HATE SPEECH: AN OVERVIEW FOR TAX EXEMPT ORGANIZATIONS
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1 INTRODUCTION

The regulation of “hate speech” raises challenging legal questions. How do we decide what constitutes “hate”? Are there certain messages or viewpoints that so lack any form of redeeming social value that the government should be permitted to regulate or prohibit them under the First Amendment? What are the legal tests and/or guidelines for regulators to distinguish good and bad speech? Should an open culture tolerate speech designed to spread intolerance?

These difficult free-speech questions grow increasingly more complex when evaluated in the context of U.S. tax policy. Should the government prohibit recognition of federal income tax exemption and/or charitable deductions for organizations that engage in “hate speech”? Are there circumstances when communications characterized by some as “hate speech” may nevertheless constitute an educational or religious activity within the parameters of section 501(c)(3) of the Internal Revenue Code? What about an activity that promotes social welfare under Section 501(c)(4)? What is the proper role of the IRS in regulating these matters, given that its primary responsibility is to collect tax revenues and enforce tax laws?

Answers to these questions draw upon fundamental assumptions of how one views the role of law in a civil society, the rationale for tax exemption and the charitable deduction, and the relationship between the nonprofit sector and the state. A full discussion of tax subsidy theory and pluralism are beyond the scope of this summary, but they underly the ongoing legal debate. As illustrated in the case law summaries below, these theories are neither mutually exclusive nor consistently applied. Section 501(c)(3) organizations make up an incredibly large and diverse sector of American society. Tax policy rationales for exempting churches, advocacy groups, schools, youth athletics, animal welfare groups, and hospitals (and allowing charitable deductions for financially supporting them) need not be the same. Likewise, the First Amendment considerations at play in their exempt activities are not always uniform. As we will see, they require nuance.

The following information is intended to provide an overview of the current legal landscape of “hate speech” in the United States, particularly, within the nonprofit sector. We begin with basic definitional questions and contextual considerations. Following this section are notes on several, but far from all, of the key cases that build today’s legal jurisprudence in this area. The focus here is on how courts have evaluated regulating speech of 501(c)(3) organizations. However, a handful of ancillary cases are included in order to provide a broader perspective of where the constitutional boundaries likely lie in the regulation of “hate speech” for 501(c) organizations.

2 DEFINITIONAL AND CONTEXT OVERVIEW*

2.1 Definition of Hate Speech

Despite its common use in popular discourse in the United States, the term “hate speech” does not currently have a fixed legal meaning under U.S. laws. The term is included in most dictionaries, encyclopedias, and Black’s Law Dictionary. Black’s Law Dictionary is less a definition and more a statement highlighting the definitional ambiguity.

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2.1.1 Webster Dictionary’s Definition

Speech that is intended to insult, offend, or intimidate a person because of some trait, such as race, religion, sexual orientation, national origin, or disability.

2.1.2 Encyclopedia Britannica’s Definition

Speech or expression that denigrates a person or persons on the basis of (alleged) membership in a social group identified by attributes such as race, ethnicity, gender, sexual orientation, religious, age, physical or mental disability, and others.”

2.1.3 Black’s Law Dictionary’s Definition

Hate speech is loosely defined by laypersons as any offensive speech targeted toward people based on race, religion, sexual orientation, or gender. Opinions about how such speech should be handled by legal authorities vary. Few seem to be familiar with the actual legalities of hate speech, and it is not uncommon for it to be confused with other crimes where hatred is believed to be a motivating factor. While much ado is often made about so-called “hate speech,” no satisfactory definition for this type of speech exists within the confines of the law.

2.2 Hate Speech vs. Hate Crimes

“Hate speech” is often confused with hate crimes in public discourse—an understandable confusion given the non-obvious distinction between the separate concepts of mere speech and conduct. Nevertheless, hate crimes (sometimes referred to as bias crimes) have a defined legal framework in the United States and have been enforced since the 1960s.

Hate crime laws enhance the punishment for criminal acts (such as murder, assault, vandalism) when the perpetrator is motivated in whole or in part by a bias against a race, religion, disability, sexual orientation, ethnicity, gender, or gender identity.

Criminal activity, including all forms of hate crimes, is a bar for tax-exempt status under section 501(c)(3). See, for example, Church of Scientology, Synanon Church, and Mysteryboy, Inc. and 2.5.2 below.

2.3 Examples of Acceptable Limitations on Free Speech

Modern free speech jurisprudence carves out a few narrow exceptions for types of speech that are not subject to absolute protection under the First Amendment. Libel, slander, false light, and invasion of privacy tort laws make up an important area where speech is regulated due to resulting reputational harm or invasion of privacy. Similarly, free speech jurisprudence allows for limitations concerning obscenities and certain emergency situations. Under the emergency exception, for instance, the government may punish speech about public issues when there is a clear and present danger of criminal activity that cannot otherwise be averted by non-censorial measures.

2.4 Right vs. Privilege Distinction

In addition to the above exceptions, the government is not required to fund or subsidize the exercise of First Amendment rights. When and if the government does engage in subsidizing or funding activities, however, it must do so in a viewpoint-neutral manner. The government must also comply with established legal protections to prevent infringing on civil rights and liberties, for example, by suppressing or chilling free speech.
2.5 Brief Historical Perspective

2.5.1 “Charity” for Tax Exemption Purposes

Sections 501(c)(3) and 170 of the Tax Code provide for tax-deductible donations as a privilege in recognition of an organization's activities that 1) benefit the general public and promote the general welfare; and 2) offset government burdens such as to educate children, provide for the poor, and foster community well-being. The U.S. system is based on the English Statute of Charitable Uses of 1601 and codified through the 20th century's tax code iterations, with the term “charitable” derived from and associated with common law standards of charity and charitable trusts. Per section 1.501(c)(3)-1(d)(2) of the U.S. Treasury Regulations: “the term charitable is used in section 501(c)(3) in its generally accepted legal sense and is, therefore, not to be construed as limited by the separate enumeration in section 501(c)(3) of other tax-exempt purposes which may fall within the broad outlines of charity as developed by judicial decisions.”

2.5.2 “Illegality” Never a Tax-Exempt Purpose

IRS Revenue Ruling 75-384, noting trust law as the “main source” of the “general law of charity,” provides that no tax-exempt organization may be created for illegal purposes. Rejecting tax exemption for an organization sponsoring acts of illegal civil disobedience to protest war, the IRS determined as follows and without any reference to “hate speech” and apart from any First Amendment considerations:

The purpose is illegal if the trust property is to be used for an object which is in violation of the criminal law, or if the trust tends to induce the commission of crime, or if the accomplishment of the purpose is otherwise against public policy. . . Thus, all charitable trusts (and by implication all charitable organizations, regardless of their form) are subject to the requirement that their purposes may not be illegal or contrary to public policy.

This limitation has been most recently utilized in the IRS’ denial of charitable activities that involve cannabis, a controlled substance under federal law, but legal in many states (and also in the context of trade associations promoting cannabis business activities). See IRS Denial 201917008.

2.5.3 Religious Organizations

Religious organizations’ tax-exempt status may involve additional compelling First Amendment considerations. As the U.S. Supreme Court observed in the landmark case of Walz v. Tax Commission, 397 U.S. 664, 676 (1970):

Few concepts are more deeply embedded in the fabric of our national life beginning with pre-revolutionary colonial times, than for the government to exercise at the very least this kind of benevolent neutrality toward churches and religious exercise generally, so long as none was favored over others and none suffered interference.

Critical constitutional principles are implicated here, particularly, since the power to tax is that of a sovereign. Religious institutions may be subject to the sovereign in limited ways (e.g., payroll taxes, health and safety regulations), but all such intrusions should be strictly scrutinized and guarded against overreaching. Notably, the Free Exercise Clause of the First Amendment protects religious liberty by prohibiting invasions thereof by the government – i.e., too much scrutiny of religious organizations’ activities. Additionally, the Establishment Clause of the First Amendment acts as a restraint on government power of matters “respecting an establishment of religion,” thus, making tax exemption consistent with separation of church and state – indeed, actually furthering separation.
The following cases are arranged in chronological order to illustrate how challenging courts have found these cases to be and the varying rationales relied upon to sort through the competing interests at play between First Amendment freedom of speech rights and tax exemption.

3.1  *Slee v. Commissioner*, 42 F.2d 184 (2d Cir. 1930)

This case addressed whether the American Birth Control League’s advocacy activity was charitable. The League operated a clinic that provided birth control information to married women, mainly for free. Judge Learned Hand took issue with the League’s activities that were “agitating for the repeal of laws preventing birth control.” The Court drew a distinction between fighting to remove an obstacle necessary to advance an organization’s exempt purposes and the activity itself being the exempt purpose. “Political agitation as such is outside the statute, however innocent the aim, though it adds nothing to dub it propaganda . . . Controversies of that sort must be conducted without public subvention; the Treasury stands aside from them.”

3.2  *Speiser v. Randall*, 357 U.S. 513 (1958)

The Supreme Court struck down a California property tax exemption requirement that was traditionally available to veterans but had been updated to limit eligibility only to veterans who signed a loyalty oath to abstain from advocating for the overthrow of the government or supporting foreign governments against the United States. The Court ruled that a discriminatory denial of a tax exemption for engaging in speech is a limitation on free speech. To deny an exemption to someone who engages in certain forms of speech is in effect to penalize them for such speech.


Fraternal orders excluding nonwhites from membership did not qualify for tax-exempt status. The court noted that tax exemption for such a group would amount to a subsidy, that is, federal government support or encouragement of racial discrimination. The court distinguished such discriminatory act, as opposed to speech alone.


This case raised the question of whether an organization that educated on women’s rights and other matters of public interest to women primarily through a newspaper was entitled to tax-exempt status. The Court held that Treasury Regulation 1.501(c)(3)-1(d)(3), requiring a “full and fair exposition” of the facts, was an unconstitutionally vague standard for assessing whether an organization qualifies as educational. In doing so, the Court noted that statutes phrased in individual sensitivities are suspect and susceptible to attack on vagueness grounds. As the Court further noted, “Distinguishing facts on the one hand, and opinion or conclusion, on the other, does not provide an objective yardstick by which to define ‘educational.’ A law needs an objective measurement to prevent viewpoint discrimination that people of common intelligence will not guess at the meaning.” The Court added, “We are sympathetic to the IRS’ attempts . . . the burden involved in reformulating the definition of ‘educational’ to confirm to First Amendment requirements.”

3.5  *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983)

It is constitutionally permissible to make “entitlement to tax exemption” under 501(c)(3) contingent on meeting minimum standards of charity – including serving a public purpose and not contrary to fundamental public policy. This case involved racially discriminatory conduct, not speech alone. Considering a private school policy that prohibited interracial dating and marriage by students, the
Court concluded that these racially discriminatory policies were unacceptable. The Court relied on public policy and added that whether the rationale behind the school policy was religious or not was irrelevant. The Court held that Bob Jones University could no longer be recognized as a tax-exempt entity, as its racially discriminatory policy was contrary to fundamental public policy.

For a helpful resource on how the public policy doctrine may apply more broadly to religious organizations, see Wagenmaker, Why Religious Organizations Shouldn’t Lose Tax-Exempt Status Based on Public Policy, Post-Obergefell, at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3104688 (page 15-24, digesting cases and IRS rulings).


Congress’ lobbying limitation under 501(c)(3) does not infringe on First Amendment rights. First Amendment rights are not required to be subsidized by the government. When there is no viewpoint discrimination, Congress has the full authority to determine what types of activities it will subsidize. “Both tax exemptions and tax-deductibility are a form of subsidy that is administered through the tax system.” Both majority and concurring opinions emphasized the importance of the 501(c)(4) alternative to conduct lobbying activity.


The IRS sets forth four new criteria known as the “methodology test,” as an “explanatory gloss” to the full and Big Mama Rag fair exposition test previously ruled unconstitutional for vagueness to support its denial of tax-exempt status to the National Alliance. The organization advocated white supremacy and the removal of non-whites and Jews from society through its newsletter, “Attack!” The four points of the methodology test are:

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

ii. The facts that purport to support the viewpoints are distorted.

iii. 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.

iv. The approach used in the organization’s presentations is not aimed at developing an understanding on the part of the intended audience or readership because it does not consider their background or training in the subject matter.

“The IRS attempts to test the method by which the advocate proceeds from the premises he furnishes to the conclusion he advocates rather than the truth or accuracy or general acceptance of the conclusion.” “It requires advocacy material to have “an intellectually appealing development of the views (at 875).”

The Court did not address the question of whether the test itself, or the application of the test, cures the vagueness issue. It also declined to offer an alternative test or definition. It instead stated that under any reasonable interpretation of the term “educational,” the IRS did not overstep by determining this organization did not qualify. “Speech may be constitutionally protected but the term ‘educational’ for purposes of 501(c)(3) does not embrace every continuing dissemination of ideas (at 876).”

In Footnote 14 of the opinion, the court, in dicta, stated that the exemption may also arguably have been denied through an alternative method due to the organization’s discriminatory membership practices based on McGlotten (above).
3.8 **Nationalist Movement v. Commissioner, 102 T.C. 558 (1994)**

The Tax Court went a step beyond the *National Alliance* and affirmed the constitutionality of the methodology test, as set forth in IRS Rev. Proc. 86-43, as applied to Nationalist Movement, another white supremacy advocacy organization.

The basis for the vagueness doctrine is due process, which requires 1) fair notice of proscribed conduct; and 2) explicit standards for Government officials, who might otherwise engage in arbitrary and discriminatory enforcement (at 584).

The Court analyzed the organization’s activities and the content of its publications in detail and then applied the first of the four-factors test and found that, “without question, the newsletter presents viewpoints unsupported by facts.”

It declined to conclude whether the newsletters failed the second distortion of facts standard. The third factor was satisfied because of the organization’s emphasis in using derogatory, inflammatory, and disparaging terms.

The fourth disqualifying factor, which focuses on whether the materials are intended to develop an understanding of the audience, was also determined to be present. The Court determined that youth were the intended audience but that most of the arguments were derived from the unrest of the 1960s, the Civil Rights Act, and Martin Luther King Jr. To that end, the Court elaborated, “Young people, by virtue of age alone, might have a somewhat limited background or training in the subject matter” . . . and [therefore] we conclude that the newsletter does not educate its readership in the manner required (at 594).”

3.9 **Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995)**

A state university’s refusal to use school funds to pay the printing costs of student publications solely based on the religious nature of some of the content constituted impermissible viewpoint discrimination in violation of the First Amendment’s guarantees of the freedom of speech. The use of school funds to pay printing costs in this context did not violate the Establishment Clause because the school funding program in question was neutral towards religion generally. In this case, the use of the funds served to provide a forum for the free expression of ideas, not a subsidy for a particular point of view. Thus, the program was deemed to have been designed to facilitate private speech, not a governmental message, despite the use of public-school funds.


The use of federal funds for legal services related to welfare benefits could not be contingent on requiring recipient organizations to abstain from challenging existing welfare laws in the course of their representation of clients. The Court held that these restrictions constituted impermissible viewpoint discrimination. This is so because the program in question was designed to facilitate private speech, not promote a governmental message, despite the use of governmental funds.


The Court held that a section 501(c)(4) organization did not violate the Bipartisan Campaign Reform Act of 2002, when it used corporate funds for an ad that encouraged listeners to contact their senators and oppose a filibuster. The Court emphasized the importance of First Amendment freedom of speech, noting that a key constitutional principle is “[w]here the First Amendment is implicated, the tie goes to the speaker, not the censor.” Similarly, “[w]here at all possible, government must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on the speech that does not pose the danger that has prompted regulations” (quoting *Fed. Election Comm’n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 265 (1986)). When it comes to speech,
“the benefit of any doubt [must be] given to protecting rather than stifling speech” (citing N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269–70 (1964)).


A state law school provided funds to its student organizations and thereby created a limited public forum, wherein the use of such funds by those organizations constituted a government subsidy. The Court concluded that reasonable campus rules applicable to all organizations may not be deemed viewpoint discrimination if an exemption from an all-comers’ membership policy is not granted. The reasonable rules and forum purposes are properly avenues of the State of California to subsidize certain public policies – or not. The state law school is a limited public forum and a tool to advance a governmental message.


The District Court for the D.C. Circuit permitted a constitutional challenge to an internal IRS policy subjecting certain applications for recognition of 501(c)(3) tax-exempt status connected with Israel to scrutiny in comparison to the then-current federal executive administration’s policies. The court explained that the First Amendment challenge was not barred and permitted the Plaintiff to seek declaratory and injunctive relief reasoning, in part, that the IRS’s internal policy constituted impermissible viewpoint discrimination, inconsistent with 501(c)(3) parameters.


Section 1052(a) of the Lanham Act, which prohibits the registration of trademarks that “disparaged or brought into contempt or disrepute any person, living or dead,” violated the free speech clause of the First Amendment. In this case, Slants, a rock group, had been refused trademark registration for the mark THE SLANTS under the disparagement limitation.

While the Court issued a spilt opinion (4/4), all Justices agreed that the disparagement provision unconstitutionally violated the First Amendment because it discriminated on the basis of viewpoint. Notable for exempt organizations is the Court’s analysis of the government’s arguments in favor of treating the speech (the trademark) as (1) government speech, not private speech; (2) a form of government subsidy; or (3) essentially a government program. The Court rejected all three, but its discussion provides helpful summaries on the scope of the law as it relates to each:

- “Our cases use the term ‘viewpoint’ in a broad sense, the disparagement clause discriminates on the bases of viewpoint [because] giving offense is a viewpoint.”
- “Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express ‘the thought that we hate’” (quoting Holmes’ dissent in Schwimmer, 279 US 644, 655 (1929)).

In the concurring opinion, Justice Kennedy emphasized that the law mandated positivity and silenced dissent.

This case may make the methodology test’s third factor, which evaluates whether an organization is making substantial use of inflammatory and disparaging terms, particularly susceptible to First Amendment challenges.


In a 6-3 opinion, the Court held a second section of the Lanham Act to be unconstitutional viewpoint discrimination. Specifically, Section 1052(a) denied trademarks for immoral or scandalous marks.
The Court explained that a law banning speech deemed by government officials to be “immoral” or “scandalous” can easily be exploited for illegitimate ends. The Court further explained that “a provision only rejecting marks for obscenity, vulgarity, and profanity” may be content-neutral, but the terms “scandalous” and “immoral,” were particularly problematic.

4 CONCLUDING REMARKS

As noted above, there remain many challenging questions when it comes to defining the contours of the First Amendment protections of free speech in light of the competing rationales for tax exemption and charitable deductions. The ambiguities, of course, have significant implications for how to address the intersection in the context of “hate speech.” As illustrated in the above case summaries, federal courts have significantly strengthened and expanded First Amendment protections for speech over the last several years. This trend is particularly clear in the Supreme Court’s two most recent trademark cases. These protections are, however, not absolute. Some level of regulation is constitutional. Indeed, racially discriminatory conduct presents a very strong case for denying tax-exempt status under 501(c), as compared to speech alone. If and how the federal courts’ recent expansion of free-speech rights will affect the boundaries of IRS oversight and judicial regulation of 501(c)(3) and 501(c)(4) organizations remain open questions. But they are important questions for a free and liberal democracy to continually wrestle with, as they shape the very nature of the interactions of private individuals, mediating institutions, and the state.