also Darryll K. Jones, *Stochastic Terrorism, Speech Incantations and Federal Tax Exemptions*, N.M. L. REV. (forthcoming 2023) (manuscript at 43–45) <https://ssrn.com/abstract=4343878> [<https://perma.cc/CVD2-38QN>] (proposing a wholesale revision of the methodology test).

83. Tommy F. Thompson, *The Availability of the Federal Educational Tax Exemption for Propaganda Organizations*, 18 U.C. DAVIS L. REV. 487, 551–52 (1985).

84. Corey Brettscheider, *Democratic Persuasion and Freedom of Speech: A Response to Four Critics and Two Allies*, 79 BROOK. L. REV. 1059, 1061–62 (2014).

85. See Treas. Reg. § 1.501(c)(3)-1(c)(1) (engaging in activities that do not further an exempt purpose as a substantial part of an organization’s activities is inconsistent with section 501(c)(3) status); *Bob Jones Univ. v. United States*, 461 U.S. 574, 586 (1985) (section 501(c)(3) incorporates a not-against-fundamental-public-policy condition); Jones, *supra* note 82, at 25 (arguing that hate groups are by their very nature incompatible with charitable status under federal tax law).

the existing methodology test based on the relatively few published IRS decisions and related court cases in this area.⁸⁶

D. Fake News

It should first be acknowledged that while some tax-exempt nonprofits promulgate false information, it is larger trends—primarily the decreasing cost of sharing information via digital communications, including social media—that have led to the explosive growth in “fake news.”⁸⁷ Any attempt to limit such speech by tax-exempt nonprofits is therefore unlikely to significantly reduce the spread of disinformation.⁸⁸ Rather, such attempts are more about denying both the subsidy and “halo effect” resulting from IRS recognition of tax exemption and particularly charitable status.

The IRS has used the methodology test to deny tax-exempt charity status to several purportedly educational organizations that disseminated false information. One such instance involved an organization that claimed the federal government was enslaving and entrapping Hollywood celebrities, where the IRS and the Tax Court found that the organization’s materials failed all four prongs of the methodology test.⁸⁹ In another instance, the IRS held that the organization advocated for its positions with literature that included “numerous inflammatory and derogatory terms and statements” and provided “minimal factual information concerning the arguments advanced by those who are not in agreement with its position.”⁹⁰ In that instance the redactions in the IRS ruling make it impossible to know what exact factual positions

86. See *supra* note 80.

87. See, e.g., RICHARD L. HASEN, CHEAP SPEECH: HOW DISINFORMATION POISONS OUR POLITICS—AND HOW TO CURE IT 19–22 (2022); Larry Kramer, *A Deliberate Leap in the Opposite Direction: The Need to Rethink Free Speech*, in SOCIAL MEDIA, FREEDOM OF SPEECH, AND THE FUTURE OF OUR DEMOCRACY 17, 34 (Lee C. Bollinger & Geoffrey R. Stone eds., 2022); April, *Amending the Johnson Amendment*, *supra* note 52, at 8–9; Kenneth Grad & Amanda Turnbull, *Harmful Speech and the Covid-19 Penumbra*, 19 CANADIAN J.L. & TECH., July 2021, at 1, 14–15; Tawanna D. Lee, Note, *Combating Fake News with “Reasonable Standards,”* 43 HASTINGS COMM’NS & ENT. L.J. 81, 82–83 (2021).

88. For a recent examination of attempts to counter disinformation in the election context, see Richard K. Sherwin, *Anti-Speech Acts and the First Amendment*, 16 HARV. L. & POL’Y REV. 353 (2022). Interestingly, Facebook and Instagram suspended for misinformation one of the anti-vaccine charities discussed below. See Sheera Frenkel, *Facebook and Instagram Remove Robert Kennedy Jr’s Nonprofit for Misinformation*, N.Y. TIMES (Aug. 18, 2022), <https://www.nytimes.com/2022/08/18/technology/facebook-instagram-robert-kennedy-jr-misinformation.html> [<https://perma.cc/8TMN-LV86>] (discussing Children’s Health Defense); *infra* note 97 and accompanying text (same).

89. *Families Against Gov’t Slavery v. Comm’r*, 93 T.C.M. (CCH) 958, 959 (2007).

90. I.R.S. Non-Docketed Serv. Advice Rev. 4040E (Apr. 16, 2004), 2004 WL 2203372.

the nonprofit was asserting.⁹¹ A third instance involved a pro-life group that the IRS held primarily promoted a book in which “[t]he presentation of viewpoints or positions is unsupported by facts” and “[t]he facts that purport to support the viewpoints are distorted.”⁹²

At the same time, there are examples of other nonprofits that promulgate inaccurate information and yet have received and retained recognition from the IRS as tax-exempt charities. For example, the Institute for Historical Review has long been identified as a prominent Holocaust denial organization.⁹³ Yet it is a tax-exempt charity.⁹⁴ Similarly, Architects & Engineers for 9/11 Trust, also a tax-exempt charity, promotes the debunked view that the destruction of the World Trade Center was the result of a controlled demolition.⁹⁵ Some religiously motivated groups are also arguably in this category because they promote themselves as educational organizations, although they may also rely on promoting a religious, as opposed to educational, purpose as the basis for their tax-exempt status under section 501(c)(3) and therefore do not solely rely on satisfying the methodology test.⁹⁶

91. *Id.*

92. I.R.S. Non-Docketed Serv. Advice Rev. 0266R (Apr. 22, 1996), 1996 WL 33674854.

93. See *Institute for Historical Review*, WIKIPEDIA, https://en.wikipedia.org/wiki/Institute_for_Historical_Review#cite_note-Denial-1 [<https://perma.cc/8AUZ-23XT>] (see notes 1–7 (citing sources) and accompanying text).

94. Under the name Legion For the Survival of Freedom, Inc. See IHR Donation Page, INST. FOR HIST. REV., <http://www.ihr.org/main/support.shtml> [<https://perma.cc/NV4D-PEDD>] (confirmed on Aug. 18, 2022, using the IRS online Tax Exempt Organization Search tool (<https://apps.irs.gov/app/eos/>)).

95. See *Architects & Eng'rs for 9/11 Truth v. Raimondo*, No. 21-CV-02365 (TNM), 2022 WL 3042181 (D.D.C. Aug. 2, 2022) (dismissing lawsuit seeking “correction” of 9/11-related report for lack of standing); *Architects & Engineers for 9/11 Truth*, WIKIPEDIA, https://en.wikipedia.org/wiki/Architects_%26_Engineers_for_9/11_Truth [<https://perma.cc/2F65-ZZYX>] (see footnotes 6–12 and accompanying text); *Donate to Architects & Engineers for 9/11 Truth*, AE911TRUTH, <https://action.ae911truth.org/donate> [<https://perma.cc/QU5L-7J5R>] (confirmed on Aug. 18, 2022 using the IRS online Tax Exempt Organization Search tool under the name Architects & Engineers for 911 (<https://apps.irs.gov/app/eos/>)). Another possible example is the Texas Public Policy Foundation, which has been accused of spreading “misinformation about climate science.” David Gelles, *The Texas Group Waging a National Crusade Against Climate Action*, N.Y. TIMES (Dec. 4, 2022), <https://www.nytimes.com/2022/12/04/climate/texas-public-policy-foundation-climate-change.html> [<https://perma.cc/G3JF-RDHL>].

96. For example, the Creation Museum teaches the young-Earth creationist view that the Earth is approximately 6,000 years old. *Creation Museum*, WIKIPEDIA, https://en.wikipedia.org/wiki/Creation_Museum [<https://perma.cc/B3FR-WC6H>]. But it is operated as part of a ministry, the tax-exempt charity Answers in Genesis, which presumably bases its claim to that status on its religious purpose instead of, or in addition to, its educational purpose. (Tax-exempt charity status confirmed on Aug. 18, 2022, using the IRS online Tax Exempt Organization Search tool (<https://apps.irs.gov/app/eos/>)). Some purported hate groups may also claim tax exemption under section 501(c)(3) as religious organizations. See, e.g., Liam Adams, *Conservative Rod of Iron Ministries Building Global Retreat Center in East Tennessee*, TENNESSEAN (Oct. 20, 2021, 1:29 PM),

The COVID-19 pandemic also highlighted that there are several tax-exempt charities that oppose vaccinations or promote questionable, or even harmful, health care remedies. For example, the Center for Countering Digital Hate identified organizations linked to individuals spreading inaccurate anti-vaccine messages, four of which are tax-exempt charities.⁹⁷ And an organization that was at the forefront of promoting the use of the parasite medicine ivermectin to treat COVID-19 is the Front Line COVID-19 Critical Care (FLCCC) Alliance, a tax-exempt charity.⁹⁸ This is despite an unequivocal statement from the Food and Drug Administration (FDA) that ivermectin should not be used to treat or prevent COVID-19.⁹⁹

It is unclear why the IRS initially granted these groups recognition as tax-exempt under section 501(c)(3) and why the IRS has not challenged that recognition since. At a minimum, based simply on their claims identified above, it appears that they would be vulnerable under the second, distorting-facts prong of the methodology test. It may be that the IRS is wary of applying the methodology test too aggressively, both given its previous defeat on constitutional grounds when attempting to interpret “educational” and the possibility such a denial would create political problems for the IRS.¹⁰⁰

<https://www.tennessean.com/story/news/religion/2021/10/20/conservative-rod-iron-ministries-building-global-retreat-center-east-tennessee/8522996002/> [https://perma.cc/7RKN-EMCG].

97. See CTR. FOR COUNTERING DIGIT. HATE, *THE DISINFORMATION DOZEN: WHY PLATFORMS MUST ACT ON TWELVE LEADING ONLINE ANTI-VAXXERS 10* (2021), <https://counterhate.com/wp-content/uploads/2022/05/210324-The-Disinformation-Dozen.pdf> [https://perma.cc/JJ5L-P2Z9]; Shannon Bond, *Just 12 People Are Behind Most Vaccine Hoaxes on Social Media, Research Shows*, NPR (May 14, 2021, 11:48 AM), <https://www.npr.org/2021/05/13/996570855/disinformation-dozen-test-facebooks-twitthers-ability-to-curb-vaccine-hoaxes> [https://perma.cc/CQ8K-2BT4]. The four tax-exempt charities are Children’s Health Defense, Informed Consent Action Network, the National Vaccine Information Center, and the Organic Consumers Association, and their tax-exempt statuses were confirmed on Aug. 18, 2022, using the IRS online Tax Exempt Organization Search tool (<https://apps.irs.gov/app/eos/>). See also Casey Tolan & Yahya Abou-Ghazala, *Foundation Behind Network Pushing Election and Coronavirus Conspiracies Had Its Tax-Exempt Status Revoked. It Still Solicits Donations*, CNN, (Jan. 10, 2022, 3:11 PM), <https://www.cnn.com/2022/01/10/politics/worldview-weekend-foundation-tax-status-irs-invs/index.html> [https://perma.cc/SKE9-R588] (revocation for failure to file required IRS annual information returns, not failure to satisfy the methodology test).

98. See *supra* notes 4–5 and accompanying text.

99. FDA, *supra* note 6; see also WHO *Advises That Ivermectin Only Be Used to Treat COVID-19 Within Clinical Trials*, WORLD HEALTH ORG. (Mar. 31, 2021), <https://www.who.int/news-room/feature-stories/detail/who-advises-that-ivermectin-only-be-used-to-treat-covid-19-within-clinical-trials> [https://perma.cc/M6AV-5CN3]; Sidik, *supra* note 6 (reporting on a study that found ivermectin did not speed recovery from COVID-19 under the conditions tested).

100. See *supra* note 64 and accompanying text (Tea Party scandal); *supra* note 77 and accompanying text (defeat).

Finally, several media reports have linked tax-exempt nonprofits to efforts spreading “Big Lie” conspiracy theories that challenge the 2020 election results.¹⁰¹ However, a close read of those reports reveals few specific allegations of tax-exempt nonprofits directly supporting demonstrably false claims about the 2020 election, as opposed to questioning the reliability of some election results and advocating for legal changes they assert will improve that reliability in the future. For example, in a lengthy *New Yorker* piece, Jane Mayer identified numerous tax-exempt nonprofits involved in questioning the 2020 election results or funding groups that did so but provided few specifics, including whether any of those groups took the position that President Biden was not actually elected.¹⁰² Similarly, Murtaza Hussain in *The Intercept* identified a number of tax-exempt nonprofits that engaged in such activities, but again with no specifics that would clearly establish the existence of one or more of the methodology test factors.¹⁰³ Perhaps the most specific media allegations of spreading fake news relate to the Worldview Weekend Foundation, which funds the Worldview Weekend Broadcast Network that allegedly spreads both 2020 “election denial” stories and false claims about coronavirus vaccines.¹⁰⁴

Relatedly, the Anti-Defamation League (ADL) alleges that several tax-exempt charities are related to individuals and groups involved in the Capitol attack on January 6, 2021, including several groups associated with the Oath Keepers movement and several other groups inspired by the Three Percenters movement.¹⁰⁵ While it

101. E.g., Murtaza Hussain, *Secret Donors to Nonprofit Pushing Trump’s “Big Lie” Election Conspiracy Revealed*, INTERCEPT (Aug. 7, 2021, 3:00 AM), <https://theintercept.com/2021/08/07/election-fraud-bradley-impact-fund-donors/> [<https://perma.cc/9LD8-6WNG>]; Jane Mayer, *The Big Money Behind the Big Lie*, NEW YORKER (Aug. 2, 2021), <https://www.newyorker.com/magazine/2021/08/09/the-big-money-behind-the-big-lie> [<https://perma.cc/Z9ZA-HQZ5>].

102. See Mayer, *supra* note 101 (naming ALEC, the Election Integrity Project California, FreedomWorks, the Heritage Foundation, the Honest Elections Project, the Lynde and Harry Bradley Foundation, and True the Vote).

103. See Hussain, *supra* note 101 (naming the Heritage Foundation, the Lynde and Harry Bradley Foundation, Project Veritas, the Public Interest Legal Foundation, and Turning Point USA).

104. See Tolan & Abou-Ghazala, *supra* note 97 (reporting that the IRS revoked the foundation’s tax-exempt status for failing to file required annual information returns, but that the foundation was still soliciting donations and seeking reinstatement of that status).

105. ADL, *supra* note 3, at 5–6; see also Sue Sturgis, *Institute Index: How U.S. Taxpayers Subsidize the Oath Keepers*, FACING S. (July 15, 2022), <https://www.facing-south.org/2022/07/oath-keepers-militia-nonprofits-IRS-taxes>

-subsidies [<https://perma.cc/G4DD-PGHE>]; Rogers Statement, *supra* note 3, at 11 (one-third of militia groups identified, including the Oath Keepers, have federal tax-exempt status); Michael Kunzelman, *Nonprofit Created by O.C. Capital Riot Suspect May Face Scrutiny*, ORANGE CNTY. REG. (June 16, 2021, 1:06 AM) <https://www.oregister.com/2021/06/16/nonprofit-created-by-o-c-capitol-riot-suspect-may-face-scrutiny/> [<https://perma.cc/RE9Y-BSUY>] (discussing the section

forwarded its report to the IRS, it is too soon to know whether the IRS will take any action in response.¹⁰⁶ In addition, media reports indicate that several noncharitable, tax-exempt nonprofits were involved in organizing the rally that preceded the attack.¹⁰⁷ But for both the charitable and noncharitable tax-exempt nonprofits, negative actions by the IRS may be unlikely because of IRS resource constraints, the potential political backlash against the IRS, and the difficulty of proving that the groups in fact are not educational under the methodology test (or promoted or supported the violence that followed the rally, which was illegal and so inconsistent with tax-exempt status).¹⁰⁸

E. Solicitation

In contrast to the other types of speech already considered, for the most part attempts to regulate charitable solicitation or solicitations for donations by other types of nonprofits have not been tied to federal or state tax benefits.¹⁰⁹ But there are two exceptions.

501(c)(3) American Phoenix Project); Jaclyn Peiser, *He Was at the Capitol on Jan. 6. Now, Feds Say He Used His Nonprofit to Advocate Violence*, WASH. POST (June 17, 2021, 6:49 AM) <https://www.washingtonpost.com/nation/2021/06/17/irs-alan-hostetter-nonprofit-capitol-riot/> [https://perma.cc/L3ZY-3WJD] (same).

106. See ADL Seeks Review of Tax-Exempt Hate-Sponsoring NPOs, NONPROFIT TIMES (July 26, 2021), <https://www.thenonprofittimes.com/regulation/adl-seeks-review-of-tax-exempt-hate-sponsoring-npos/> [https://perma.cc/92R2-8R4S]. Even if the IRS has begun examinations of any of the groups named in the ADL report, it cannot share that information, so the examinations would only become known if the groups themselves publicized them. See *Exempt Organizations General Issues: Complaints about Activities of Exempt Organizations*, IRS, <https://www.irs.gov/charities-non-profits/exempt-organizations-general-issues-complaints-about-activities-of-exempt-organizations> [https://perma.cc/DJ2J-QLAT].

107. E.g., Jamie Corey, *Republican Attorneys General Dark Money Group Organized Protest Preceding Capital Mob Attack*, DOCUMENTED (Jan. 7, 2021), <https://documented.net/reporting/republican-attorneys-general-dark-money-group-organized-protest-preceding-capitol-mob-attack> [https://perma.cc/M58P-QJ4R]; Brian Schwartz, *Pro-Trump Dark Money Groups Organized the Rally That Led to Deadly Capitol Hill Riot*, CNBC, (Jan. 9, 2021, 2:52 PM), <https://www.cnbc.com/2021/01/09/pro-trump-dark-money-groups-organized-the-rally-that-led-to-deadly-capitol-hill-riot.html> [https://perma.cc/MF4W-9SJU].

108. See Ellen P. Aprill, *Nonprofits Helped Organize the Pro-Trump Rally Before the Capital Siege*, THE CONVERSATION (Jan. 15, 2021, 8:20 AM), <https://theconversation.com/nonprofits-helped-organize-the-pro-trump-rally-before-the-capitol-siege-but-they-probably-wont-suffer-any-consequences-153271> [https://perma.cc/B42P-9SD5]; Rev. Rul. 75-384, 1975-2 C.B. 204, 1975 WL 34915 (inducing or encouraging criminal acts is inconsistent with tax-exempt status under either section 501(c)(3) or section 501(c)(4), including if those acts are civil disobedience engaged in for political reasons).

109. See James J. Fishman, *Who Can Regulate Fraudulent Charitable Solicitation?*, 13 PITT. TAX REV. 1, 14–17 (2015) (describing existing government regulation of charitable solicitation); Joseph W. Mead, *Local Regulation of Charitable Solicitation*, 5 J. PUB. & NONPROFIT AFFS. 178, 180–81, 184–91 (2019) (describing existing government regulation of charitable solicitation, including by localities).

First, Congress requires nonprofits that are tax-exempt but not eligible to receive tax deductible contributions to explicitly state so in their solicitations.¹¹⁰ This requirement is an attempt to prevent donors from being confused about the deductibility of their contributions to such organizations.¹¹¹ There does not appear to be any information regarding the extent to which noncharitable tax-exempt nonprofits comply with this requirement or the extent to which the IRS enforces it.

Second, one state (Oregon) has made the ability to deduct contributions for state tax purposes conditional on the organization using at least 30 percent of the organization's total annual functional expenses on program services.¹¹² This provision relates to solicitation because some states have sought to require charities to inform potential donors of the percentage of funds raised spent on program services, as opposed to fundraising or administration, only to have the Supreme Court conclude such requirements are unconstitutional.¹¹³ But as with the federal provision, it is unclear to what extent Oregon enforces this provision. The Oregon Department of Justice in 2015 listed several entities that did not qualify as charities because of this rule but has not listed any additional entities since then.¹¹⁴ This lack of enforcement may stem from a constitutional challenge made by one of the listed organizations; an administrative law judge rejected the challenge, but the organization then appealed.¹¹⁵ It appears the parties stipulated to the dismissal of the appeal, and the organization is no longer on the list of disqualified entities but is instead currently registered as a charity in Oregon.¹¹⁶

110. I.R.C. § 6113; Gregory I. Devorkin, *Dual Character Contributions: A Proposed Penalty to Deter Charities from Providing Erroneous Information Regarding Deductibility*, 67 MARQ. L. REV. 294, 305–06 (1992).

111. *Treasury Explains Policy Behind Rule to Identify When Donations Are Nondeductible*, TAX NOTES TODAY, 88 TNT 177-8 (Aug. 12, 1988).

112. OR. REV. STAT. § 128.760 (2022); see also James J. Fishman, *Rethinking Riley: New Approaches to State and Federal Regulation of Charitable Solicitation*, 25 GEO. MASON L. REV. 471, 511 (2018) (describing the Oregon statute and explaining why and how it relates to regulation of charitable solicitation).

113. *Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781, 795–801 (1988).

114. *Disqualified Oregon Charities*, OR. DEP'T OF JUST., <https://www.doj.state.or.us/charitable-activities/wise-giving/disqualified-oregon-charities/> [<https://perma.cc/T44W-WC5Q>].

115. Petitioner Car Donation Foundation's Amended Opening Brief at 513–14, *Car Donation Found. v. Dep't of Just.*, No. A164973 (Or. Ct. App. Nov. 28, 2017), 2017 WL 10443837.

116. See Docket, *Car Donation Found. v. Dep't of Just.*, No. A164973 (Or. Ct. App. Sept. 9, 2018) (listing "Case Dispositional Decision—Order—Dismissing—Stipulated Motion," dated Sept. 5, 2018); OR. DEP'T OF JUST., *supra* note 114 (list of disqualified charities). Current registration confirmed on Aug. 18, 2022, by a search of charitable organizations registered in Oregon at <https://justice.oregon.gov/charities>.

F. Other Speech

On occasion, public officials have suggested that nonprofits that engage in other forms of disfavored speech could be placing their tax-exempt status at risk. For example, on July 10, 2020, President Trump said in a pair of tweets:

Too many Universities and School Systems are about Radical Left Indoctrination, not Education. Therefore, I am telling the Treasury Department to re-examine their Tax-Exempt Status and/or Funding, which will be taken away if this Propaganda or Act Against Public Policy continues. Our children must be Educated, not Indoctrinated!¹¹⁷

The tweets prompted letters from House Ways and Means Chairman Richard Neal to the IRS, the Treasury Inspector General for Tax Administration (TIGTA), and the Treasury's Office of the Inspector General (OIG).¹¹⁸ Both TIGTA and OIG responded, stating no IRS officials had been directed to investigate the tax-exempt status of any specific universities or school systems, although the Treasury Secretary expected the Office of Tax Policy to conduct a policy review.¹¹⁹ The tweet also prompted a scholarly response criticizing the tweet as lacking any basis in law and indeed as likely violating a more than twenty-years-old statute prohibiting the President from telling the IRS to investigate any specific taxpayer.¹²⁰

As mentioned previously, public officials have also attempted, sometimes successfully, to limit the speech of recipients of government funding, including tax-exempt nonprofits, through conditions on that funding.¹²¹ For example, the 1995 Simpson Amendment specifically targeted the speech of social welfare organizations tax-exempt

117. Donald Trump (@realDonaldTrump), TWITTER (July 10, 2020, 8:49 AM), <https://twitter.com/realDonaldTrump/status/1281616586273468416> [<https://perma.cc/749J-UMZV>].

118. Press Release, Richard E. Neal, Chairman, H. Comm. on Ways & Means, Chairman Neal Calls for Immediate Oversight of Trump's Unlawful Directive to Examine the Tax-Exempt Status of Select Universities and School Systems (July 15, 2020), <https://neal.house.gov/news/document/single.aspx?DocumentID=1440> [<https://perma.cc/A5RJ-KAPH>].

119. Letter from Rich Delmar, Deputy Inspector Gen., Tax Admin., U.S. Treas., to Richard E. Neal, Chairman, H. Comm. on Ways & Means (July 31, 2020) (on file with author); Letter from J. Russell George, Inspector Gen., Tax Admin., U.S. Treas., to Richard E. Neal, Chairman, H. Comm. on Ways & Means (July 31, 2020) (on file with author).

120. Samuel D. Brunson & Ellen P. Aprill, *Trump Tweets, Tax Law and Alleged University "Propaganda,"* THE HILL (July 19, 2020, 9:00 PM) <https://thehill.com/opinion/education/508034-trump-tweets-tax-law-and-alleged-university-propaganda/> [<https://perma.cc/V29V-5XLJ>].

121. See *supra* note 40 and accompanying text.

under section 501(c)(4) by prohibiting them from receiving any federal funds if they engaged in lobbying.¹²² Similarly, the TIGTA and OIG letters stated that the concern raised in President Trump's tweets would be referred to the Department of Education, which oversees federal funding for colleges and universities and loans to their students.¹²³ But while such limitations may be targeted at tax-exempt nonprofits, they are not conditions imposed on tax exemption or other tax benefits and so are beyond the scope of this Article.

II. CONSTITUTIONAL CONCERNS

Both the current and proposed limits on speech by tax-exempt nonprofits may be surprising given the robust protection of speech by the First Amendment.¹²⁴ Not all the current limits have faced constitutional challenges in court, much less challenges that reached the Supreme Court. But courts that have considered First Amendment free speech challenges to these limits have found them to be constitutional based on a two-part rationale. First, Congress is permitted to condition the receipt of tax benefits on not engaging in certain types of speech because those benefits are a subsidy provided by the federal government.¹²⁵ And second, the nonprofits subject to these limits can still engage in the relevant speech with non-subsidized funds because the IRS makes it relatively easy for a tax-exempt nonprofit to create affiliated entities to engage in the relevant speech.¹²⁶ As will be detailed in this part, courts have also rejected constitutional challenges based on the First Amendment's Free Exercise of Religion Clause and the equal

122. See *supra* note 41 and accompanying text.

123. See Letter from Rich Delmar, *supra* note 119, at 1–2; Letter from J. Russell George, *supra* note 119, at 2.

124. This part takes the current First Amendment landscape as a given and so does not consider proposals to revise First Amendment jurisprudence to counter hate speech, fake news, or other forms of problematic speech. See, e.g., Kramer, *supra* note 87; Cass R. Sunstein, *A Framework for Regulating Falsehoods*, in SOCIAL MEDIA, FREEDOM OF SPEECH, AND THE FUTURE OF OUR DEMOCRACY, *supra* note 87, at 53, 53; Stephen M. Feldman, *Hate Speech and Democracy*, 32 CRIM. JUST. ETHICS 78, 86–87 (2013) (reviewing JEREMY WALDRON, *THE HARM IN HATE SPEECH* (2014)) (explaining how current approaches to the First Amendment would need to change to permit governments to regulate hate speech); Brian Leiter, *The Epistemology of the Internet and the Regulation of Speech in America*, 20 GEO. J.L. & PUB. POL'Y 903, 928 (2022); Jeff Wise, *Do You Have a Right Not to Be Lied to? The Legal Thinkers Reconsidering Freedom of Speech.*, N.Y. MAG.: INTELLIGENCER (Nov. 28, 2022), <https://nymag.com/intelligencer/2022/11/academics-are-reconsidering-the-meaning-of-free-speech.html> [<https://perma.cc/ATG9-CRBZ>].

125. See *infra* notes 134–135 and accompanying text.

126. See *infra* notes 137–138, 143 and accompanying text.

protection component of the Fifth Amendment.¹²⁷ This part details the relevant holdings and explains to what extent, even given gaps in their reasoning and coverage, Congress (and the states) likely can constitutionally condition tax benefits for nonprofits on not engaging in certain types of speech under existing precedents. This part also identifies three significant open constitutional issues that relate to the ability of Congress and state legislatures to expand the existing speech limitations.

A. Free Speech

The First Amendment provides with respect to speech: “Congress shall make no law . . . abridging the freedom of speech.”¹²⁸ It is also well established that this Free Speech Clause by implication provides a right to freedom of association to engage in collective speech.¹²⁹ Nevertheless, federal courts have generally rejected constitutional free speech challenges to the existing speech-related restrictions on tax-exempt charities, albeit with some important caveats.¹³⁰

1. Existing Restrictions on Lobbying and Election-Related Speech

The Supreme Court has squarely addressed the constitutionality of the existing federal tax law limitation on lobbying by tax-exempt charities.¹³¹ In *Regan v. Taxation With Representation of Washington*,¹³² the Court rejected a Free Speech Clause challenge to that limit.¹³³ The Court concluded that the tax benefits enjoyed by charities are subsidies: “[b]oth tax exemptions and tax-deductibility are a form of subsidy that is administered through the tax system.”¹³⁴ It then

127. See *infra* Sections II.B–C.

128. U.S. CONST. amend. I.

129. See *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2382 (2021).

130. See *infra* notes 133, 143 and accompanying text.

131. See *supra* notes 24–27 and accompanying text (lobbying limit).

132. 461 U.S. 540 (1983).

133. *Id.*

134. *Id.* at 544; see also *Bob Jones Univ. v. United States*, 461 U.S. 574, 591 (1983) (“When the Government grants exemptions or allows deductions all taxpayers are affected; the very fact of the exemption or deduction for the donor means that other taxpayers can be said to be indirect and vicarious ‘donors.’”). While some commentators have argued the exemption and even the deduction are not actually subsidies, the Supreme Court has not indicated any willingness to question this conclusion. See, e.g., William Andrews, *Personal Deductions in an Ideal Income Tax*, 86 HARV. L. REV. 309, 345–46 (1972) (arguing that in most situations the charitable contribution deduction is not a subsidy); Ellen P. Aprill & Lloyd Hitoshi Mayer, *Tax Exemption Is Not a Subsidy Except for When It Is*, 172 TAX NOTES FED. 1887, 1892–95 (2021) (arguing that tax exemption is a subsidy only in certain situations and for certain types of income of nonprofit organizations); Johnny R. Buckles, *The Community Income Theory of the Charitable Contributions Deduction*, 80 IND. L.J.

reasoned that it was constitutional for Congress to choose not to permit these subsidies to be used to support lobbying.¹³⁵ The Court also noted in its discussion of an equal protection challenge that the lobbying prohibition did not and was not intended to suppress any specific ideas or viewpoints.¹³⁶ In a concurrence, Justice Blackmun added an important caveat to the Free Speech Clause conclusion: there must exist a relatively easy way for a charity to engage in the otherwise limited speech with non-deductible funds, which Justice Blackmun found was provided to section 501(c)(3) charities by their ability to create a closely affiliated section 501(c)(4) social welfare organization.¹³⁷ While only a concurrence, in a later opinion the Court confirmed that an aspect of its holding is the availability of this alternate channel for the otherwise limited speech.¹³⁸

The Supreme Court has never considered the constitutionality of the separate political campaign intervention prohibition for tax-exempt charities, which bars any speech (or other actions) that would support or oppose the election of a candidate for public office.¹³⁹ But in *Branch Ministries v. Rossotti*,¹⁴⁰ the U.S. Court of Appeals for the District of Columbia Circuit applied the reasoning of *Taxation With Representation* to conclude that this prohibition was constitutional.¹⁴¹ The court noted that the political campaign activity prohibition was

947 (2005) (arguing that tax exemption and tax deductions for charities reflect theoretically correct taxation of community income and therefore are not subsidies).

135. *Tax 'n With Representation of Wash.*, 461 U.S. at 544–45.

136. *Id.* at 548; see also Marjorie Heins, *Viewpoint Discrimination*, 24 HASTINGS CONST. L.Q. 99, 107 (1996) (noting that the Court in *Taxation With Representation* relied in part on the lobbying limitation not being viewpoint-based).

137. *Tax 'n With Representation of Wash.*, 461 U.S. at 552–54 (Blackmun, J., concurring).

138. See *FCC v. League of Women Voters*, 468 U.S. 364, 399–400 (1984); *Branch Ministries v. Rossotti*, 211 F.3d 137, 143 (D.C. Cir. 2000) (noting this confirmation). As noted by Professor Eugene Volokh during the symposium, an alternate approach that would lead to the same conclusion would be to consider the subsidization of nonprofits as creating a limited public forum for which Congress could constitutionally prohibit certain types of speech but not specific viewpoints. See Corey Brettschneider, *Value Democracy as the Basis for Viewpoint Neutrality: A Theory of Free Speech and Its Implications for the State Speech and Limited Public Forum Doctrines*, 107 NW. L. REV. 603, 629 (2013) (“[T]he [Supreme] Court has found that when the state creates or designates a ‘limited public forum’ for ‘private speech,’ it cannot choose to give or withhold subsidies to groups based on their viewpoints, although it can potentially use content-based criteria such as obscenity, especially when this criteria is related to the purpose of the forum.”).

139. See I.R.C. §§ 170(c)(2), 501(c)(3), 2055(a)(2)–(3), 2106(a)(2)(A)(ii)–(iii), 2522(a)(2) (all including the political campaign intervention prohibition); Benjamin M. Leff, *Fixing the Johnson Amendment Without Totally Destroying It*, 6 U. PA. J.L. & PUB. AFFS. 115, 143, 148 (2020) (noting *Branch Ministries* is the leading case for applying the Supreme Court’s reasoning in *Taxation With Representation* to the political campaign intervention prohibition).

140. 211 F.3d 137 (D.C. Cir. 2000).

141. *Id.* at 143; Leff, *supra* note 139, at 148.

“viewpoint neutral; [it] prohibit[s] intervention in favor of all candidates for public office by all tax-exempt organizations, regardless of candidate, party, or viewpoint.”¹⁴² The court also emphasized the ability of the church in this case to create a tax-exempt but noncharitable affiliate to engage in the prohibited activity.¹⁴³ While the decision focused primarily on the Free Exercise of Religion Clause as detailed in the next section, the court reached the same conclusion with respect to a challenge based on the Free Speech Clause.¹⁴⁴ In addition, the court also rejected an Equal Protection Clause challenge based on an assertion that the IRS had engaged in viewpoint discrimination, which the court found was not the case.¹⁴⁵

Later Supreme Court decisions involving political speech by nonprofits do not undermine these decisions, either explicitly or implicitly. For example, the Supreme Court in *Citizens United v. FEC*¹⁴⁶ rejected an election law prohibition on corporations, including nonprofit corporations, engaging in certain election-related speech.¹⁴⁷ But the Court did not even mention *Taxation With Representation* or otherwise suggest that its holding in the election law context would apply to the tax/subsidy context of the latter case. For this reason, commentators generally agree the decision did not affect the constitutional holding in *Taxation With Representation*.¹⁴⁸

Similarly, the Supreme Court in a case involving speech-related conditions imposed on direct government funding to a nonprofit held that the government could impose speech-related conditions on the use

142. *Branch Ministries*, 211 F.3d at 144.

143. *Id.* at 143. The court reached this conclusion even though it incorrectly stated that an affiliated section 501(c)(4) organization could not engage in political campaign intervention, based on its correct observation that an affiliated section 501(c)(4) could in turn create a section 527 political organization. *Id.*

144. *Id.* at 144.

145. *Id.*

146. 558 U.S. 310 (2010).

147. *Id.*

148. *E.g.*, Ellen P. Aprill, *Regulating the Political Speech of Noncharitable Exempt Organizations After Citizens United*, 10 ELECTION L.J. 363, 401 (2011); Roger Colinvaux, *The Political Speech of Charities in the Face of Citizens United: A Defense of Prohibition*, 62 CASE W. RESV. L. REV. 685, 732 (2012); Miriam Galston, *When Statutory Regimes Collide: Will Citizens United and Wisconsin Right to Life Make Federal Tax Regulation of Campaign Activity Unconstitutional?*, 13 U. PA. J. CONST. L. 867, 929–30 (2011); Lloyd H. Mayer, *Charities and Lobbying: Institutional Rights in the Wake of Citizens United*, 10 ELECTION L.J. 407, 415–16 (2011). *But see* Paul Weitzel, *Protecting Speech from the Heart: How Citizens United Strikes Down Political Speech Restrictions on Churches and Charities*, 16 TEX. REV. L. & POL. 155, 164–67 (2011); Jennifer Rigterink, *Comment, I'll Believe It When I "C" It: Rethinking § 501(c)(3)'s Prohibition on Politicking*, 86 TUL. L. REV. 493, 506–07 (2011).

of government funds, including funds provided through tax provisions, citing *Taxation With Representation* among other cases.¹⁴⁹ The Court ultimately struck down the provision in that case as unconstitutional, but only because it not only prohibited certain speech but compelled the recipient organization to explicitly adopt a specific policy position.¹⁵⁰ At the same time, the Court reiterated its endorsement of the previously mentioned caveat that the government had to permit a not unduly burdensome means for the restricted organization to engage in the prohibited speech, such as through an affiliated, noncharitable nonprofit.¹⁵¹

The result of these decisions is that Congress and presumably state legislatures are free, consistent with the Free Speech Clause, to limit or prohibit entire categories of speech, but only if they: (1) do not attempt to impose differing restrictions based on the viewpoints expressed; and (2) continue to allow non-subsidized affiliates to engage in the otherwise limited or prohibited speech.¹⁵² The second caveat indicates that any attempts to limit the speech of noncharitable, tax-exempt nonprofits must for constitutional reasons leave available the option of having another nonprofit affiliate able to engage in the otherwise prohibited or limited speech, whether a noncharitable section 501(c) entity or a section 527 organization.¹⁵³

All that said, there are three significant issues not fully addressed by the existing case law. The first is whether the definitions of political campaign intervention and lobbying are unconstitutionally vague.¹⁵⁴ The second is whether the limits on political campaign intervention by

149. *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 214 (2013).

150. *Id.* at 218–19.

151. *Id.* at 215. The same nonprofit lost a second case involving the same speech-related condition, but only because the second case involved foreign affiliates and the Supreme Court held that those affiliates did not possess any relevant First Amendment rights. *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 140 S. Ct. 2082 (2020).

152. See *supra* notes 136–138, 142–143 and accompanying text.

153. See I.R.S. Priv. Ltr. Rul. 2011-27-013 (Apr. 15, 2011) (describing this option); Galston, *supra* note 148, at 904–05 (describing this “alternate channel” doctrine).

154. See Anne B. Carroll, *Religion, Politics, and the IRS: Defining the Limits of Tax Law Controls on Political Expression by Churches*, 76 MARQ. L. REV. 217, 256–57 (1992) (describing the potential vagueness challenge to the political campaign intervention prohibition); Galston, *supra* note 148, at 918 (same); David M. Andersen, Comment, *Political Silence at Church: The Empty Threat of Removing Tax-Exempt Status for Insubstantial Attempts to Influence Legislation*, 2006 BYU L. REV. 115, 125 (2006) (describing vagueness concerns with the definition of lobbying); Michael Fresco, Note, *Getting to “Exempt!”: Putting the Rubber Stamp on Section 501(c)(3)’s Political Activity Prohibition*, 80 FORDHAM L. REV. 3015, 3039–40 (2012) (explaining that, as of 2012, no court has reached the merits of a vagueness challenge to the definition of political campaign intervention under section 501(c)(3)).

noncharitable tax-exempt nonprofit organizations are constitutional.¹⁵⁵ The third is to what extent can Congress and state governments condition tax exemption on requiring potentially speech-chilling disclosure of contributor-identifying or other information.¹⁵⁶

On the first point, a law that regulates speech is unconstitutionally vague if its terms are so ambiguous that they either unduly chill speech or grant government officials excessive discretion in applying the law.¹⁵⁷ The application of the vagueness doctrine to the definition of political campaign intervention is a complicated task as detailed by Miriam Galston, who ultimately concludes it is uncertain whether a vagueness challenge would be successful.¹⁵⁸ That said, the extensive guidance the IRS has issued relating to what is and what is not prohibited by that provision may be sufficient to shield it from a successful vagueness challenge.¹⁵⁹ Indeed, a federal district court reached this conclusion, but on appeal its decision was vacated and remanded for dismissal on standing grounds.¹⁶⁰ As for the definition of lobbying,

155. See Elizabeth Kingsley & John Pomeranz, *A Crash at the Crossroads: Tax and Campaign Finance Laws Collide in Regulation of Political Activities of Tax-Exempt Organizations*, 31 WM. MITCHELL L. REV. 55, 72–74, 108 (2004) (describing the ambiguity of this limit and that this ambiguity may raise a constitutional concern).

156. See *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2389 (2021) (noting but not deciding this issue).

157. See Benjamin C. Zipursky, *Snyder v. Phelps, Outrageousness, and the Open Texture of Tort Law*, 60 DEPAUL L. REV. 473, 494 (2011) (describing vagueness doctrine generally); David Hildebrand, *Free Speech and Constitutional Transformation*, 10 CONST. COMMENT 133, 154 (1993) (describing vagueness doctrine as applied to laws relating to speech).

158. Galston, *supra* note 148, at 918–29; see also Fresco, *supra* note 154, at 3039–43 (reaching the same conclusion).

159. See, e.g., Rev. Rul. 2007-41, 2007-1 C.B. 1421, 2007 WL 1576989 (providing twenty-one examples illustrating what activities constitute political campaign intervention under section 501(c)(3)); Judith E. Kindell & John F. Reilly, *Election Year Issues*, in EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION (CPE) TECHNICAL INSTRUCTION PROGRAM FOR FISCAL YEAR 2002, at 335 (2001), <https://www.irs.gov/pub/irs-tege/eotopici02.pdf> (IRS employee authored document gathering relevant authorities); STEVEN H. SHOLK, GIBBONS P.C., A GUIDE TO ELECTION YEAR ACTIVITIES OF SECTION 501(C)(3) ORGANIZATIONS (May 1, 2021), <https://gibbons-admin.onenorth.com/wp-content/uploads/Election-Year-Activities-of-Section-501c3-Organizations-2021.pdf> (a comprehensive guide gathering relevant authorities). The IRS could also provide further guidance, including safe harbors, to further reduce the chances for success of any potential vagueness challenge. See, e.g., Ellen P. Aprill, *Why the IRS Should Want to Develop Rules Regarding Charities and Politics*, 62 CASE W. RESV. L. REV. 643, 680–81 (2012) (urging the IRS to adopt additional rules relating to the political campaign intervention prohibition, including but not limited to safe harbors); *History of the Bright Lines Project*, BRIGHT LINES PROJECT, <https://brightlinesproject.org/about-us/history/> (describing an ongoing effort to encourage the IRS to provide clearer rules relating to the political campaign intervention prohibition).

160. *Freedom Path, Inc. v. IRS*, No. 14-CV-1537-D, 2017 WL 2902626, at *5 (N.D. Tex. July 7, 2017), *vacated & remanded*, 913 F.3d 503 (5th Cir. 2019). Freedom Path is now pursuing a new case raising a vagueness challenge to the definition of political campaign intervention.

there is a similar argument that the definitions provided, both under the default substantial part test and particularly through detailed regulations under the optional, elective regime, are sufficient to address this vagueness concern.¹⁶¹

Regarding the second point, on one hand the *Taxation With Representation* rationale appears to provide a strong defense to any constitutional challenge to the requirement that non-charitable tax-exempt nonprofit organizations engage primarily in activity that furthers their exempt purposes, not counting political campaign intervention. That is because the Supreme Court characterized tax exemption as a subsidy in that case, and the IRS permits these noncharitable but still tax-exempt nonprofits to create affiliated section 527 political organizations that can engage in unlimited political campaign intervention.¹⁶² On the other hand, there are strong arguments that exemption by itself is only a subsidy to a limited degree, especially since exemption does not extend to the investment income of these noncharitable nonprofits to the extent they have political campaign intervention expenditures.¹⁶³ If there is no subsidy, then the rationale of *Taxation With Representation* no longer applies.

Freedom Path, Inc.'s Complaint for Declaratory and Injunctive Relief, Freedom Path, Inc. v. IRS, No. 20-cv-01349 (D.D.C. May 20, 2020), ECF No. 1.

161. See, e.g., Treas. Reg. § 1.501(c)(3)-1(c)(3)(ii) (definition under default test); Treas. Reg. § 1.4911-2 (definition under elective test); Kindell & Reilly, *supra* note 26, at 261 (IRS employee authored document gathering relevant authorities); Lloyd H. Mayer, *What Is This "Lobbying" That We Are So Worried About?*, 26 YALE L. & POL'Y REV. 485, 509–11 (2008) (describing the lobbying definition).

162. See *supra* notes 134, 143 and accompanying text. Under section 527, political organizations are exempt from tax only with respect to "exempt function income," which is defined as contributions, membership dues and similar amounts, proceeds from political fundraising and political campaign material sales, and bingo game proceeds that the organization segregates for use only to influence or attempt to influence the selection, nomination, election, or appointment of an individual for public office, office in a political organization, or as a presidential or vice-presidential elector. I.R.C. § 527(b), (c)(1), (c)(3), (e)(2).

163. See I.R.C. § 527(f) (subjecting to tax the lesser of an otherwise tax-exempt section 501(c) organization's net investment income or "exempt function" expenditures, including expenditures to influence or attempt to influence the election of any individual to public office); Aprill & Mayer, *supra* note 134, at 1892–85 (arguing that tax exemption is a subsidy only for certain types of nonprofit organization income, including investment income). But this no-subsidy point does not apply with respect to gifts of appreciated property to section 501(c)(4), 501(c)(5), and 501(c)(6) organizations because such gifts do not trigger realization and recognition of gain to the donor, in contrast with the treatment of such gifts for section 527 political organizations. See Roger Colinvaux, *Social Welfare and Political Organizations: Ending the Plague of Inconsistency*, 21 N.Y.U. J. LEGIS. & PUB. POL'Y 481, 490 (2018). When combined with the exemption of contributions to these organizations from the federal gift tax, added by Congress in 2015, this gain escapes both income tax and gift tax. See Consolidated Appropriations Act of 2016, Pub. L. 114-113, § 408, 129 Stat. 2242, 3120–21 (2015) (codified at I.R.C. § 2501(a)(6)); Ellen P. Aprill, *Once and Future Gift Taxation of Transfers to Section 501(c)(4) Organizations: Current Law, Constitutional Issues, and Policy*

Absent a subsidy, the Free Speech Clause is more difficult for governments to avoid. The Supreme Court has made this clear in a series of cases that sharply limited the ability of states to regulate charitable solicitations.¹⁶⁴ That regulation was not tied to the provision of tax benefits, and so the states could not rely on *Taxation With Representation*.¹⁶⁵ Concluding that such speech is not solely commercial, even though it involves asking for donations, the Court has subjected those restrictions to the highest level of constitutional scrutiny.¹⁶⁶ The result has been that the Court has struck down most attempts by states to control what charities and paid solicitors they hire say when engaging in charitable solicitation, while upholding registration and reporting requirements imposed on charities and for-profit companies that assist with fundraising.¹⁶⁷ This line of cases indicates that if exemption is not a subsidy, at least for political campaign intervention speech, then any limit on such speech by noncharitable tax-exempt nonprofits is constitutionally suspect unless that limit is inherent in the purposes required for exemption in the first place. Such a limit may be inherent in some of those purposes—for example, the limited purposes permitted for a cemetery company that is tax-exempt under section 501(c)(13) may not be consistent with any political campaign intervention speech.¹⁶⁸ But for noncharitable tax-exempt nonprofits with broader permitted purposes—for example, section 501(c)(4) social welfare promoting organizations, section 501(c)(5) labor organizations, and section 501(c)(6) business leagues and chambers of commerce—that inherent limit argument is unconvincing.

On the third point, it appears that Congress can impose on tax-exempt organizations, including noncharitable ones, reporting and

Considerations, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 289, 324–25 (2012) (arguing that if Congress enacted exemption from gift tax for contributions to section 501(c)(4) organizations it should also require realization and recognition of gain for such contributions at the time of donation).

164. See Fishman, *supra* note 112, at 486–97 (summarizing this line of cases).

165. One state has conditioned the ability to receive (state) tax deductible charitable contributions on otherwise qualified charities spending a certain percentage on program services, an issue targeted by other states in the charitable solicitation statutes that did not survive First Amendment challenge in the cases discussed in this section. See *supra* notes 112–116 and accompanying text.

166. *Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781, 787–90 (1988); Fishman, *supra* note 112, at 471.

167. Fishman, *supra* note 112, at 499. But see *Kissel v. Seagull*, 552 F. Supp. 3d 277 (D. Conn. 2021) (applying the recent Supreme Court decision in *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373 (2021), to support the grant of a motion for preliminary injunction with respect to a requirement that a paid solicitor retain donor-identifying records and make them available for inspection by a state government agency on request).

168. See *infra* note 297 and accompanying text.

disclosure requirements, including disclosure of identifying information for significant contributors. In *National Federation of Republican Assemblies v. United States*,¹⁶⁹ a federal district court upheld the congressionally imposed contributor disclosure requirements for section 527 organizations, relying on *Taxation With Representation*.¹⁷⁰ While a federal appellate court then vacated the decision on standing grounds, that court endorsed the lower court's application of *Taxation With Representation* in this context.¹⁷¹

That said, in the recent *Americans for Prosperity Foundation v. Bonta*¹⁷² decision the Supreme Courts made it clear that government compelled disclosure of potentially speech chilling information must survive an exacting level of scrutiny.¹⁷³ In that case, the Court concluded a California rule requiring charities to disclose certain contributor-identifying information to the state's attorney general was unconstitutional under this level of scrutiny.¹⁷⁴ But in reaching this conclusion, the Court carefully did not resolve the question of whether the federal tax law requirement that tax-exempt charities disclose certain contributor-identifying information to the IRS is unconstitutional, stating that "revenue collection efforts and conferral of tax-exempt status may raise issues not presented by California's disclosure requirement" and citing *Taxation With Representation*.¹⁷⁵ So while this decision does not foreclose a future successful Free Speech Clause challenge to reporting or disclosure requirements imposed as a condition of tax exemption, at the moment it appears that the success of such a challenge is uncertain at best.¹⁷⁶ This is especially the case if the Supreme Court leaves undisturbed its conclusion that exemption is a subsidy, despite academic commentary to the contrary.¹⁷⁷

Finally, it must be acknowledged that it is possible *Taxation With Representation* and its progeny are less secure precedents than I have

169. 218 F. Supp. 2d 1300 (S.D. Ala. 2002).

170. *Id.* at 1322. The court struck down as unconstitutional expenditure disclosure requirements, but as Richard Briffault has detailed the court's analysis on that point had several critical flaws. Briffault, *supra* note 56, 978–79 n.163 (2004).

171. *Mobile Republican Assembly v. United States*, 353 F.3d 1357, 1361–62 (11th Cir. 2003).

172. 141 S. Ct. 2373 (2021).

173. *Id.* at 2382–83.

174. *Id.* at 2389.

175. *Id.*

176. See Ellen P. Aprill, *Americans for Prosperity and The Future of Schedule B*, 172 TAX NOTES FED.: LETTERS TO THE ED. 279 (2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3887732 [<https://perma.cc/ZHU4-7YSV>] (concluding that the current federal tax donor disclosure requirement is at risk because of the decision).

177. See *supra* note 134 and accompanying text.

assumed. For example, some commentators note that in *Citizens United* the Supreme Court emphasized the burden imposed by having to create a separate (and separately funded) political committee for corporations to engage in electioneering, an emphasis that the Court could extend to creating nonprofit affiliates and so undermine the reasoning of the *Taxation With Representation* concurrence.¹⁷⁸ And at least prior to the Supreme Court's 2013 decision in *Agency for International Development v. Alliance for Open Society International*,¹⁷⁹ it could have been argued that federal court decisions were beginning to suggest that government-imposed speech limitations could only constitutionally apply to government speech, as opposed to all speech that benefits from government funding in some way (including through tax exemptions and deductions).¹⁸⁰ But to date the Supreme Court continues to cite *Taxation With Representation* as good law, including in *Agency for International Development*¹⁸¹ and even more recently in *Americans for Prosperity Foundation*.¹⁸²

2. Existing Definition of "Educational"

A separate free speech issue arises with respect to the definition of "educational," which is one of the purposes that qualifies a nonprofit as a charity for both tax exemption and deductibility of contributions purposes.¹⁸³ The IRS initially lost a free speech challenge when it denied exemption based on the "full and fair exposition" requirement included in the regulatory definition of educational.¹⁸⁴ In *Big Mama Rag v. United States*,¹⁸⁵ the U.S. Court of Appeals for the District of Columbia Circuit held that this requirement was unconstitutionally vague, including because of the difficulty of differentiating fact from unsupported opinion and emotional appeals from appeals to the mind.¹⁸⁶ But the court recognized that not all organizations claiming to be educational deserved that status and so remanded the case for further proceedings (which did not occur, presumably because the case

178. See *Citizens United v. FEC*, 558 U.S. 310, 338–39 (2010); Weitzel, *supra* note 148, at 165–66; Riggerink, *supra* note 148, at 506–07.

179. 570 U.S. 205 (2013).

180. See Lloyd H. Mayer, *Nonprofits, Speech, and Unconstitutional Conditions*, 46 CONN. L. REV. 1045, 1067–68 (2014).

181. 570 U.S. at 214–16 (2013).

182. 141 S. Ct. 2373, 2389 (2021).

183. See I.R.C. §§ 170(c)(2), 2055(a)(2), 2106(a)(2)(ii), 2522(a)(2), 2522(b)(2).

184. See Treas. Reg. § 1.501(c)(3)-1(d)(3)(i) (definition of "educational").

185. 631 F.2d 1030 (D.C. Cir. 1980).

186. *Id.* at 1039.

settled).¹⁸⁷ In other words, if an organization's only basis for claiming exemption and deductibility of contributions is that it furthers an "educational" purpose, the court held that Congress and the IRS can deny those tax benefits based on the definition of that term, but that definition must not be so vague as to violate the Free Speech Clause.¹⁸⁸

In response to this decision, the IRS developed the methodology test described above.¹⁸⁹ The Supreme Court has not addressed the constitutionality of the methodology test or the regulatory definition of educational more generally. But the two lower courts that have addressed this issue have found that definition and, in one instance, the methodology test itself constitutional under the Free Speech Clause. In *National Alliance v. United States*¹⁹⁰ the Court of Appeals for the District of Columbia Circuit upheld the IRS's decision to deny a white supremacist group's application for recognition of exemption under section 501(c)(3), including rejecting a First Amendment challenge to the IRS's decision that the group did not qualify as educational within the meaning of that section, although the court declined to rule specifically on whether the methodology test was constitutional.¹⁹¹ And in *Nationalist Movement v. Commissioner*,¹⁹² the Tax Court upheld the methodology test both on its face as not unconstitutionally vague or overbroad and as applied to the group in that case, concluding that the test's "provisions are sufficiently understandable, specific, and objective both to preclude chilling of expression protected under the First Amendment and to minimize arbitrary or discriminatory application by the IRS."¹⁹³ So while the now more than thirty-five-years-old methodology test could still be vulnerable to a vagueness challenge, it has survived so far, although it is not clear how often the IRS invokes the test to support a denial of exemption.¹⁹⁴

187. *See id.* at 1040.

188. *Id.* at 1034, 1040.

189. *See supra* notes 77–79 and accompanying text.

190. 710 F.2d 868 (D.C. Cir. 1983).

191. *Id.* at 875–76.

192. 102 T.C. 558, 588–89, *aff'd*, 37 F.3d 216 (5th Cir. 1994).

193. *Id.*

194. A recent study of exemption denials by the IRS found that slightly less than a third of the denials reviewed involved an alleged failure of the organization's activities to further a required purpose, with "[m]any of these rulings involv[ing] consideration of whether the organization's activities were 'educational.'" Terri L. Helge, *Rejecting Charity: Why the IRS Denies Tax Exemption to 501(c)(3) Applicants*, 14 PITT. TAX REV. 1, 40 (2016); *see id.* at 21 (total data set of 588 denial letters); *id.* at 39 (at least 184 denials based, in whole or in part, on not sufficiently furthering a required purpose). But the study did not report to what extent the IRS relied on the methodology test in those instances. *Id.* at 39–40.

These decisions collectively indicate that the IRS may apply the methodology test as a constitutional matter given the need for some limit on what it means to be educational, but the IRS must be rigorous in applying the test so as not to make the test vulnerable to a vagueness claim or its application vulnerable to a discrimination claim. In other words, and as was the case with the lobbying limitation and political campaign intervention prohibition, the speech-related condition must be sufficiently specific and must not discriminate based on viewpoint, either on its face or as applied by the IRS. Perhaps out of concern that the test may still be vulnerable to constitutional challenge given the limited case law to date, the IRS appears to have only rejected exempt educational status in relatively extreme situations.¹⁹⁵

3. Other Tax-Related Restrictions on Speech

Speech evidencing violations of other limitations imposed on charities, such as speech promoting illegal activity or activity contrary to fundamental policy, or promoting the personal interests of private individuals, may support the denial of tax-exempt status under section 501(c)(3).¹⁹⁶ The use of such speech in this manner generally does not raise significant constitutional concerns. That is because such speech either is not protected by the First Amendment at all—as is the case for speech promoting illegal conduct or fraud¹⁹⁷—or is evidence of a substantial noncharitable purpose, in which case it is not the speech itself but the noncharitable purpose it evidences that is basis for denying recognition of exemption.¹⁹⁸ To the extent the personal interests at issue are business or commercial ones, speech promoting commercial interests is also subject to less protection under the First Amendment, so the government’s interest in not subsidizing private benefit by preventing charities from promoting the commercial interests of private

195. See *supra* notes 80, 89–92, 193 and accompanying text.

196. See *Bob Jones Univ. v. United States*, 461 U.S. 574, 591–92 (1983) (prohibition on promoting illegality or violating established public policy); Treas. Reg. § 1.501(d)(1)(ii) (prohibition on serving private interests).

197. See VICTORIA L. KILLION, CONG. RSCH. SERV., IF11072, THE FIRST AMENDMENT: CATEGORIES OF SPEECH (2019), <https://crsreports.congress.gov/product/pdf/download/IF/IF11072/IF11072.pdf/> [<https://perma.cc/9B4R-PMV5>].

198. See *Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993) (“The First Amendment . . . does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent.”).

individuals likely would pass muster even if a court felt First Amendment scrutiny was required.¹⁹⁹

B. Free Exercise of Religion

The few courts that have addressed this issue have also rejected constitutional challenges to the speech-related conditions brought by religious nonprofits under the Free Exercise of Religion Clause of the First Amendment for similar reasons as put forward in the free speech cases. That clause provides: “Congress shall make no law . . . prohibiting the free exercise [of religion].”²⁰⁰ In *Christian Echoes National Ministry v. United States*,²⁰¹ the Court of Appeals for the Tenth Circuit held that if an organization chose to claim “the privilege of exemption” under section 501(c)(3) then it also could be subject to the lobbying limitation and political campaign intervention prohibition even if its lobbying and political campaign intervention was religiously motivated.²⁰² And in the more recent *Branch Ministries* case, the Court of Appeals for the District of Columbia Circuit rejected a church’s Free Exercise of Religion Clause challenge to the political campaign intervention prohibition based on the reasoning of *Taxation With Representation*, as detailed above.²⁰³ There do not appear to have been any attempts by religious organizations to challenge either the regulatory definition of “educational” or the methodology test, likely because these organizations rely primarily on having a religious, not educational, purpose as the basis for claiming the tax benefits available to charities.²⁰⁴

Some scholars have questioned the reasoning and reach of these two appellate court decisions, particularly with respect to religiously motivated messages from the pulpit (which were not at issue in either *Christian Echoes* or *Branch Ministries*), but these decisions remain the leading cases in this area.²⁰⁵ Furthermore, in *Employment Division*

199. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 557 (1980); KILLION, *supra* note 197.

200. U.S. CONST. amend. I.

201. 470 F.2d 849 (10th Cir. 1972).

202. *Id.* at 857.

203. *Branch Ministries v. Rossotti*, 211 F.3d 137, 143–44 (D.C. Cir. 2000); *supra* notes 141–143 and accompanying text.

204. See I.R.C. §§ 170(c)(2), 2055(a)(2), 2106(a)(2)(ii), 2522(a)(2), 2522(b)(2) (all listing “educational” and “religious” as separate, qualifying purposes).

205. See, e.g., CRIMM & WINER, *supra* note 45, at 281 n.74 (discussing the limits of the holdings in *Branch Ministries* and *Christian Echoes*); EDWARD A. ZELINSKY, TAXING THE CHURCH: RELIGION, EXEMPTIONS, ENTANGLEMENT, AND THE CONSTITUTION 196–201 (2017) (collecting

*v. Smith*²⁰⁶ the Supreme Court held that the Free Exercise of Religion Clause is not violated by a neutral law of general application, assuming a plaintiff cannot demonstrate the law was enacted with a purpose of religious discrimination.²⁰⁷ The speech-related conditions imposed on tax-exempt charities appear to be a clear example of neutral laws of general application since they apply to all charities, not only religious ones, much less ones associated with a particular religious sect.²⁰⁸ They also do not include a mechanism for providing exemptions, much less individualized exemptions, and so they do not run afoul of the Supreme Court's recent holding that a law does not have general application if government authorities provide individualized exemptions.²⁰⁹ And while Congress enacted the Religious Freedom Restoration Act (RFRA) in response to *Employment Division v. Smith*, the court in *Branch Ministries* specifically rejected an RFRA-based argument, albeit in part because the church did not allege that the speech at issue was in fact religiously motivated.²¹⁰ Existing case law therefore does not provide any grounds for concluding that the Free Exercise of Religion Clause imposes a greater limitation on Congress's power to enact speech-related conditions on tax-exempt religious charities than the Free Speech Clause does for such conditions on all tax-exempt charities.

C. Equal Protection

One last constitutional ground that organizations have raised to combat the speech-related conditions imposed on tax-exempt charities

scholarly views on the prohibition's application to churches); Edward A. Zelinsky, *Applying the First Amendment to the Internal Revenue Code: Minnesota Voters Alliance and the Tax Law's Regulation of Nonprofit Organizations' Political Speech*, 83 ALB. L. REV. 1, 39 n.280 (2019) (noting that *Christian Echoes* and *Branch Ministries* remain the leading cases with respect to the political campaign intervention prohibition).

206. 494 U.S. 872 (1990).

207. *Id.* at 878–82.

208. *But see* Johnny R. Buckles, *The Penalty of Liberty: Liberal Suppression: Section 501(c)(3) and the Taxation of Speech*, 25 TEX. REV. L. & POL. 159, 209–11 (2020) (concluding there is a plausible argument that *Smith* does not apply to faith-motivated church communications).

209. *See* *Fulton v. Philadelphia*, 141 S. Ct. 1868, 1877 (2021).

210. *Branch Ministries*, 211 F.3d at 142–44; *see also* Jonathan Backer, Note, *Thou Shalt Not Electioneer: Religious Nonprofit Political Activity and the Threat "God PACs" Pose to Democracy and Religion*, 114 MICH. L. REV. 619, 647–48 (2016) (concluding an RFRA-based challenge would fail). *But see* Lloyd H. Mayer, *Politics at the Pulpit: Tax Benefits, Substantial Burdens, and Institutional Free Exercise*, 89 B.U. L. REV. 1137, 1196–97, 1211–13 (2009) (arguing for an RFRA-based exemption from the prohibition for certain church communications).

is the Fifth Amendment's equal protection component.²¹¹ In *Taxation With Representation*, the nonprofit argued that the lobbying limitation violated equal protection because Congress had not imposed the limitation on veterans' organizations even though they enjoyed the same tax benefits as charities.²¹² And in *Branch Ministries* the church argued that the political campaign intervention prohibition as applied to it violated equal protection because it was the target of selective prosecution.²¹³

These challenges have failed for two reasons. First, as the Supreme Court held in *Taxation With Representation*, "statutory classifications are valid if they bear a rational relation to a legitimate governmental purpose."²¹⁴ In reaching this conclusion, the Court rejected the appellate court's position that the Constitution required a heightened level of scrutiny for this differing treatment because it affected speech.²¹⁵ Applying instead a rational basis standard, the Court concluded that it was not irrational for Congress to subsidize lobbying by veterans' organizations, given the sacrifices veterans have made for their country.²¹⁶ But the Court did caution that the "case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to aim at the suppression of dangerous ideas."²¹⁷

As for *Branch Ministries'* claim, it depended on the organization at issue being able to produce evidence of selective prosecution.²¹⁸ As the court noted, this evidentiary burden is "a demanding one" that *Branch Ministries* was unable to satisfy.²¹⁹ Under any conditions, a finding of selective prosecution would not have invalidated the

211. If a nonprofit were to challenge a state law-imposed, speech-related condition on equal protection grounds, the constitutional basis for that challenge would instead be the Fourteenth Amendment. U.S. CONST. amend. XIV ("No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224 (1995) (quoting *Buckley v. Valeo*, 424 U.S. 1, 93 (1976), *superseded by statute on other grounds as stated in* *McConnell v. FEC*, 540 U.S. 93, 120–22 (2003)) ("Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.").

212. *Regan v. Tax'n With Representation of Wash.*, 461 U.S. 540, 546–47 (1983).

213. *Branch Ministries*, 211 F.3d at 144–45.

214. *Tax'n With Representation of Wash.*, 461 U.S. at 547. This assumes the classification is not one that raises specific constitutional concerns, such as racial classifications. See generally Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE U. L. REV. 135 (2011) (discussing which "suspect classifications" trigger heightened constitutional scrutiny).

215. *Tax'n With Representation of Wash.*, 461 U.S. at 548–49.

216. *Id.* at 550–51.

217. *Id.* at 548 (citation omitted).

218. *Branch Ministries*, 211 F.3d at 144.

219. *Id.* at 144–45.

political campaign intervention prohibition generally, only its specific application to Branch Ministries in that case.²²⁰

For these reasons, the equal protection component of the Fifth Amendment does not appear to restrict the ability of Congress to impose speech limitations on tax-exempt charities in any significant way. A similar conclusion would apply with respect to the Fourteenth Amendment's Equal Protection Clause and the ability of state legislatures to impose similar limitations.²²¹ Indeed, the only requirement is that these legislative bodies be able to articulate a rational reason for subsidizing the speech at issue for other types of organizations eligible for the same tax benefits but not subject to the speech-related restrictions.²²² As the equal protection holding in *Taxation With Representation* demonstrates, this is not a high bar.²²³ And there does not appear to be a reason for it to be, since legislatures necessarily must constantly choose among various options when deciding what activities or organizations to subsidize, including various types of speech and nonprofits.

The constitutional principles that can be drawn from existing cases are therefore relatively straightforward. Congress, and presumably the states, can condition receipt of tax benefits, such as exemption and the ability to receive tax deductible contributions, on not engaging, or only engaging to a limited extent, in certain types of speech if the benefitting nonprofit can easily create less tax-favored affiliates to engage in the relevant speech. Existing case law does not address all such prohibitions or limitations, and there may be vagueness concerns with some of the speech-related conditions—including the methodology test interpreting the meaning of “educational”—but to date this principle has proven sufficient to protect these conditions from successful constitutional challenge. At the same time, the prohibitions or limitations cannot constitutionally be aimed at certain viewpoints or,

220. It is not completely clear what would have been the appropriate remedy if Branch Ministries had sustained its selective prosecution claim, but whatever the remedy (e.g., reversal of exemption revocation retroactively, damages) it would have only been available to Branch Ministries and so would have left the prohibition in place. *See United States v. Armstrong*, 517 U.S. 456, 461 n.2 (1996) (in the context of a selective criminal prosecution claim based on alleged racial discrimination, noting that the Court has “never determined whether dismissal of the indictment, or some other sanction, is the proper remedy”); Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 MICH. L. REV. 2001, 2004 (1998) (in the same context, noting four possible remedies that all only apply to the individual criminal defendant).

221. *See supra* note 210.

222. *See supra* notes 213–214 and accompanying text.

223. *See supra* note 215 and accompanying text.

as the Supreme Court put it “the suppression of dangerous ideas.”²²⁴ These principles therefore set the constitutional boundaries for the policy debates surrounding the existing and proposed speech limitations on tax-exempt nonprofits.

III. JUSTIFICATIONS FOR NONPROFIT TAX BENEFITS

The policy justifications for restricting the speech of nonprofits are threefold. First, and as the Supreme Court referenced in *Taxation With Representation*, it is usually assumed that the significant federal and state tax benefits that almost all nonprofits receive are subsidies supporting their activities, including their speech.²²⁵ Second, the reasons for providing those subsidies are arguably incompatible with certain types of speech.²²⁶ Third, for some types of speech, providing these subsidies would create an uneven playing field with other types of speakers that would be unfair or could indirectly undermine the reasons for providing subsidies.²²⁷ Because the tax benefits enjoyed by charities are significantly greater than those enjoyed by noncharitable nonprofits, and the current speech limitations are also greater for charities, this part first considers the justifications for the tax benefits enjoyed by charities and then the justifications for the usually lesser tax benefits enjoyed by noncharitable nonprofits.

A. Charitable Nonprofits

Based on a long legal history that predates the federal income tax, section 501(c)(3) defines a charity as an organization that has two key positive requirements: its purpose or purposes must fall within those listed in that section; and it must serve a public interest.²²⁸ Setting

224. *Regan v. Tax'n With Representation of Wash.*, 461 U.S. 540, 548 (1983) (quoting *Cammarano v. United States*, 358 U.S. 498, 513 (1959)).

225. *See supra* note 134 and accompanying text. This conclusion does not necessarily mean that the tax benefits are “subsidies” for all purposes, although two federal district courts recently held that tax exemption under I.R.C. § 501(c)(3) constitutes “federal financial assistance” for purposes of Title IX of the Education Amendment Act of 1972. *E.H. ex rel. Herrera v. Valley Christian Acad.*, 616 F.Supp.3d 1040, 1049–50 (C.D. Cal. 2022); *Buettner-Hartsoc v. Balt. Lutheran High Sch. Ass'n*, No. CV RDB-20-3132, 2022 WL 2869041, at *5 (D. Md. July 21, 2022), *appeal docketed*, No. 23-1453 (4th Cir. Apr. 27, 2023); *see also* William Jordan, Note, *Why 501(c)(3) Tax-Exempt Status Does Not Count as Federal Financial Assistance Under Title IX*, 109 IOWA L. REV. (forthcoming 2023) (discussing these cases), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4446187.

226. *See infra* Section III.A.

227. *See supra* note 28 and accompanying text.

228. *See* I.R.C. § 501(c)(3) (an entity described in that section must be “organized and operated exclusively for” one of the listed purposes); Treas. Reg. § 1.501(c)(3)-1(a)(1) (same); Treas. Reg.

aside the speech-related restrictions for the moment, the negative restrictions on a charity's activities reinforce these requirements.²²⁹ These negative restrictions include prohibitions on significant non-charitable purposes,²³⁰ private inurement (that is, distributing earnings to insiders),²³¹ otherwise serving a more-than-incidental private interest (for example, benefitting only a small and definite group, such as the members of a particular family),²³² and acting illegally or contrary to fundamental public policy.²³³ State laws generally provide a similar definition for charities, although with some significant variations.²³⁴

The federal tax law charity definition is broad and vague, particularly with respect to three of the listed purposes: charitable, educational, and religious.²³⁵ Several commentators have sharply criticized the definition on these grounds.²³⁶ State laws usually contain similarly broad and vague definitions of charitable (and educational and

§ 1.501(c)(3)-1(d)(1)(ii) (serving "a public rather than a private interest" required); John P. Persons et al., *Criteria for Exemption Under Section 501(c)(3)*, in 4 RESEARCH PAPERS SPONSORED BY THE COMMISSION ON PRIVATE PHILANTHROPY AND PUBLIC NEEDS: TAXES 1909, 1912–16, 1920–25 (1977) (legal history).

229. *Bob Jones Univ. v. United States*, 461 U.S. 574, 591–92 (1983); John Simon et al., *The Federal Tax Treatment of Charitable Organizations*, in THE NONPROFIT SECTOR: A RESEARCH HANDBOOK 267, 282 (Walter W. Powell & Richard Steinberg eds., 2d ed. 2006).

230. Treas. Reg. § 1.501(c)(3)-1(b)(1)(iv), (c)(1).

231. I.R.C. § 501(c)(3); Treas. Reg. §§ 1.501(c)(3)-1(c)(2), 1.501(a)-1(c); *Overview of Inurement/Private Benefit Issues in IRC 501(c)(3)*, in EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION (CPE) TECHNICAL INSTRUCTION PROGRAM FOR FISCAL YEAR 1990 paras. 1–10 (1990), www.irs.gov/pub/irs-tege/eotopic90.pdf [<https://perma.cc/4KE5-9L33>].

232. Treas. Reg. § 1.501(c)(3)-1(d)(1)(ii), (iii).

233. *Bob Jones Univ.*, 461 U.S. at 591–92.

234. See WELLFORD & GALLAGHER, *supra* note 12, at 122–38, app. A at 153–260 (requirements for charitable organizations to claim state property tax exemptions); Cowan, *supra* note 12, at 1096, app. A at 1206–1221 (definition of "charitable organization" for state sales and use tax exemption purposes).

235. See Treas. Reg. § 1.501(c)(3)-1(d)(2) ("The term *charitable* is used . . . in its generally accepted legal sense and is, therefore, not to be construed as limited by the separate enumeration . . . of other tax-exempt purposes which may fall within the broad outlines of *charity* as developed by judicial decisions."); *Churches and Other Religious Organizations*, in EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION (CPE) TECHNICAL INSTRUCTION PROGRAM FOR FISCAL YEAR 1979 para. 3 (1979), <https://www.irs.gov/pub/irs-tege/eotopicf79.pdf> [<https://perma.cc/4A77-ALXT>] (noting that neither the IRC or regulations define "religious purposes" and that "the Supreme Court has ruled that government has no authority to pass on the legitimacy of religious belief or to define permissible religious belief"); *supra* note 75 and accompanying text (regulatory definition of educational).

236. See, e.g., ROB REICH ET AL., ANYTHING GOES: APPROVAL OF NONPROFIT STATUS BY THE IRS 26 (2009), <https://paccenter.stanford.edu/wp-content/uploads/2015/08/Anything-Goes-PACS-11-09.pdf> [<https://perma.cc/Z534-VLMV>]; Roger Colinvaux, *Charity in the 21st Century: Trending Toward Decay*, 11 FLA. TAX REV. 1, 17–18, 38–39 (2011).

religious), although there is significant variation between states, and some states limit educational to formal schools for at least some purposes.²³⁷

There is an enormous literature devoted to exploring justifications for the federal tax benefits enjoyed by charities.²³⁸ The first major division of these justifications is between those who argue exemption and deductibility of donations are consistent with overall income tax principles—the tax base or tax measurement theories—and those who argue that these tax benefits depart from those principles and so provide a subsidy to charities—the subsidy theories.²³⁹ The subsidy theories have broader acceptance for several reasons.²⁴⁰ First, even tax base proponents usually acknowledge that certain features of the existing tax benefits, and particularly of the deductibility of donations, are not consistent with overall income tax principles and so constitute subsidies.²⁴¹ Second, the tax base theories fail to justify the deductibility of donations if the ability of donors to choose the charitable recipients of their donations is considered sufficient to make the donations essentially the same as other, personally beneficial consumption choices.²⁴² Third, problems with calculating net income for charities identified by tax measurement theorists as justifying exemption have been shown not to be as significant as initially asserted.²⁴³ Fourth, the subsidy theories more closely match the limited historical evidence

237. See RESTATEMENT OF THE L., CHARITABLE NONPROFIT ORGS. § 1.01(b) & cmt. d (AM. L. INST. 2021); WELLFORD & GALLAGHER, *supra* note 12, at 126–29 & app. A at 153–260; Cowan, *supra* note 12, at 1096 & app. A at 1221–36 & app. B at 1221–36.

238. See sources cited *infra* notes 239–253.

239. Simon et al., *supra* note 229, at 273–75.

240. *Id.*

241. See, e.g., Andrews, *supra* note 134, at 371–72 (acknowledging that the ability of donors to deduct the fair market value of donated appreciated capital assets is a subsidy); David J. Herzig & Samuel D. Brunson, *Let Prophets Be (Non)Profits*, 52 WAKE FOREST L. REV. 1111, 1113–14 (2017) (arguing exemption does not provide a subsidy, while conceding deductibility of donations does).

242. See, e.g., Mark G. Kelman, *Personal Deductions Revisited: Why They Fit Poorly in an Ideal Income Tax and Why They Fit Worse in a Far from Ideal World*, 31 STAN. L. REV. 831, 834 (1979); Stanley A. Koppelman, *Personal Deductions Under an Ideal Income Tax*, 43 TAX L. REV. 679, 706–07 (1988); Peter J. Wiedenbeck, *Charitable Contributions: A Policy Perspective*, 50 MO. L. REV. 85, 89–90 (1985). *But see*, e.g., Andrews, *supra* note 134, at 346 (arguing against treating charitable contributions as taxable personal consumption); Buckles, *supra* note 134, at 961–67 (same).

243. See, e.g., Henry Hansmann, *The Rationale for Exempting Nonprofit Organizations from Corporate Income Taxation*, 91 YALE L.J. 54, 59 (1981). But this does not mean all aspects of exemption constitute a subsidy. See Daniel Halperin, *Is Income Tax Exemption for Charities a Subsidy?*, 64 TAX L. REV. 283, 312 (2011) (concluding exemption for contributions and income from charitable activities is not a subsidy, but exemption for investment income is a subsidy).

relating to enactment of these tax benefits.²⁴⁴ For all of these reasons, courts, other government officials, the media, academics, and the public usually characterize these tax benefits as subsidies.²⁴⁵

Once it is accepted that the existing tax benefits do, at least in part, subsidize charities, then there is a further division of justifications with respect to what exactly should be subsidized and, relatedly, whether those justifications match the legal definition of what it means to be a “charitable” nonprofit. These justifications include economic ones relating to market, government, and nonprofit failures when it comes to the production of certain services and goods that lead to one type of entity being best suited to produce efficiently the optimal level of a particular service or good.²⁴⁶ They also include political ones focusing on the role that nonprofits play in a democratic society, including as vehicles for exercising political rights, training grounds for democratic engagement, and counterweights to governments.²⁴⁷ And some justifications arise from moral philosophy, focusing on what specifically nonprofits promote that is worthy of government support, with identified, sufficiently worthy goals including altruism, distributive justice, and pluralism.²⁴⁸

244. See Simon et al., *supra* note 229, at 274.

245. See, e.g., *Bob Jones Univ. v. United States*, 461 U.S. 574, 591 (1983) (“When the Government grants exemptions or allows deductions all taxpayers are affected; the very fact of the exemption or deduction for the donor means that other taxpayers can be said to be indirect and vicarious ‘donors.’”); *Regan v. Tax’n With Representation of Wash.*, 461 U.S. 540, 544 (1983) (“Both tax exemptions and tax-deductibility are a form of subsidy that is administered through the tax system.”); Press Release, Mark W. Everson, Comm’r, IRS, Written Statement of Mark W. Everson Before the Senate Committee on Finance During Hearing on Charitable Giving Problems and Best Practices 9 (June 22, 2004), <https://www.irs.gov/pub/irs-news/ir-04-081.pdf> [<https://perma.cc/B84Y-KA2E>] (“[F]or many tax-exempt entities, most notably charities, tax-exemption, the charitable contribution deduction, and other tax benefits constitute an indirect subsidy of activities Congress has determined are beneficial to society.”); Aprill & Mayer, *supra* note 134, at 1888–92 (summarizing government positions); David E. Pozen, *Remapping the Charitable Deduction*, 39 CONN. L. REV. 531, 552–53 (2006) (“In Congress, the courts, the media, and now academia . . . the deduction is widely viewed as a government subsidy.”); *id.* at 553 n.105 (“[T]he nonprofit tax exemptions are likewise now considered by many to be subsidies.”).

246. See generally Maitreesh Ghatak, *Economic Theories of the Social Sector*, in THE NONPROFIT SECTOR: A RESEARCH HANDBOOK, *supra* note 229, at 319, 321–23 (existing economic theories of nonprofits); Nicole P. Marwell & Maoz Brown, *Toward a Governance Framework for Government-Nonprofit Relations*, in THE NONPROFIT SECTOR: A RESEARCH HANDBOOK, *supra* note 229, at 231, 235–36 (same).

247. See generally Ted Lechterman & Rob Reich, *Political Theory and the Nonprofit Sector*, in THE NONPROFIT SECTOR: A RESEARCH HANDBOOK, *supra* note 229, at 171, 176–78.

248. See, e.g., ROB REICH, JUST GIVING: WHY PHILANTHROPY IS FAILING DEMOCRACY AND HOW IT CAN DO BETTER 128–33 (2018) (pluralism); Rob Atkinson, *Altruism in Nonprofit Organizations*, 31 B.C. L. REV. 501, 510 (1990); Miranda P. Fleischer, *Theorizing the Charitable Tax Subsidies: The Role of Distributive Justice*, 87 WASH. U. L. REV. 505, 518–19 (2010).

Despite the variety of theoretical approaches, there is a common conclusion and a common theme that permeate the theories that best fit the existing tax benefits structure and are particularly relevant to speech-related restrictions. The common conclusion is that the existing broad and vague federal tax law charity definition is, for the most part, justified.²⁴⁹ The common theme is permitting private sector actors—nonprofits and their leaders and supporters—a great deal of freedom in choosing both the ends and means of charities if their purposes fall within one or more of several broad, vaguely defined categories. This theme arises from a reliance on market forces to incentivize the production of goods and services by charities when that production is best fitted to them economically,²⁵⁰ a reliance on personal political preferences to incentivize the development of charities as vehicles for political expression and democratic engagement,²⁵¹ and a reliance on personal views of what constitutes the good to promote altruism.²⁵² And it is operationalized not only by the broad and vague definition of charitable, but by the fact that charities are subsidized indirectly through the tax code as opposed to directly through a government grant program.²⁵³

Some theories tend to instead suggest that what qualifies as a charity eligible for government subsidy should be more restricted than is the case under existing law. For example, some distributive justice theories indicate that only organizations that significantly facilitate the shifting of economic resources from wealthier individuals to less wealthy individuals should qualify as charities.²⁵⁴ For this reason, these theories generally do not fit well with the existing definition of charity under federal tax law or even the use of tax law to provide the subsidy, as opposed to a government grant program.

Therefore, both the tax benefits currently provided to charities and the theories that support them strongly favor granting charities and their leaders great discretion in choosing ends and means. There are

249. See, e.g., Fleischer, *supra* note 248, at 522.

250. See Ghatak, *supra* note 246, at 321.

251. See Lechterman & Reich, *supra* note 247, at 176–77.

252. See Atkinson, *supra* note 248, at 618 & n.335.

253. See, e.g., *Walz v. Tax Comm'n of N.Y.C.*, 397 U.S. 664, 674 (1970) (characterizing (property) tax exemption as an “indirect economic benefit”); Donald L. Sharpe, *Unfair Business Competition and the Tax on Income Destined for Charity: Forty-Six Years Later*, 3 FLA. TAX REV. 367, 408 (1996) (discussing indirect nature of tax benefits for charities, which helps charities remain independent).

254. See Lechterman & Reich, *supra* note 247, at 174; Fleischer, *supra* note 248, at 558.

limits to this discretion, as indicated by the conditions or negative requirements incorporated in section 501(c)(3) and its regulations as noted earlier.²⁵⁵ But those limits still leave wide room for charity choices.

This conclusion in turn suggests that any speech-related restrictions should similarly only apply if they are inconsistent with the basis for subsidizing charities. Current law only identifies two categories of such inconsistencies. First, if a charity provides undue benefit to private parties, whether insiders or third parties (so acting inconsistently with *whom* a charity should benefit).²⁵⁶ Second, if a charity causes harm instead of benefit by promoting illegality or actions contrary to fundamental public policy (so acting inconsistently with *what* a charity should provide).²⁵⁷ Any restrictions on speech by charities should therefore be grounded in one of these two more general limitations. In addition, a possible third ground is if allowing the speech would favor charities in a way that either is unfair to other speakers or could indirectly harm charities. For example, federal tax law generally prohibits individuals and businesses from deducting election-related and lobbying expenditures, so permitting charities to engage in these types of speech while their donors enjoyed deductibility for their contributions would favor charities and their donors over other speakers.²⁵⁸ Relatedly, this favoring could lead individuals and businesses to attempt to shift their election-related and lobbying speech to charities, even when doing so does not actually further charitable purposes, potentially harming the charitable sector as a whole.

B. Noncharitable Nonprofits

For nonprofits that do not qualify as charities under section 501(c)(3) the situation is more complicated. This complication arises

255. See *supra* notes 230–233 and accompanying text.

256. See *supra* notes 231–232 and accompanying text.

257. See *supra* note 233 and accompanying text.

258. See I.R.C. § 162(e) (denial of trade or business expense deduction for certain lobbying and political campaign intervention expenditures); Buckles, *supra* note 208, at 200 (“[N]o provision of federal tax law authorizes a deduction for lobbying or political-campaign intervention in its own right.”). If Congress were to change the law to permit a trade or business expense deduction for lobbying expenditures, this level playing field argument would favor relaxing or eliminating the limit on lobbying by charities. See Pepper et al., *Legislative Activities of Charitable Organizations Other than Private Foundations, with Addendum on Legislative Activities of Private Foundations*, in 5 RESEARCH PAPERS SPONSORED BY THE COMMISSION ON PRIVATE PHILANTHROPY AND PUBLIC NEEDS: REGULATION 2917, 2921 (1977) (taking this position at a time when Congress permitted a trade or business expense deduction for certain lobbying expenditures).

from the variety of noncharitable nonprofits and the differences in the federal and state tax benefits enjoyed by different types of these nonprofits.²⁵⁹ These differences in turn complicate the issue of whether those tax benefits provide a subsidy or instead reflect an appropriate application of general tax principles, and therefore whether any justification beyond those general tax principles is required to support those tax benefits.

This section divides noncharitable nonprofits into three categories. First, community-benefiting social welfare nonprofits that are tax-exempt under section 501(c)(4) but not eligible to receive tax deductible contributions. Second, mutual benefit nonprofits that exist primarily to benefit their members, as opposed to the public, and as a result enjoy some measure of tax exemption under federal and usually state income tax law but are not eligible to receive tax deductible charitable contributions. And third, a small subset of congressionally favored mutual benefit nonprofits that enjoy both the ability to receive tax deductible contributions under federal tax law and federal and usually state income tax exemption.

1. Community-Benefiting Social Welfare Nonprofits

Some nonprofits qualify for tax exemption for almost all of their income but not the receipt of deductible charitable contributions because they further social welfare within the meaning of section 501(c)(4) in a manner that disqualifies them from section 501(c)(3) status.²⁶⁰ Common reasons for disqualification include: benefitting too small and definite a segment of the public, engaging in more lobbying than permitted for a section 501(c)(3) organization, and engaging in political campaign intervention that is prohibited for a section 501(c)(3) organization.²⁶¹

Commentators generally agree the exemption these nonprofits enjoy is at least partially a subsidy because of tax deferral advantages from not having to temporally match income and (deductible)

259. See Miller, *supra* note 65, at 454–55 (federal tax benefits); *50-State Chart of Nonprofit State Tax Exemptions*, *supra* note 12 (state income and sales tax exemptions); WELLFORD & GALLAGHER, *supra* note 12, at app. A at 153–260 (state property tax exemptions).

260. See Ellen P. Aprill, *Examining the Landscape of 501(c)(4) Social Welfare Organizations*, 21 N.Y.U. J. LEGIS. & PUB. POL'Y 345, 375–83 (2018) (describing the “border” between section 501(c)(3) and section 501(c)(4) organizations).

261. Daniel Halperin, *The Tax Exemption Under I.R.C. 501(c)(4)*, 21 N.Y.U. J. LEGIS. & PUB. POL'Y 519, 522–23 (2018).

expenditures, including with respect to exemption of investment income.²⁶² The usual justification for this subsidy is the social welfare–promoting purpose of these nonprofits.²⁶³ While less well developed than the theories relating to charities, this justification suggests for similar reasons that “social welfare” is correctly defined in a broad and vague manner to permit these nonprofits, and their leaders and supporters, to pursue their vision of social welfare and to choose the means with which to do so.²⁶⁴ This in turn suggests that, similar to the case with charities, limitations on speech are only justified if they are contrary to limits on who can benefit from a section 501(c)(4) social welfare organization’s activities (a more relaxed requirement than for section 501(c)(3) charities)²⁶⁵ or undermine social welfare. And unlike charities, concerns about ensuring an even playing field with other speakers with respect to deductibility do not arise because contributions to section 501(c)(4) social welfare are not deductible.²⁶⁶

2. Mutual Benefit Nonprofits Not Eligible for Tax Deductible Charitable Contributions

Most other types of tax-exempt nonprofits are mutual benefit organizations, in that they exist to further the interests of their members. Common examples of these types of nonprofits are labor unions, business associations, social clubs, and fraternal organizations.²⁶⁷ As with section 501(c)(4) organizations, most of these nonprofits are not eligible to receive deductible charitable contributions.²⁶⁸ (The next section discusses the issues raised by the few that are eligible.)

Whether the exemption these nonprofits enjoy is a subsidy is complicated by the fact that the exemption varies in breadth depending on the type of nonprofit. For example, social welfare organizations, labor unions, business associations, and fraternal organizations usually enjoy exemption from federal income tax for their net investment

262. See Aprill & Mayer, *supra* note 134, at 1893–94.

263. See, e.g., Boris I. Bittker & George K. Rahdert, *The Exemption of Nonprofit Organizations from Federal Income Taxation*, 85 YALE L.J. 299, 347–48 (1976).

264. *Id.* at 346–47.

265. See Aprill, *Examining the Landscape of 501(c)(4) Social Welfare Organizations*, *supra* note 260, at 351 (citing *Social Welfare: What Does It Mean? How Much Private Benefit Is Permissible? What Is a Community?*, in EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION (CPE) TECHNICAL INSTRUCTION PROGRAM FOR FISCAL YEAR 1981 para. 16 (1981), <https://www.irs.gov/pub/irs-tege/eotopicg81.pdf> [<https://perma.cc/MYY6-3UUU>]).

266. See I.R.C. §§ 170(c), 2055, 2106, 2522.

267. See I.R.C. § 501(c)(5)–(8), (10).

268. See I.R.C. §§ 170(c), 2055, 2106, 2522.

income, but social clubs do not.²⁶⁹ And the exemption for political organizations under section 527 only applies to contributions received for their (political) exempt purposes.²⁷⁰

As is the case with community-benefitting social welfare organizations, the most recent analyses conclude that exemption is a subsidy to the extent it provides tax deferral advantages, including by exempting investment income.²⁷¹ This includes the ability of donors to avoid taxation of gain when they contribute appreciated property to section 501(c)(4), 501(c)(5), and 501(c)(6) organizations because such contributions both do not trigger realization and recognition of that gain and are exempt from the federal gift tax.²⁷² Commentators struggle to justify these subsidies in this mutual benefit context, with the most recent usually concluding there is not a sufficient justification for them and so they should be eliminated.²⁷³ If Congress followed this advice, then not only would there be no policy basis for limiting speech of these nonprofits unless it was fundamentally inconsistent with the purpose underlying their exemption classification, but the Supreme Court–endorsed, constitutionally sufficient justification for speech limits described in *Taxation With Representation* would no longer apply.²⁷⁴

269. See I.R.C. § 501(c)(4)–(8), (10) (generally exempting income from tax for these organizations); I.R.C. § 512(a)(3) (for section 501(c)(7) social clubs, classifying income other than exempt function income as unrelated business taxable income).

270. I.R.C. § 527(c)(1).

271. Aprill & Mayer, *supra* note 134, at 1893–94.

272. See Colinvaux, *supra* note 65, at 490–91. The subsidy arises from the combination of non-recognition of gain when a donor contributes appreciated property and the federal gift tax exemption. See Aprill, *supra* note 163, at 324–25. This contrasts with the treatment of appreciated property gifts to section 527 political organizations, which are also exempt from gift tax, but which trigger taxation of gain for the donor. See I.R.C. § 84 (transfer of appreciated property to political organizations treated as a sale); I.R.C. § 2501(a)(4) (gift tax exemption for transfer of property to a political organization).

273. See, e.g., Daniel Halperin, *Income Taxation of Mutual Nonprofits*, 59 TAX L. REV. 133, 135–36 (2006); Miller, *supra* note 65, at 458–59.

274. As for the issue of “dark money,” that is the ability of donors to these organizations to conceal their identities even if the organizations engage in political campaign intervention as long as that activity does not trigger election law disclosure requirements, I have argued elsewhere that to the extent donor disclosure should apply to such activities it is better imposed through election laws administered by election agencies. See Lloyd H. Mayer, *The Much Maligned 527 and Institutional Choice*, 87 B.U. L. REV. 625 (2007). That said, if the federal courts ultimately foreclose this option because of the recently decided *Americans for Prosperity Foundation v. Bonta* decision, as some predict may happen, that conclusion would need to be revisited. See, e.g., Lindsay Hemminger, Note, *Americans for Prosperity Foundation v. Bonta: The Dire Consequences of Attacking a Major Solution to Dark Money in Politics*, 81 MD. L. REV. 1007, 1007 (2022).

3. Mutual Benefit Nonprofits Eligible for Tax Deductible Charitable Contributions

A small subset of tax-exempt, mutual benefit nonprofits is eligible to receive deductible charitable contributions.²⁷⁵ These are veterans' organizations, cemetery companies, and, if the contribution is given for charitable purposes, certain fraternal organizations.²⁷⁶ The justifications for the last category are the same as for charities generally given the required dedication of such contributions to charitable purposes.²⁷⁷ As for veterans' organizations and cemetery companies, both of which are subject to limits on private inurement as a condition of deductibility as well as certain other requirements, there appears to be no clear rationale for their eligibility other than Congress's favoring of veterans for the former and historical inertia for the latter.²⁷⁸

That said, there appear to be only two rationales for limiting the speech of these organizations as a condition of either exemption or deductibility of contributions. The first is if the speech is inconsistent with the purpose that is the basis for their exemption, a rationale that also applies to both charities and other types of tax-exempt nonprofits. The second is if the ability of donors to deduct their contributions that

275. According to IRS data, there are 28,965 section 501(c)(19) veterans' organizations, 10,738 section 501(c)(13) cemetery companies, 42,600 section 501(c)(8) fraternal beneficiary societies, and 16,737 section 501(c)(10) domestic fraternal beneficiary societies. INTERNAL REVENUE SERV., INTERNAL REVENUE SERVICE DATA BOOK OF 2021, at 30 (2022), <https://www.irs.gov/pub/irs-pdf/p555b.pdf> [<https://perma.cc/EM7X-Q9HT>]. This compares to 1,828,187 organizations that are tax-exempt under all the provisions of section 501(c), including 1,431,266 that are tax-exempt under section 501(c)(3). *Id.* The figures in the latter sentence do not include organizations that do not have to apply for recognition of exemption, do not have to file annual information returns with the IRS, and have not chosen to voluntarily take either action, which consist primarily of churches and church-related entities. See I.R.C. § 508(c)(1)(A) (exempting churches and certain church-related entities from the requirement that section 501(c)(3) organizations apply for recognition of that status); I.R.C. § 6033(a)(3)(A)(i) (exempting churches and certain church-related entities from the requirement that organizations exempt from taxation under section 501(a) file an annual return).

276. See I.R.C. § 170(c)(3)–(5) (income tax deduction); I.R.C. § 2055(a)(3)–(4) (estate tax deduction, which is not available for transfers for cemetery companies); I.R.C. § 2106(a)(2)(A)(iii) (estate tax deduction for estates of nonresident noncitizens, which is not available for transfers for cemetery companies or veterans' organizations); I.R.C. § 2522(a)(3)–(4), (b)(4)–(5) (gift tax deduction, which is not available for gifts to cemetery companies).

277. See *supra* notes 247–249 and accompanying text.

278. See I.R.C. § 501(c)(13), (19); *Regan v. Tax'n With Representation of Wash.*, 461 U.S. 540, 550–51 (1983) (assuming Congress was motivated by a desire to favor veterans when providing tax benefits to veterans' organizations); *John D. Rockefeller Fam. Cemetery Corp. v. Comm'r*, 63 T.C. 355, 359–60 (1974) (noting that the exemption for cemetery companies dates back to 1913 and the language of the exemption had not materially changed since 1921); *Cemeteries*, in EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION (CPE) TECHNICAL INSTRUCTION PROGRAM FOR FISCAL YEAR 1980 paras. 1–3 (1981), <http://www.irs.gov/pub/irs-tege/eotopicj80.pdf> [<https://perma.cc/A2ME-ZX75>] (same).

are then used for the speech at issue creates an uneven playing field with other entities. But as the Supreme Court held in *Taxation With Representation*, the Constitution's equal protection requirement does not prohibit Congress from creating such an uneven playing field if it has a rational basis for doing so, which it has with respect to favoring veterans.²⁷⁹

IV. TAX EXEMPTION, TAX DEDUCTIBILITY, AND SPEECH

This part draws on the previous constitutional and policy discussions to evaluate current and proposed limitations on speech by tax-exempt nonprofits. It concludes that the existing limitations on election-related speech and lobbying by charities are supported by private benefit concerns for the former type of speech and by maintaining a level tax field for all speakers, including individuals and taxable entities, for both types of speech. At the same time, it concludes that there is no justification for expanding those limits to encompass other forms of political speech, especially given the existing broad legal definitions of what purposes qualify a nonprofit as charitable, which are supported by significant policy arguments. It also concludes that there is not a sound policy basis for limiting political speech of any type for noncharitable tax-exempt organizations other than the small subset of such organizations that are eligible to receive tax deductible contributions, and as a practical matter it does not appear those latter entities engage in much such speech.

As for other types of speech, including hate speech and fake news, any attempt to limit this speech even for charities would likely raise significant and constitutionally vulnerable definitional issues and again be contrary to the broad legal definitions of what purposes qualify a nonprofit as charitable. In extreme situations some speech may clearly not provide public benefit and so, if a substantial part of a purported charity's activities, would disqualify that entity as a charity. These situations include if the speech promotes illegality, is contrary to fundamental public policy, or expresses positions unsupported by facts or only supported by obviously distorted facts. But any prohibition or limitation of speech outside of these extreme situations would be constitutionally problematic, very difficult for the IRS to administer in a constitutionally valid manner, and/or inconsistent with the current broad legal definitions of permitted purposes.

279. *Tax 'n With Representation of Wash.*, 461 U.S. at 549–51.

A. Political Speech: Advocacy and Elections

There are at least two grounds for limiting political speech by charities, but not by other tax-exempt nonprofits.²⁸⁰ First, political speech could provide a prohibited private benefit.²⁸¹ With respect to lobbying and other political advocacy, there is no inherent private benefit in this type of speech, as a charity could easily engage in it solely for the purpose of benefitting the public or a significant portion of the public. Political campaign intervention—supporting or opposing a candidate for public office—does, however, provide inherently a significant private benefit to the supported candidate (or the opponent(s) of an opposed candidate).²⁸²

Second, other speakers are prohibited from using after-tax dollars for either political campaign intervention or lobbying because the IRC denies a deduction for spending on these types of speech.²⁸³ The Supreme Court concluded this denial was constitutional even when the speech at issue was directly related to the business interests of a speaker and so otherwise would have been deductible as an ordinary and necessary business expense.²⁸⁴ If, therefore, charities could engage in either of these types of political speech with deductible charitable contributions, that would give them and their supporters an advantage over individuals and businesses.²⁸⁵ It also could lead individuals and businesses to create purported charities as vehicles for this type of speech to level the playing field, with the risk that some of

280. Adam Parachin also argues that another justification for restrictions on political advocacy by charities is that charity and government should remain distinct from each other. See Adam Parachin, *Reforming the Regulation of Political-Advocacy by Charities: From Charity Under Siege to Charity Under Rescue?*, 91 CHI.-KENT L. REV. 1047, 1076–77 (2016). But this argument has much broader ramifications for the permissible activities of charities, including non-speech activities, and so is beyond the scope of this Article.

281. See *Overview of Inurement/Private Benefit Issues in IRC 501(c)(3)*, *supra* note 231 and accompanying text.

282. See Kindell & Reilly, *supra* note 46, at 452–58 (discussing the overlap of the political campaign intervention and private benefit prohibitions under section 501(c)(3)); Gregory L. Colvin, *How Well Does the Tax Code Work in Regulating Politics?*, 12 J. TAX'N EXEMPT ORGS., Sept./Oct. 2000, at 66–67, 69 (2000) (same); Simon et al., *supra* note 229, at 287 (same). A related but distinct argument is that political campaign intervention fails to provide a significant public benefit. See Daniel J. Hemel, *Tangled Up in Tax: The Nonprofit Sector and the Federal Tax System*, in THE NONPROFIT SECTOR: A RESEARCH HANDBOOK, *supra* note 229, at 144, 153.

283. See *supra* note 258 and accompanying text.

284. *Cammarano v. United States*, 358 U.S. 498, 513 (1959).

285. As Ellen Aprill has noted, a “more persuasive justification for the [political campaign intervention] prohibition [than that Congress wanted to keep all tax-exempt organizations out of politics] is that Congress did not wish tax-deductible contributions to be used for electioneering activities.” Ellen P. Aprill, *Churches, Politics, and the Charitable Contribution Deduction*, 42 B.C. L. REV. 843, 844 (2001).

these entities would not truly be charities, which, if they were exposed as such, could harm the reputation of all charities.²⁸⁶

There are therefore strong policy reasons for maintaining the current prohibition on political campaign intervention by charities—both to prevent significant private benefit and to keep the playing field level with other speakers.²⁸⁷ As for the lobbying limitation, while there is nothing inherently inconsistent with lobbying (or other political advocacy) and being a charity as defined in the IRC,²⁸⁸ the lack of any limitation would give charities and their supporters an advantage over other speakers for which there is not a clear rationale. These reasons therefore support the current limits on political speech by charities, limits which are also constitutional under the existing court precedents.²⁸⁹ At the same time, there is no policy basis for extending the current limits to other forms of political advocacy, although the definition of lobbying should be refined to make it more consistent with the definition used for purposes of denying a deduction for other speakers.²⁹⁰ But this would be a minor change.

In contrast, there does not appear to be a policy basis for a blanket limitation on political campaign intervention or lobbying by noncharitable, tax-exempt nonprofits that are not eligible to receive deductible

286. The IRS currently applies a relatively low level of scrutiny to applications for recognition of exemption as a section 501(c)(3) charity. See INTERNAL REVENUE SERVICE DATA BOOK OF 2021, *supra* note 275, at 28 (of 90,461 closed applications for recognition of exemption under section 501(c)(3), the IRS approved 78,093 and denied 64, with the remainder closed without a decision because they were withdrawn, incomplete, or for other reasons); David A. Fahrenthold et al., *76 Fake Charities Shared a Mailbox. The I.R.S. Approved Them All*, N.Y. TIMES (July 3, 2022), <https://www.nytimes.com/2022/07/03/us/politics/irs-fake-charities.html> [https://perma.cc/Y2ZK-V7S5]. It also audits less than 0.2 percent of the annual information returns (the Form 990 series) filed by tax-exempt organizations. Compare INTERNAL REVENUE SERVICE DATA BOOK OF 2021, *supra* note 275, at 53 (reporting examinations of 1,586 Form 990 series annual information returns and certain other forms in fiscal year 2021), with *id.* at 4 (reporting more than 1.3 million Form 990 series annual information returns and certain other forms filed by tax-exempt organizations in each of fiscal year 2020 and fiscal year 2021); INTERNAL REVENUE SERV., INTERNAL REVENUE SERVICE DATA BOOK OF 2019, at 4 (2020), <https://www.irs.gov/pub/irs-prior/p55b--2020.pdf> [https://perma.cc/3AU2-7CP2] (2020) (reporting more than 1.5 million Form 990 series annual information returns and certain other forms filed by tax-exempt organizations in each of fiscal year 2018 and fiscal year 2019).

287. For other policy arguments that support the prohibition, including based on maintaining a “border” between charities and governments, see Simon et al., *supra* note 229, at 284–87 (also noting that there is a “near consensus” of support among commentators for the prohibition).

288. See *id.* at 286–87 (discussing policy arguments in favor of the lobbying limitation, but noting they all have significant flaws).

289. See *supra* notes 131–153 and accompanying text.

290. See Lloyd H. Mayer, *What Is This “Lobbying” That We Are So Worried About?*, *supra* note 161, at 508–18 (comparing the definitions of lobbying in federal tax law and under the federal Lobbying Disclosure Act).

contributions. This is particularly true given that such nonprofits are taxable with respect to their investment income to the extent of their political campaign intervention or lobbying expenditures, thereby eliminating any actual subsidy for that speech in most cases.²⁹¹ In fact, if there is no subsidy, the limit may be unconstitutional, since the *Taxation With Representation* rationale would not apply.²⁹²

That said, there are two gaps in this reasoning that Congress should address. First, and as previously noted, the ability of donors to avoid both income tax and gift tax on gain by donating appreciated property to section 501(c)(4), 501(c)(5), and 501(c)(6) organizations should be eliminated.²⁹³ Second, the ability of these organizations to receive (tax-exempt) investment income in one year and then spend that (subsidized) income on political activity in a later year during which they do not receive investment income and so are not subject to the section 527(f) tax should also be eliminated.²⁹⁴

As for the relatively small subset of noncharitable, tax-exempt nonprofits that are eligible to receive deductible contributions, they should be subject to the same limits on political campaign intervention and lobbying to provide an even playing field with other, non-exempt speakers.²⁹⁵ But as a practical matter, deductible contributions to fraternal organizations are not useable for this type of speech because they have to be dedicated to charitable purposes, which presumably are not furthered by either political campaign intervention or lobbying.²⁹⁶ As for cemetery companies, the statutory requirements for

291. See *supra* note 163 and accompanying text. As with the limit on lobbying by charities, the definition of lobbying should be refined to make it more consistent with the business-deduction-denial definition, but this would be a minor change. See *supra* note 290 and accompanying text.

292. Eliminating the current limitation on political campaign intervention by section 501(c) organizations (other than section 501(c)(3) organizations) would mean that organizations seeking to engage primarily or solely in political campaign intervention to further purposes that could qualify them for exemption under a provision of section 501(c) would not be required to form as a section 527 political organization to be tax-exempt. This in turn means that if Congress desires tax-exempt organizations that engage primarily or solely in political campaign intervention to be subject to special rules, such as the notification and disclosure rules currently only applicable to section 527 organizations, it would have to extend them to such section 501(c) organizations. See I.R.C. § 527(i) (notification); I.R.C. § 527(j) (disclosure). For a contrary proposal that would require all organizations, including all section 501(c) organizations, to engage in political campaign intervention only through affiliated section 527 political organizations, see Aprill, *supra* note 60, at 48, 78–79.

293. See *supra* note 163; *supra* notes 272–273 and accompanying text.

294. See Aprill, *supra* note 163, at 325 n.186 (noting this issue); *supra* note 163 (describing section 527(f) tax).

295. See *supra* notes 283–286 and accompanying text.

296. See *supra* notes 21–23 and accompanying text. Political activity may also be inconsistent with the statutory requirements for section 501(c)(10) domestic fraternal societies. CONG. RSCH.

exemption and deductibility may, by limiting those companies to being chartered “solely” for burial purposes, prevent them from engaging in political speech.²⁹⁷ Finally, for veterans’ organizations there are no indications that they engage to any significant extent, if at all, in this type of speech. And even if they do or do so in the future, the favoring of individuals who have served in the armed services may justify allowing the field to be tilted in this respect.

B. Disfavored Speech: Hate Speech and Fake News

In contrast, there are two grounds for *not* imposing specific limits on hate speech and fake news as a condition of tax-exempt status as a charity, or other type of nonprofit, except in the most egregious situations. First and most importantly, any such limits would require definitions of hate speech and fake news that would provide sufficient notice to charities and sufficient limits on IRS discretion to avoid being unconstitutionally vague.²⁹⁸ Indeed, the initial attempt by the IRS to apply the regulatory definition of “educational” to deny tax-exempt status to a purported charity led to a finding that its application was unconstitutional in that instance.²⁹⁹ While the IRS responded with the methodology test, that test likely would be unconstitutional if applied too vigorously by the IRS, which may explain why the IRS appears to have only used it sparingly to deny tax-exempt status.³⁰⁰ The difficulty of creating a sufficiently non-vague definition of hate speech is illustrated by the various existing definitions of what constitutes a hate group.³⁰¹ And none of those definitions has had to withstand constitutional scrutiny, as they either are provided by non-governmental actors or, for the FBI definition, are only used for data gathering purposes.³⁰² Similarly, creating a definition of fake speech is difficult because

SERV., RL33377, TAX-EXEMPT ORGANIZATIONS: POLITICAL ACTIVITY RESTRICTIONS AND DISCLOSURE REQUIREMENTS 13 (2010), <https://crsreports.congress.gov/product/pdf/RL/RL33377/8> [<https://perma.cc/EDA9-FHN7>].

297. See I.R.C. § 170(c)(5) (“chartered solely for burial purposes”); I.R.C. § 501(c)(13) (“chartered solely for the purpose of the disposal of bodies by burial or cremation”); Aprill, *Amending the Johnson Amendment*, *supra* note 52, at 6 n.33.

298. See *supra* notes 154, 157 and accompanying text.

299. See *supra* note 186 and accompanying text.

300. See *supra* notes 189–194 and accompanying text.

301. See *supra* notes 70–73 and accompanying text.

302. *Id.* A recent attempt by New York to require social media networks to create a complaint mechanism and a response policy for “hateful conduct” foundered in part on this constitutional concern. See *Volokh v. James*, No. 22-CV-10195, 2023 WL 1991435, at *10 (S.D.N.Y. Feb. 14, 2023) (concluding that facial challenge under the First Amendment was likely to succeed in part because of indefiniteness of key terms in the definition of “hateful conduct”).

many issues—whether determining and interpreting history or medical treatments—are hard for even experts to resolve with certainty and would presumably prove even more challenging for IRS officials.

Second, the definitions of educational and charitable more generally are broad and relatively vague to allow charities, and their leaders and supporters, to choose goals and means. This freedom is supported by many of the theories used to justify the special treatment of charities, including their role in providing goods and services not sufficiently available through either the market or the political system and as a vehicle for supporting pluralism.³⁰³ Any limits on what some would label hate speech or fake news would risk constraining these definitions and so undermining these policy reasons for supporting charities in the first place.

That said, speech that is unambiguously incompatible with public benefit would be inconsistent with being a charity and so, if a substantial part of a purported charity's activities, should be prohibited. Under existing law, this would include speech promoting illegal activity or that is contrary to fundamental public policy, which the IRS and the courts view as inherently inconsistent with providing public benefit.³⁰⁴ It also presumably would include fraudulent speech, which is not protected by the First Amendment.³⁰⁵ But as others have documented, the IRS and the courts only apply these limits in relatively egregious cases, such as promoting violence against others (not merely antagonism to specific groups) or racial discrimination in education (and possibly racial discrimination in some other contexts).³⁰⁶ So while existing law should prevent hate groups that promote illegal violence, including violent insurrection, from qualifying for section 501(c)(3) status, it would not reach many other groups that engage in speech that most view as hateful but does not cross this threshold.

Spreading demonstrably false information would also appear to be inconsistent with providing public benefit, but as already noted the difficulty is how to determine what is false. The IRS has chosen to only make this determination relatively rarely, and usually when the

303. See *supra* notes 249–252 and accompanying text.

304. See *supra* notes 196–197 and accompanying text.

305. See *supra* note 194 and accompanying text.

306. See Samuel D. Brunson & David J. Herzig, *A Diachronic Approach to Bob Jones: Religious Tax Exemptions After Obergefell*, 92 IND. L.J. 1175, 1189–93 (2017) (gathering the instances where the IRS or the courts have denied or revoked tax exemption based on illegality or the fundamental public policy doctrine).

organization states positions clearly unsupported by the possibly true facts provided.³⁰⁷ When a purported charity instead asserts positions based on arguably defensible facts, even if the positions are well outside the mainstream, the IRS appears to have chosen to let the organization claim charity status.³⁰⁸ Given the limited expertise and fact-finding ability of the IRS, as well as the constitutional concerns already described, this appears to be a prudent decision.³⁰⁹

An alternate approach would be to limit “educational” to formal educational institutions—that is, organizations with a formal curriculum, faculty, and student body.³¹⁰ This is an approach used by some states when creating special rules or exemptions for educational institutions in their charitable solicitation statutes.³¹¹ Congress has applied a similar definition for certain federal tax purposes.³¹² But such a limitation would both require congressional action and would strip a wide range of organizations that currently qualify as educational—including museums, theaters, think tanks, and advocacy organizations from across the political spectrum—of their charitable status.³¹³ While such

307. *See, e.g.*, *Nat'l All. v. United States*, 710 F.2d 868, 873 (D.C. Cir. 1983) (“The real gap is in reasoning from the purported facts to the views advocated”); *Families Against Gov't Slavery v. Comm'r*, 93 T.C.M. (CCH) 958, 959 (2007) (“The documents that petitioner presents to the public [about the alleged slavery and entrapment of Hollywood celebrities by government officials] are full of unsupported opinions and distorted facts.”); I.R.S. Non-Docketed Serv. Advice Rev. 0343R (July 19, 2002), 2002 WL 32864703 (“[C]ontent [of articles and letters provided] appears to be more the personal opinions *** than a full exposition of facts.”); I.R.S. Non-Docketed Serv. Advice Rev. 0266R (Apr. 22, 1996), 1996 WL 33674854 (“[A] significant portion of the material makes use of inflammatory and disparaging terms and expresses conclusions more on the basis of strong emotional feelings, rather than on objective evaluations.”).

308. *See, e.g.*, *supra* notes 93–95 and accompanying text.

309. Even under this relatively permissive approach, some white supremacist groups may not qualify as “educational” under the methodology test. *See* Brunson, *supra* note 3, at 84–85.

310. *See* George D. Webster & John S. Nolan, *Educational v. Propaganda Organizations Federal Tax Exemption*, 42 AM. BAR ASS'N J. 773, 774 (1956) (mentioning the possibility of limiting “educational” in this manner).

311. *See, e.g.*, GA. CODE ANN. § 43-17-2(7) (2018); MO. REV. STAT. § 407.453(3) (1986); N.M. STAT. ANN. § 57-22-3(D) (1999); OKLA. STAT. tit. 18, § 552.4(2) (2022); S.C. CODE ANN. § 33-56-20(5) (2022); TENN. CODE ANN. § 48-101-502(b) (2022); CAL. CODE REGS. tit. 11, § 300.1(a) (2022).

312. *See* I.R.C. § 170(b)(1)(A)(ii) (describing an “educational organization” in this manner). There is an ongoing dispute regarding the proper interpretation of this statute. *See* *Mayo Clinic v. United States*, 997 F.3d 789, 792 (8th Cir. 2021).

313. *See* Treas. Reg. § 1.501(c)(3)-1(d)(3)(ii) (examples of educational organizations under section 501(c)(3), including groups that present “forums, panels, lectures, or other similar programs,” and “museums, zoos, planetariums, symphony orchestras, and other similar organizations”); Laura B. Chisolm, *Sinking the Think Tanks Upstream: The Use and Misuse of Tax Exemption Law to Address the Use and Misuse of Tax-Exempt Organizations by Politicians*, 51 U. PITT. L. REV. 577, 581–85, 593–603 (1990) (describing why think tanks qualify as section 501(c)(3) tax-exempt organizations under current law).

a move likely would also strip most if not all groups identified as hate groups or spreaders of false news by their critics of charitable status as well, the number of groups affected would be orders of magnitude greater than the number of these purported hate groups and fake news outlets.³¹⁴

Despite these difficulties, it could and indeed has been argued that hate speech and fake news may constitute a clear danger to our democracy.³¹⁵ It could therefore be further argued that organizations engaging in these types of speech should be disqualified from tax-exempt and particularly charitable status under federal tax law, given the benefits that come with that status. But the difficulty, as highlighted by the previous discussion and the apparent IRS reluctance to vigorously apply the illegality and contrary to fundamental public policy standards or the methodology test, is separating speech with which we (or IRS officials) disagree from speech that is contrary to these requirements.³¹⁶ And there are also dangers created by giving government officials too much leeway with respect to regulating these kinds of speech, including through denial of favorable tax status.

For example, the International Center for Not-for-Profit Law (ICNL) has documented the attempts by many countries to restrict freedom of expression, including for nonprofits, through laws purportedly aimed at preventing extremism and other negative behavior.³¹⁷ And such attempts are not limited to authoritarian regimes, as illustrated by a more recent report from ICNL documenting attempts in the

314. Compare, e.g., *Directory of Charities and Nonprofit Organizations*, GUIDESTAR, <https://www.guidestar.org/NONPROFITDIRECTORY.ASPX?CAT=1&SUBCAT=3&P=1> [<https://perma.cc/2V8F-U5ZC>] (listing more than 12,500 museums and over 31,200 performing arts organizations), with, e.g., *supra* note 3 and accompanying text (the number of purported hate groups that currently qualify as section 501(c)(3) tax-exempt charities appear to be only in the dozens).

315. See, e.g., Feldman, *supra* note 124, at 88 (“A society that constitutionally protects hate speech is, quite simply, not a pluralist democracy.”); Merton Reglitz, *Fake News and Democracy*, 22 J. ETHICS & SOC. PHIL. 162, 164 (2022) (arguing that “online fake news threatens democratic values and processes by playing a crucial role in reducing the perceived legitimacy of democratic institutions,” even if its content is not widely believed); Daniela C. Manzi, Note, *Managing the Misinformation Marketplace: The First Amendment and the Fight Against Fake News*, 87 FORDHAM L. REV. 2623, 2632 (2019) (“Fake news undermines democracy by inhibiting voters’ ability to make informed political decisions and sowing distrust in legitimate media.”).

316. For examples of attempts to wrestle with whether these requirements should be applied more broadly, see, e.g., Miriam Galston, *Public Policy Constraints on Charitable Organizations*, 3 VA. TAX REV. 291 (1984); Adam Parachin, *Why and When Discrimination is Discordant with Charitable Status: The Problem with “Public Policy,” The Possibility of a Better Solution*, 6 CANADIAN J. COMP. & CONTEMP. L. 305 (2020).

317. Int’l Ctr. for Not-for-Profit L., *The Right to Freedom of Expression: Restrictions on a Foundational Right*, 6 GLOB. TRENDS NGO L., Apr. 2015, at 1, 1, https://www.icnl.org/wp-content/uploads/global-ngo-law_trends6-1.pdf [<https://perma.cc/73EW-MEX2>].

United States to restrict the right to assemble through anti-protest laws.³¹⁸ Even rules that prohibit seemingly clearly problematic speech can lead to troubling results, as evidenced by the recent New Zealand Supreme Court's decision that an otherwise qualified nonprofit could not register as a charity because of its "discriminatory" speech that promoted socially conservative views about marriage and family.³¹⁹ Whatever one's position on such views, it is troubling for a government to be able to deny a legal benefit for expressing views that are seen by many if not most as a legitimate part of public discussion, even if they disagree with them, especially since views that once were in vogue may become disfavored and vice versa.

C. Solicitation and Other Speech

There do not appear to be any policy grounds for restricting specific speech for tax-exempt nonprofits in other respects, other than the minimal imposition by Congress of certain speech-related provisions designed to help enforce the limitations on deductibility of contributions.³²⁰ Turning first to charitable solicitation, while the states have sought to impose certain limits on charitable solicitation out of a desire to protect potential donors, the federal government has chosen to leave such efforts almost entirely to the states (including limiting the jurisdiction of the Federal Trade Commission with respect to solicitation to for-profit entities).³²¹ Absent a shift in this federalist approach by Congress, there does not appear to be a policy ground for Congress to attempt to regulate solicitation through tax exemption.³²²

As for state efforts to regulate charitable solicitation, in theory states could try to impose such regulation as a condition of tax exemption under state law. It is unclear, however, to what extent doing so would be constitutional if the regulation was not related to the tax

318. Int'l Ctr. for Not-for-Profit L., *Restrictions on Protest in the United States*, 9 GLOB. TRENDS NGO L., Oct. 2018, at 1, 1 <https://www.icnl.org/wp-content/uploads/Global-Trends-October-2018-final.pdf> [<https://perma.cc/3Q7K-WHD3>].

319. Att'y-Gen. v. Fam. First N.Z., [2022] NZSC 80; *see also* Samuel Chu, *Controversial or Discriminatory Purposes after Family First*, J. INT'L & COMPAR. L. (Jan. 17, 2023), <https://ndjicl.org/online/2023/controversial-or-discriminatory-purposes-after-family-first> [<https://perma.cc/4FG4-ZXHG>] (discussing the case).

320. *See supra* notes 110–111 and accompanying text.

321. *See* Cmty. Blood Bank of Kan. City Areas, Inc. v. FTC, 405 F.2d 1011, 1018–19, 1022 (8th Cir. 1969) (limited jurisdiction of the FTC, citing 15 U.S.C. §§ 44, 45(a)(2)); *supra* notes 164–167 and accompanying text (states' efforts to regulate charitable solicitation).

322. *See, e.g.*, Fishman, *supra* note 109, at 36–37 (discussing possible federalization of charitable solicitation oversight).

benefits provided; this at least was the argument that an affected non-profit pursued when challenging the Oregon statute discussed previously, which Oregon now appears to have chosen not to enforce.³²³ And the Supreme Court's recent charity donor disclosure case, striking down California's requirement that charities provide it with donor information to aid in charity regulation, suggests that the federal courts may look carefully at claims that speech restrictions are justified by general charitable solicitation policy concerns.³²⁴

As for other types of speech, there are both constitutional and policy arguments against such restrictions, as demonstrated by the reaction to then-President Trump's criticism of certain institutions of higher education.³²⁵ Furthermore, any such restrictions would be inconsistent with the broad definition of "educational" that is supported by the previously discussed policy reasons, except in the most egregious situations of promoting illegality or acting contrary to fundamental public policy and of emotional appeals unsupported by facts or only supported by highly distorted facts. Therefore, any proposals to impose speech-related limitations as a condition on federal tax benefits (or state tax benefits) are not justified as a policy matter and may be unconstitutional.

CONCLUSION

The fact that groups ranging from white supremacists to Holocaust deniers to promoters of quack COVID-19 remedies to repeaters of the "Big Lie" conspiracy theories enjoy the benefits of charitable tax-exempt status is troubling. And it is perhaps little comfort to note that the number of such groups is relatively small, especially given that in the age of social media their impact may be much greater than their numbers or finances might indicate. Yet, both constitutional and policy considerations argue for caution in seeking to deny such groups this favored tax status, lest by doing so the government is given undue power to pick and choose among speakers based on its, or the public's, preferences of the day. Similarly, there appear to be no solid policy grounds for attempting to limit other forms of non-political speech and potential constitutional issues with doing so.

323. Petitioner Car Donation Foundation's Amended Opening Brief at 22–23, *Car Donation Found. v. Dep't of Just.*, No. A164973 (Or. Ct. App. Nov. 28, 2017), 2017 WL 10443837.

324. *See supra* notes 173–174 and accompanying text (discussing *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373 (2021)).

325. *See supra* notes 117–120 and accompanying text.

In contrast, the current, time-tested limits on political campaign intervention and lobbying are supported by the policies underlying this favored tax status and permitted under existing constitutional law. For non-charitable, tax-exempt organizations, some tweaks are needed with respect to the extent of the exemption they enjoy and the limits they face for such speech. And as with many issues of federal tax law, more extensive and clearer rules would ease both enforcement of and compliance with these limits, as well as lessening any remaining constitutional concerns. But with such caveats, these tax law limits on speech by nonprofits are appropriate and constitutionally permitted.

It almost goes without saying that this Article would not have been possible without the many contributions of Professor Ellen April. I am deeply grateful to have been able to build on the foundation that she has so carefully and expertly laid in this area. And I am even more grateful to have had the opportunity to know her both as a fellow scholar and as a friend and to be able to honor her through participating in this festschrift symposium.