FLUNKING THE METHODOLOGY TEST: A FLAWED TAX-EXEMPTION STANDARD FOR EDUCATIONAL ORGANIZATIONS THAT "ADVOCATE[] A PARTICULAR POSITION OR VIEWPOINT"[1]

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If "the power to tax involves the power to destroy,"[2] the power to exempt involves the power to let flourish. Pursuant to the Taxing Clause,[3] Congress may grant exemptions from federal income taxation as a matter of "legislative grace."[4] Congress has seen fit to bestow this favor upon a wide range of organizations, including social welfare and mutual benefit organizations, such as veterans' associations and country clubs.[5] Arguably Congress' greatest solicitude has been reserved for public charities under Internal Revenue Code ("I.R.C.") section 501(c)(3) and its implementing regulations,[6] which extend exempt status to organizations that provide religious, educational, and other services of broad public benefit, including but not limited to "relief of the poor and distressed."[7] Today, public charities constitute a large proportion of all

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1. Treas. Reg. § 1.501(c)(3)-1(d)(3)(i)(b) (1959).

2. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 431 (1819).

3. U.S. CONST. art. I, § 8, cl. 1.

4. Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 643 n.2 (1980) (Rehnquist, J., dissenting) (citing Comm'r v. Sullivan, 356 U.S. 27, 28 (1958)); IHC Health Plans, Inc. v. Comm'r, 325 F.3d 1188, 1193 (10th Cir. 2003) (citations omitted); Haswell v. United States, 500 F.2d 1133, 1140 (Ct. Cl. 1974). Tax exemption is often viewed as an indirect federal subsidy. *See* Regan v. Taxation With Representation, 461 U.S. 540, 544 (1983) ("Both tax exemptions and tax deductibility are a form of subsidy that is administered through the tax system."). *See also* David A. Brennen, *Tax Expenditures, Social Justice, and Civil Rights: Expanding the Scope of Civil Rights Laws to Apply to Tax-Exempt Charities*, 2001 B.Y.U. L. REV. 167 (2001) (advocating treatment of tax exemption as federal financial aid subject to civil rights laws); Edward A. Zelinsky, *Are Tax "Benefits" Constitutionally Equivalent to Direct Expenditures?*, 112 HARV. L. REV. 379, 380–81 (1998) ("The [Supreme] Court itself has equivocated, equating tax benefits and direct spending in some constitutional cases but not in others without indicating a rationale for such a seemingly inconsistent approach.").

5. *See, e.g.*, I.R.C. § 501(c)(4) (social welfare organizations); I.R.C. § 501(c)(5) (labor organizations); I.R.C. § 501(c)(6) (trade associations and chambers of commerce); I.R.C. § 501(c)(7) (social clubs); I.R.C. § 501(c)(19) (veterans' organizations). Organizations whose exempt status derives from portions of the Internal Revenue Code other than section 501(c)(3) are beyond the scope of this article.

6. I.R.C. § 501(c)(3) (2003); Treas. Reg. § 1.501(c)(3)-1 (1959).

7. Treas. Reg. § 1.501(c)(3)-1(d)(ii)(2) (1959).

exempt organizations,[8] providing myriad public services that neither the private sector nor the government is willing or able to offer.[9] Public charities are also a thriving and important sector of the economy, accounting for 10.6% of total employment and 6.49% of national income in 1994.[10]

Insulated to a significant degree from the demands of the profit-driven marketplace,[11] as well as from the political process that determines the allocation of public funds,[12] charitable organizations have the flexibility and capacity to experiment with new ideas, methods, and bases of support.[13] Yet such organizational "independence" comes with strings attached; statutory constraints on the use of funds—such as prohibitions on lobbying, electioneering, or benefit

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8. *See, e.g.*, JAMES J. FISHMAN & STEPHEN SCHWARZ, NONPROFIT ORGANIZATIONS: CASES AND MATERIALS 15 (2003) ("At the end of 2002, approximately 55 percent of all IRS-recognized organizations were exempt from taxation under section 501(c)(3) of the Internal Revenue Code.").

9. A variety of theories may account for governmental solicitude toward charitable organizations: some commentators view tax exemption as an effective subsidy to qualifying organizations that relieve the government of some of the burden of social service provision, and others explain the exemption on efficiency grounds or as recognition of the will of private individuals who support such organizations with voluntary donations. *See, e.g.*, John D. Colombo, *Why Is Harvard Tax-Exempt? And Other Mysteries of Tax Exemption for Private Educational Institutions*, 35 ARIZ. L. REV. 841 (1993) (donative theory); Henry Hansmann, *The Rationale for Exempting Nonprofit Organizations from Corporate Income Taxation*, 91 YALE L.J. 54 (1981) (subsidy theory). *See also* ALEXIS DETOCQUEVILLE, DEMOCRACY IN AMERICA 2 (1840). *See generally* LESTER M. SALAMON, AMERICA'S NONPROFIT SECTOR: A PRIMER (2d ed. 1999); David Horton Smith, *The Impact of the Volunteer Sector on Society*, *in* THE NONPROFIT ORGANIZATION: ESSENTIAL READINGS 347 (David L. Gies, J. Steven Ott & Jay M. Shafritz eds., 1990); THE NONPROFIT ORGANIZATION: ESSENTIAL READINGS, *supra*, at 330–51 (excerpting Chauncey Belknap, The Federal Income Tax Exemption of Charitable Organizations: Its History and Underlying Policy, in 4 COMMISSION ON PRIVATE PHILANTHROPY AND PUBLIC NEEDS, RESEARCH PAPERS 2025 (1977); Boris I. Bittker & George K. Rahdert, *The Exemption of Nonprofit Organizations from Federal Income Taxation*, 85 YALE L.J. 299 (1976); Mark A. Hall & John D. Colombo, *The Donative Theory of the Charitable Tax Exemption*, 54 OHIO ST. L.J. 1379 (1991); Henry Hansmann, *Reforming Nonprofit Corporation Law*, 129 U. PA. L. REV. 497 (1981); Henry Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835 (1980).

10. FISHMAN & SCHWARZ, *supra* note 8, at 11 (citing statistics showing that public charities accounted for 10.6% of total employment and 6.4% of national income in 1994) (citations omitted).

11. *See* FISHMAN & SCHWARZ, *supra* note 8, at 33–35 (excerpting LESTER M. SALAMON, AMERICA'S NONPROFIT SECTOR: A PRIMER (2d ed. 1999)); *id.* at 35–39 (excerpting Henry Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835 (1980)).

12. *See also* FISHMAN & SCHWARZ, *supra* note 8, at 33–35 (excerpting LESTER M. SALAMON, AMERICA'S NONPROFIT SECTOR: A PRIMER (2d ed. 1999)).

13. *See id.* at 4–6 (excerpting John W. Gardner, *The Independent Sector*, *in* AMERICA'S VOLUNTARY SPIRIT ix, xiii–xv (Brian O'Connell ed., 1983)). *See also* Alexander v. Americans United, 416 U.S. 752, 772 n.8 (1974) (Blackmun, J., dissenting) (discussing benefits of philanthropic organizations, particularly private foundations, based on a comment by the Treasury Department that "[p]rivate philanthropic organizations . . . may be many-centered, free of administrative superstructure, subject to the readily exercised control of individuals with widely diversified views and interests. Such characteristics give these organizations great opportunity to initiate thought and action, to experiment with new and untried ventures, to dissent from prevailing attitudes, and to act quickly and flexibly.") (quoting Senate Comm. on Finance, 89th Cong., 1st Sess., 12–13 (1965)).

to private individuals[14]—narrow the range of activities to which exempt organizations may devote their resources.[15] By relaxing or restricting the requirements of exemption, then, Congress may facilitate or inhibit certain kinds of organizational functions.[16] Tax-exempt status thus may be perceived as a symbol of government tolerance, if not outright approval, of activities that do not receive direct public funding.[17] On the other hand, denial of exemption may be perceived as an indication that an organization's activities fail to meet governmental standards or pursue government-approved policies, although they fall short of being sanctionable.[18]

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14. I.R.C. § 501(c)(3). *See infra* note 50.

15. Under "unconstitutional conditions" jurisprudence, restrictions on speech by tax-exempt organizations may not violate the First Amendment so long as such restrictions are not intended to discriminate on the basis of content. *See* Speiser v. Randall, 357 U.S. 513, 518 (1958) (decided on due process grounds, but noting that "[t]o deny an exemption [from state taxes] to claimants who engage in certain forms of speech is in effect to penalize them for such speech"). *But see* Regan v. Taxation With Representation, 461 U.S. 540, 551 (1983) ("The issue . . . is not whether [Taxation With Representation] must be permitted to lobby, but whether Congress is required to provide it with public money with which to lobby [because it does so for veterans' organizations] . . . [W]e hold that it is not."); Cammarano v. United States, 358 U.S. 498, 513–14 (1959) (limiting the holding of *Speiser* to cases in which the intent of the restriction is to discriminate and upholding a "[n]ondiscriminatory denial of deduction from gross income to sums expended to promote or defeat legislation [that] is plainly not 'aimed at the suppression of dangerous ideas'") (citing *Speiser*, 357 U.S. at 519 (quoting Am. Communications Ass'n v. Douds, 339 U.S. 382, 402 (1950))). *See also* Rust v. Sullivan, 500 U.S. 173, 197 (1991) (distinguishing cases "in which the Government has placed a condition on the *recipient* of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program," and holding that conditions on speech falling within the scope of the benefit for which federal funds are granted do not offend the First Amendment).

16. For example, I.R.C. section 501(c)(3) prohibits all political campaign activity by public charities, but prohibits only "substantial" lobbying activity by those same organizations. I.R.C. section 501(c)(3) also lists requirements that all public charities must fulfill, but public charities that also qualify as private foundations under I.R.C. section 509(a) because their resources are derived primarily from a few large donors are subject to even stricter regulation than other public charities. I.R.C. § 509(a) (2003). *See generally* FISHMAN & SCHWARZ, *supra* note 8.

17. *See* Bob Jones Univ. v. United States, 461 U.S. 574, 609 (1983) (Powell, J., concurring in part and concurring in the judgment) (criticizing the majority's suggestion that exempt organizations "act on behalf of the Government in carrying out governmentally approved policies").

18. Withdrawal of tax-exempt status and resulting assessment of back taxes due can appear to be a penalty. For example, in the wake of the Supreme Court's decision in *Dale v. Boy Scouts of America*, 530 U.S. 640 (2000) (Boy Scouts not subject to state public accommodations law prohibiting discrimination on the basis of sexual orientation), several commentators called for revocation or limitation of the Boy Scouts' state tax-exempt status as an alternate way of enforcing anti-discrimination norms. *See* Russell J. Upton, *Bob Jonesing Baden-Powell: Fighting the Boy Scouts of America's Discriminatory Practices by Revoking Its State-Level Tax-Exempt Status*, 50 AM. U. L. REV. 793 (2001); Michael J. Barry, *A Sensible Alternative to Revoking the Boy Scouts' Tax Exemption*, 30 FLA. ST. U. L. REV. 137 (2002) (arguing that a switch to exempt status under I.R.C. section 501(c)(4) would best serve tax policy considerations). *See also* Boy Scouts of America v. Wyman, 335 F.3d 80 (2d Cir. 2003) (affirming rejection of Boy Scouts' First Amendment challenge to state agency's exclusion of the organization from a state workplace contribution campaign—a nonpublic forum—because its policy of discriminating against

Educational organizations in particular have merited both the symbolic and tangible benefits of exemption in the United States since the earliest incarnations of the Internal Revenue Code,[19] in continuance of the long-standing Anglo-American legal tradition acknowledging the public benefits of broad dissemination of knowledge.[20] British charitable trust law recognized early on the validity of trusts established for "schools of learning"[21] and for "the advancement of education,"[22] and U.S. common law followed suit.[23] Yet, perhaps as a result of broad social, political, and historical support for exemption of educational organizations,[24] scant legislative history exists to provide guidance in delineating the precise intended scope and limits of the "educational" category.[25] While some educational organizations may seem unobjectionable as beneficiaries of exempt status, others may be less welcome as members of the charmed circle.

Educational organizations that seek not only to inform but also to transform society—by shaping public opinion or challenging conventional wisdom—face an uphill battle in winning political[26] and financial support for their minority

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homosexuals as members or employees violated state anti-discrimination law).

19. *See* Internal Revenue Service, *Richardson Releases 1960s-Era Memo on Exempt Organizations*, 97 TAX NOTES TODAY 54-63, 22, March 20, 1997, *available in* LEXIS, Fedtax Library, TNT File [hereinafter TNT] ("The term 'educational' has appeared in every exemption provision since the Excise Tax Act of 1909."). *See also* Tariff Act of 1894, ch. 349, § 32, 28 Stat. 509, 556 (1894) (declared unconstitutional prior to passage of the Sixteenth Amendment, Pollack v. Farmers' Loan & Trust Co., 158 U.S. 601, 637 (1895)); Tariff Act of 1909, ch. 6, § 38, 36 Stat. 11, 113 (1909); ch. 16, § II(G)(a), 38 Stat. 114, 172 (1913); ch. 136, § 231 (6), 42 Stat. 227, 253 (1921); ch. 277, § 101(6), 48 Stat. 680, 700 (1934); ch. 1, § 501(c)(3), 68A Stat. 1, 163 (1954).

20. *See, e.g.*, Bd. of Educ. v. Pico, 457 U.S. 853, 876 (1982) (Blackmun, J., concurring) (stating that "the Constitution presupposes the existence of an informed citizenry"). *See also* Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1, 17 (1989) (noting that "universal education is widely believed to generate external benefits (a law-abiding, productive, informed citizenry sharing some minimum of common values)").

21. Preamble to the Elizabethan Statute of Charitable Uses, 1601, 43 Eliz., c. 4 (Eng.).

22. Special Comm'rs of Income Tax v. Pemsel (Pemsel's Case), 22 Q.B.D. 296 (1890).

23. *See* TNT, *supra* note 19, app. I.

24. *See* Colombo, *supra* note 9, at 845 ("As other commentators have noted, the legislative history is largely silent regarding the origins of this provision. It appears to have been completely uncontroversial, and not debated.").

25. *See* Laura B. Chisolm, *Exempt Organization Advocacy: Matching the Rules to the Rationales*, 63 IND. L.J. 201, 256 (1987–1988) (noting the "complete absence of relevant legislative history" explaining the rationale behind exemption categories and concluding that the original exemption statutes "may reflect merely the longstanding tradition of non-taxation of charitable and religious organizations rather than a carefully considered policy choice"). *See also* TNT, *supra* note 19, at n.35 (noting Congress's "silence on this subject") (citing Weyl v. Comm'r, 48 F.2d 811, 812 (2d Cir. 1931) (adopting "plain, ordinary meaning" of "education" for purposes of contributions to exempt organizations)).

26. Under U.S. common law, "operation through a party apparatus" was held to be "political" activity. *See* TNT, *supra* note 19, app. I, at § 54. Here, however, I use the term "political" to refer to grassroots organizations broadly concerned with social change, rather than partisan organizations.

views or unpopular subjects. Political and social criticism are highly valued in the United States as indispensable to a vibrant and evolving liberal democracy,[27] yet merely informing the public that alternatives to mainstream perspectives exist, much less that they are worth adopting, requires time, energy, and money.[28] Clearing the hurdle of qualifying for exempt status can earn an organization a valuable measure of credibility as well as relief from financial pressure. A long-standing tradition of government tolerance of unpopular speech and viewpoints,[29] combined with government solicitude for public charities, would seem strongly to support tax exemption for organizations that both educate and advocate particular positions.[30] Nevertheless, current exemption requirements erect special obstacles for organizations that educate through political and social criticism—obstacles that other educational organizations do not face.

Current Treasury regulations and Internal Revenue Service ("IRS") procedures specially govern exemption for organizations that "advocate[] a particular position or viewpoint,"[31] what I will call "educational advocacy organizations." Organizations that are deemed to be one-sided, biased, or otherwise controversial may be subjected to a higher standard for qualification for exemption than other educational organizations. While education is undeniably a public good,[32] under the current regulatory scheme, some kinds of advocacy are treated as more educational than others. Whether and when

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27. *See, e.g.*, Whitney v. California, 274 U.S. 357, 375–76 (1926) (Brandeis, J., concurring) ("Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government."). *See also* JOHN STUART MILL, ON LIBERTY (Prometheus 1986) (1859).

28. *See* Daniel Shaviro, *From* Big Mama Rag *to* National Geographic*: The Controversy Regarding Exemptions for Educational Publications*, 41 TAX L. REV. 693, 724 (1986) (noting that "activities serving exempt purposes 'cannot be carried on without money'") (quoting Trinidad v. Sagrada Orden, 263 U.S. 578, 581 (1924)).

29. *See generally* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (The Lawbook Exchange, Ltd. 2000) (1948).

30. Current "unconstitutional conditions" jurisprudence may preclude some claims based on the First Amendment. *See supra* note 15.

31. Treas. Reg. § 1.501(c)(3)-1(d)(3) (2003) ("*Educational defined*—(i) *In general.* 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 or developing 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 presentation of unsupported opinion."). For a description of the variety of ways in which charitable organizations engage in system-based advocacy, as contrasted with direct provision of services, see Chisolm, *supra* note 25, at 204–05 (discussing public interest litigation, public education, and legislative activities among advocacy conducted by charitable, religious, and educational organizations and noting the expansion of "advocacy activity" by public charities, both in terms of volume and "their repertoire of advocacy strategies").

32. *See supra* note 20. *See also* Chisolm, *supra* note 25, at 262 (describing education as a collective good).

"advocacy" ceases to be of educational benefit and becomes disfavored for the purposes of the exemption statute depends on factors that can be broadly interpreted and applied by IRS officials. The use of substantial discretion in making such decisions raises the specter of unfair application of exemption standards to unpopular organizations on the basis of their viewpoints, despite clearly established IRS policy[33]—and constitutional values[34]—to the contrary. As a result, some otherwise qualified organizations with unpopular views may be subject to unwarranted denials of exempt status or may be required to substantially alter their organizational missions. Even more troubling, such organizations may refrain from seeking exemption at all rather than run the risk of discriminatory treatment, consequently foregoing a significant benefit to themselves and, by extension, to the public.[35]

This article examines the regulatory regime governing federal tax-exemption under section 501(c)(3) for educational organizations that advocate "a particular position or viewpoint." It argues that IRS criteria for determining which educational organizations "advocate" are hopelessly unclear, if not unconstitutionally vague, because they fail to articulate a principled and objective basis for the distinction between advocacy and non-advocacy. The lack of clear standards provides little guidance for agency officials to efficiently and accurately determine when exemption is justified, or for organizations to properly structure their activities to qualify for exemption. This ambiguous standard for exemptions unnecessarily frustrates the development of a diverse community of organizations that engage in valuable education of the public and advancement of social change.[36] Because of the inherent risk of discriminatory enforcement in the regulatory scheme, it should be abandoned in favor of already existing safeguards against unwarranted exemptions. Ultimately, this article concludes, the effort to police the borders of tax exemption should depend not on the discretion of IRS agents applying unclear Treasury regulations and IRS procedures, but on clearly articulated and fairly enforceable statements of fundamental public policy as determined by the three branches of the federal government.

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33. Rev. Proc. 86-43, 1986-2 C.B. 729 ("It has been, and it remains, the policy of the Service to maintain a position of disinterested neutrality with respect to the beliefs advocated by an organization.").

34. Constitutional protections of due process, equal protection, and free speech are implicated, although unconstitutional conditions jurisprudence may allow some nondiscriminatory constraints. *See supra* note 15.

35. Many organizations may fear that advocacy of controversial views alone renders them ineligible for tax exemption or, at the very least, that exemption may be conditioned upon significant alteration of their missions. *See* Chisolm, *supra* note 25, at 246 ("Unable to draw clear conclusions as to what activities are permitted, organizations tend to be overly cautious.").

36. *See, e.g.*, Chisolm, *supra* note 25, at 277 (arguing for representation of non-majority viewpoints in the political process through exempt organization advocacy because "[t]here are good reasons, then, not only to tolerate, but to encourage advocacy which tends to correct either general market failures or the particular failures of the 'political marketplace'").

Part I begins with an explanation and analysis of the current regulatory scheme that governs exemption for educational advocacy organizations, those that advocate "a particular position or viewpoint." A lack of clarity in the definition of "advocacy," combined with a misguided emphasis on educational methodology, requires IRS officials to make sensitive determinations about when an organization's controversial views require further inquiry into its methods of operation. An examination of the historical backdrop reveals the way the regulatory scheme evolved to address discrete concerns about misuse of educational resources for political gain. As these concrete concerns about the dangers of partisan propaganda elicited more visceral fears of unfettered ideological warfare, the emphasis of the educational advocacy regulatory scheme also shifted to focus on how to evaluate educational methodology rather than how to define advocacy. The result is an incoherent, ill-advised scheme that leaves a politically and socially, if not numerically,[37] significant range of organizations vulnerable to discrimination.

Part II analyzes the case law that developed in the 1980s to interpret the regulatory regime as educational advocacy organizations challenged denials of tax-exempt status as violations of the constitutional rights to free speech and equal protection. In two important cases, different panels of the Court of Appeals for the D.C. Circuit initially held that the educational exemption regulation was void for vagueness,[38] but later suggested that subsequent attempts by the IRS to address deficiencies in the application of the regulatory scheme by introducing an ostensibly objective "methodology test" cured the defects.[39] However, by shifting the focus away from the problem of how to identify organizations that "advocate[] a particular position or viewpoint" to that of how to evaluate such an organization's educational methodology once it has already been so identified, the IRS merely exacerbated the problem, and the scheme remains seriously flawed. Rather than clarifying the boundary between legitimate educational advocacy meriting tax exemption and advocacy undeserving of such treatment, these cases and the few lower court decisions that followed have instead left the educational advocacy regime unsettled and the risk of discrimination entrenched.

Finally, Part III argues that, rather than tinker further with the regulatory

37. While few organizations have registered formal complaints about allegedly discriminatory treatment under the scheme, those most vulnerable to such treatment may also be the least able to muster the resources and support necessary to bring legal challenges. Moreover, the risk of discrimination is best measured not by the quantity of organizations likely to be affected by the scheme, but by the marginal status of those organizations, which are by definition few in number. *See* discussion *infra* note 186.

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

39. Nat'l Alliance v. United States, 710 F.2d 868, 875–76 (D.C. Cir. 1983) (observing that the test "reduces the vagueness of the Big Mama decision" but later stating, "[w]e need not, however, and do not reach the question whether the application of the Methodology Test, either as a matter of practice or under an amendment to the regulation, would cure the vagueness found in the regulation by this court in Big Mama").

scheme for educational advocacy organizations, the IRS should abandon it altogether. While the IRS properly holds the authority to confirm the educational purposes of organizations seeking tax exemption, the regulatory scheme imposes an intolerable risk of arbitrary and discriminatory enforcement in evaluating those purposes. Moreover, the scheme is not necessary for achieving the legitimate purpose of screening out organizations that clearly do not merit educational exemption. Such organizations could still be denied exempt status on the basis of the clearer, fairly enforceable standard applicable to all section 501(c)(3) organizations that emerged in *Bob Jones University v. United States*,[40] namely the prohibition on activities that violate law or fundamental public policy. While the *Bob Jones* standard poses its own problems of application, its narrow scope provides an appropriate level of enforcement of tax exemption for educational advocacy organizations that relies on the three branches of government, not IRS officials, to establish broad exemption standards. Only the inclusion of many diverse voices—including those of educational advocacy organizations themselves—in the national debates that shape public policy will ensure that the marketplace of ideas, far from being destroyed, will continue to flourish.

I.
TAX EXEMPTION AND THE EDUCATIONAL ADVOCACY REGULATORY SCHEME

A. A Controversial Regulatory Scheme

I.R.C. section 501(a) grants exemption from federal income taxation to a wide range of organizations, including the twenty-eight categories described in section 501(c).[41] Of these, public charities, governed by section 501(c)(3), hold the most attractive exempt status, since they may qualify for additional state and federal benefits. Such benefits include lower bulk mailing rates,[42] property tax exemptions,[43] and, most significantly, the ability to receive tax-deductible contributions from individual donors or grant-making organizations under I.R.C. section 170.[44] Without the latter authorization to solicit tax-deductible

40. 461 U.S. 574 (1983).

41. I.R.C. § 501(a) (2003). Technically, organizations that fall within the scope of I.R.C. section 501(c)(3) are automatically exempt from income taxation; however, if they wish to assure donors that their contributions are also tax-deductible, most organizations must "'notify' the [IRS] that they are applying for exemption and obtain a favorable determination of their exempt status." FISHMAN & SCHWARZ, *supra* note 8, at 91–92.

42. *See* 39 C.F.R. pt. 3001, app. A to subpart C, § 321.4 (listing organizations eligible for "Nonprofit" subclass of standard mail as defined in § 1009) and § 1009 (defining religious, educational, and other organizations eligible for nonprofit standard mail rate, using language in I.R.C. § 501(c)(3)).

43. *See generally Developments in the Law—Nonprofit Corporations,* 105 HARV. L. REV. 1578, 1619 (1992) (describing state income and property tax exemptions frequently granted to organizations exempt from federal income tax under I.R.C. § 501(c)(3)).

44. I.R.C. §§ 170(a), (c)(2) (2003). Other benefits include exemption from estate and gift

contributions from members of the public, many tax-exempt organizations would be unable to survive.[45] Hence, for organizations that would generate little income to tax in any event,[46] section 501(c)(3) status is most valuable not as a way to save money by avoiding payment of taxes, but as a way actively to generate funds.

First introduced in its current form in 1954, section 501(c)(3) originally included religious, educational, charitable, and scientific organizations within its purview; additional categories have been added over the years.[47] Today, section 501(c)(3), in relevant part, describes qualifying exempt organizations to include: "Corporations, and any community chest, fund, or foundation [including charitable trusts[48]], organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes."[49] Several specific prerequisites and prohibitions are expressly imposed on organizations by the statute's own terms. For example, qualifying organizations may not allow private inurement of net earnings, may not engage in substantial lobbying, and

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taxes. *See generally* FISHMAN & SCHWARZ, *supra* note 8, at 67–68. Given statutory limitations on lobbying, many organizations may prefer to seek status as social welfare organizations under I.R.C. section 501(c)(4). *See, e.g.*, Regan v. Taxation With Representation, 461 U.S. 540, 552 (1983) (Blackmun, J., concurring) (stressing that availability of section 501(c)(4) status without lobbying restrictions saves the constitutionality of lobbying restrictions on section 501(c)(3) organizations and stating that "[t]he constitutional defect that would inhere in section 501(c)(3) alone is avoided by section 501(c)(4)").

45. *See* Shaviro, *supra* note 28, at 695 ("In many cases, the receipt of a tax exemption is critical to a publication's survival. Presumably, this is particularly true of fringe publications that espouse unpopular viewpoints and cannot expect wide circulation.") (footnotes omitted). *See also* Alexander v. Americans United, 416 U.S. 752, 774 (1974) (Blackmun, J., dissenting) (discussing importance of recognition of exempt status for solicitation of deductible contributions and for operation of organization).

46. Most expenses of public charities may be deductible as business expenses. *See generally* FISHMAN & SCHWARZ, *supra* note 8, at 71–76 (excerpting Boris I. Bittker & George K. Rahdert, *The Exemption of Nonprofit Organizations from Federal Income Taxation*, 85 YALE L.J. 299, 307–16 (1976)).

47. For example, in 1976, the language "or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment)," was added pursuant to the Tax Reform Act of 1976. Pub. L. No. 94-455, § 1313(a), 90 Stat. 1730 (1976).

48. Such entities generally organize under state corporation or trust laws, which may impose additional restrictions and confer additional benefits, as unincorporated associations, nonprofit corporations, or charitable trusts. *See* FISHMAN & SCHWARZ, *supra* note 8, at 60–64.

49. Under the implementing Treasury regulations, such an organization "must be both organized and operated exclusively for one or more of the purposes specified in such section." Treas. Reg. § 1.501(c)(3)-1(a)(1). Under the organizational test, "An organization is organized exclusively for exempt purposes if its articles of incorporation . . . [l]imit the purposes of such organization to one or more exempt purposes; and . . . [d]o not expressly empower the organization to engage, otherwise than as an insubstantial part of its activities, in activities which in themselves are not in furtherance of one or more exempt purposes." Treas. Reg. § 1.501(c)(3)-1(b)(1)(i). Under the operational test of Treasury Regulation section 1.501(c)(3)-1(c), "[a]n organization will be regarded as *operated exclusively* for one or more exempt purposes only if it engages *primarily* in activities which accomplish one or more of such exempt purposes specified in section 501(c)(3)" (second emphasis added).

may not participate in political campaigns.[50] Further requirements applicable to all section 501(c)(3) organizations are set forth in Treasury Regulation section 1.501(c)(3)-1.

Educational organizations are described in detail in Treasury Regulation section 1.501(c)(3)-1(d)(3). The regulation defines an educational organization for the purposes of section 501(c)(3) as having as its primary tax-exempt purpose: "(a) The instruction or training of the individual for the purpose of improving or developing his capabilities; or (b) The instruction of the public on subjects useful to the individual and beneficial to the community."[51] Examples of educational organizations listed in the regulation itself include traditional schools (defined as institutions that have "a regularly scheduled curriculum, a regular faculty, and a regularly enrolled body of students in attendance at a place where the educational activities are regularly carried on"); "forums, panels, [and] lectures"; and "museums, zoos, planetariums, [and] symphony orchestras."[52] Under these broad standards, a wide range of educational organizations offering instruction in a multitude of subject areas have qualified for exemption. For example, exemption has been granted pursuant to subsection (a) to organizations that provide continuing professional education to individuals, and pursuant to subsection (b) to organizations that distribute information to the public on a range of subjects in a variety of ways, including through counseling and publishing.[53]

Identification of "subjects useful to the individual and beneficial to the community" for qualification under subsection (b) may require more than merely assessing the general format in which instruction takes place (such as a school- or museum-like setting). In an attempt to assess the value of educational organizations, Treasury Regulation section 1.501(c)(3)-1(d)(3)(i)(b) establishes an additional hurdle to be surmounted by a subset of organizations engaged in "instruction of the public": those that "advocate[] a particular position or

50. I.R.C. § 501(c)(3) (granting exemption to organizations "no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office").

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

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

53. *See, e.g.*, Rev. Rul. 65-298, 1965-2 C.B. 163, 164 (seminars for physicians "relate to the instruction or training of the physicians attending them for the purpose of improving and developing their capabilities."). *See also* FISHMAN & SCHWARZ, *supra* note 8, at 168 ("The [IRS] has adopted a broad view of education, granting exemption to day care centers for infant children, trade schools, college bookstores, alumni associations, a jazz festival, organizations providing continuing education to doctors or lawyers, and marriage counseling services.") (citations omitted); Colombo, *supra* note 9, at 847 ("The educational exemption . . . has been applied to . . . research organizations, and a number of organizations whose stated purpose was to disseminate information to the public. Even the IRS, however, has its limits: a dog obedience school was held not exempt since it neither trains individuals nor educates the public.") (citations omitted).

viewpoint." Creating such a hurdle discriminates against such organizations by making it more difficult for them to obtain tax-exempt status. Perhaps even more troubling, the additional regulation poses the distinct threat that some educational organizations will be denied tax-exempt status because they fail to pass a test to which most applicant organizations are never subjected. Treasury Regulation section 1.501(c)(3)-1(d)(3)(i)(b) concludes with language that singles out organizations that present one-sided views for further demonstration of their educational merit:

> 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 presentation of unsupported opinion.[54]

A "full and fair exposition of . . . facts," which might seem reasonable as a requirement for all educational organizations, is required under the Treasury regulation only after an organization's perceived bias triggers the test.[55] This

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54. Treas. Reg. § 1.501(c)(3)-1(d)(3)(i)(b). While the first portion of subsection (b) may seem to require a subjective determination of, for example, what subjects are "beneficial to the community," its applicability to all educational organizations regardless of advocacy renders its risk of discrimination less problematic than the "full and fair exposition" test. *See infra* note 88.

55. References to advocacy of viewpoints and "full and fair exposition" of facts also appear in other regulations applicable to all section 501(c)(3) organizations, which police the border between impermissible political activities and properly charitable ones. *See* Treas. Reg. § 1.501(c)(3)-1(d)(2) ("The fact that a [charitable] organization, in carrying out its primary purpose, advocates social or civic changes or presents opinion on controversial issues with the intention of molding public opinion or creating public sentiment to an acceptance of its views does not preclude such organization from qualifying under section 501(c)(3) so long as it is not an *action* organization . . ."); Treas. Reg. § 1.501(c)(3)-1(c)(3) ("An organization is not operated exclusively for one or more exempt purposes if it is an *action* organization," defined as an organization "a substantial part of [whose] activities [includes] attempting to influence legislation by propaganda or otherwise."). Treasury Regulation section 1.501(c)(3)-1(d)(2), which governs what might be called charitable advocacy organizations, makes no mention of a "full and fair exposition" requirement. In contrast, Treasury Regulation section 1.501(c)(3)-1(c)(3)(iv) states that an organization engaged in "nonpartisan analysis, study, or research and making the results thereof available to the public" may avoid action organization status, thus qualifying for exemption. Therefore, an organization may avoid engaging in substantial lobbying or campaign activity by presenting "nonpartisan" analysis of current legislative or campaign-related issues. Under Treasury Regulation section 53.4945-2(d)(1)(ii), "'[N]onpartisan analysis, study, or research' may advocate a particular position or viewpoint so long as there is a sufficiently full and fair exposition of the pertinent facts to enable the public or an individual to form an independent opinion or conclusion. On the other hand, the mere presentation of unsupported opinion does not qualify as 'nonpartisan analysis, study, or research.'" For the purposes of the lobbying restriction, however, "nonpartisan" has been interpreted to mean *not* one-sided, unlike the educational advocacy regulation's language. *See* Haswell v. United States, 500 F.2d 1133, 1143 (Ct. Cl. 1974) (organization that advocates a one-sided view on a subject of legislation, while not "identified with any particular organized political party," is not exempt for purpose of receiving tax-deductible contributions).

The result of this patchwork of overlapping regulations is a tripartite standard for advocacy

ostensibly objective inquiry into a "full and fair exposition" thus depends on subjective evaluations of an organization's perceived bias. Such one-sidedness may not be readily apparent where an organization's "advocacy" involves mainstream positions or viewpoints shared by a majority of community members. The distinction between a "full and fair exposition of . . . facts" and "mere presentation of unsupported opinion" rests on a determination of how much of an opinion must be supported by facts; yet opinions held by a majority of people may require less explicit factual support than opinions that challenge the status quo, because the assumptions on which they are based are frequently taken for granted. Opinions that may appear "unsupported" by facts may merely be "unsupported" by the majority.[56] While recognizing that one-sided perspectives may properly be educational as "beneficial to the community" under subsection (b),[57] the IRS' limitation of the "full and fair exposition" inquiry to those organizations that present only one side of an issue introduces the need for subjective inquiries into controversial content. The regulation thus elides the question of when an organization may be said to "advocate[] a particular position" in the first place. Moreover, the question of how to make a determination of "full and fair exposition" has proven to be no easy task. Additional IRS procedures purporting to clarify this determination shift the focus further away from the threshold advocacy determination, leaving an unresolved

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by section 501(c)(3) organizations: relaxed for charitable advocacy organizations and educational non-advocacy organizations (no "full and fair exposition" required), stricter for educational advocacy organizations ("full and fair exposition" required, but only in support of one "particular position or viewpoint"), and most restrictive for organizations whose activities include dissemination of information on legislative topics or campaign candidates but that avoid action organization status (requisite "full and fair exposition" includes presentation of both sides of an issue). *See* Comment, *Tax Exemption for Educational Institutions: Discretion and Discrimination*, 128 U. PA. L. REV. 849, 862–66 (1980). It is in the murky middle ground of educational advocacy that problems arise.

56. *See* Shaviro, *supra* note 28, at 706 (discussing the possibility that the test "favors conventional over unpopular opinions, since the former may be sufficiently widely shared not to need explicit statement, and may be viewed as simple statements of fact rather than as expressions of opinion" and noting that "even nominally impartial news publications" are frequently accused of exhibiting bias). *See also id.* at 716 (noting that criticism of opponents, rather than praise of supporters, tends to be viewed as "controversial" or "advocacy").

57. By 1954, when the current exemption statute, I.R.C. section 501(c)(3), was adopted, it was clear that educational organizations with one-sided views were no longer precluded from exemption as they had been in the past. According to Assistant IRS Commissioner (Technical) Norman Sugarman, testifying before the Reece Committee in 1954,

> [I]t is now reasonably established under the law that an organization may have as its ultimate objective the creation of a public sentiment favorable to one side of a controversial issue and still secure exempt status under [the existing exemption statute] provided it does not, to any "substantial" degree, attempt to influence legislation, and provided further that its methods are of an educational nature.

Hearings on H.R. Res. 217 Before the Spec. Comm. to Investigate Tax-Exempt Foundations and Comparable Organizations, 83d Cong., 2d Sess. 96, 433 (1954) (quoted in TNT, *supra* note 19, at 26). Thus, the educational exemption regulation adopted in 1959 included for the first time the language, "An organization may be educational even though it advocates a particular position or viewpoint." Treas. Reg. § 1.501(c)(3)-1(d)(3)(i)(b).

gap in the exemption scheme.

Revenue Procedure 86-43 sets forth a methodology test, a set of additional criteria used by the IRS to determine whether a "full and fair exposition" has been made under Treasury Regulation section 1.501(c)(3)-1(d)(3). Used internally at the IRS in varying forms over the years for application under the predecessors of section 501(c)(3),[58] the procedures were only made available as published official policy in 1986, in the wake of litigation that challenged the vagueness of the educational exemption regulation standing on its own. *See infra* Part II. As discussed in Part I.B below, IRS procedures evolved in response to concerns about the campaign and lobbying activities of tax-exempt organizations, which overshadowed other forms of advocacy that were considered less troublesome. It was the latter forms of advocacy, however, that would eventually prove most difficult to describe and most susceptible to the dangers of a "know it when you see it" test. According to the Revenue Procedure's introductory policy statement, the IRS unequivocally disavows any intent to discriminate, relying on procedures such as the methodology test to eliminate the possibility of even the appearance of bias:

> [T]he [IRS] has attempted to eliminate or minimize the potential for any public official to impose his or her preconceptions or beliefs in determining whether the particular viewpoint or position is educational. It has been, and it remains, the policy of the Service to maintain a position of disinterested neutrality with respect to the beliefs advocated by an organization. The focus of section 1.501(c)(3)-1(d)(3), and of the Service's application of this regulation, is not upon the viewpoint or position, but instead upon the method used by the organization to communicate its viewpoint or positions to others.[59]

While the IRS has indeed exerted considerable effort in its attempt to clarify "full and fair exposition,"[60] such a disclaimer of discriminatory intent on the part of the IRS is an insufficient safeguard against unfair application of a test that is aimed at addressing an entirely different problem. Instead of establishing clear guidelines for determining when an organization engages in advocacy, the methodology test merely establishes criteria that an educational organization need meet only after it has already been found to advocate.

The methodology test is stated in negative terms:

> The presence of any of the following factors in the presentations made by an organization is indicative that the method used by the organization to advocate its viewpoints or positions is *not* educational.

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58. The methodology test as it was used internally at the IRS in the 1960s was similar to the test ultimately published more than a decade later in Revenue Procedure 86-43, 1986-2 C.B. 729. *See* TNT, *supra* note 19, at 43–45.

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

60. These efforts include the various congressional commissions and internal IRS reports. *See* TNT, *supra* note 19.

> 1. The presentation of viewpoints or positions unsupported by facts is a significant portion of the organization's communications.
>
> 2. The facts that purport to support the viewpoints or positions are distorted.
>
> 3. The organization's presentations make substantial use of inflammatory and disparaging terms and express conclusions more on the basis of strong emotional feelings than of objective evaluations.
>
> 4. The approach used in the organization's presentations is not aimed at developing an understanding on the part of the intended audience or readership because it does not consider their background or training in the subject matter.[61]

Finally, an escape hatch provision allows:

> There may be exceptional circumstances, however, where an organization's advocacy may be educational even if one or more of the factors listed . . . are present. The Service will look to all the facts and circumstances to determine whether an organization may be considered educational despite the presence of one or more of such factors.[62]

While use of an objective test of educational methodology such as that advanced by Revenue Procedure 86-43 makes sense for assessing the qualifications of any educational organization, the point remains that only certain organizations—those found to advocate a particular position—are actually subject to the methodology test.[63] As will be shown below in Part II, the methodology test itself retains much of the vagueness of the regulation it purports to clarify, and each of its supposedly objective prongs carries its own potential for discriminatory enforcement. Yet its level of detail is notable in comparison with the confusing threshold question of how to identify an organization that "advocates a particular position or viewpoint" in the first place.

The Internal Revenue Manual ("IRM") is the only published statement that refers to a definition of advocacy of "a particular position or viewpoint." The

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61. Rev. Proc. 86-43, 1986-2 C.B. 730 (emphasis added).

62. *Id.*

63. Educational organizations not subject to the "full and fair exposition" test need not show that they employ educational methodology, and those specifically enumerated in Treasury Regulation section 1.501(c)(3)-1(d)(3)(ii) as examples of educational organizations, such as museums and zoos, need not even be investigated for advocacy. Comment, *supra* note 55, at 858. The existence of characteristics such as "a regularly scheduled curriculum [and] a regular faculty," Treasury Regulation section 1.501(c)(3)-1(d)(3)(ii), may be considered a proxy for educational methodology. *See* TNT, *supra* note 19, at 42 (recognizing exemption for "traditionally accepted methods of education . . . in substantial conformity with the standards observed by regularly established educational institutions or by their regularly employed faculties and staffs in the instruction of their students or of the public"). Yet the fact that an educational institution comports with traditional educational methods may not establish an irrebuttable presumption of its educational value for the purposes of exemption. *See infra* note 202.

IRM discusses administration of the methodology test in a section titled "Political/Controversial Issues or Advocating a Position."[64] According to the IRM, any organization that avoids direct involvement in partisan political activities, such as campaigning (*see infra* Part I.B), yet advocates a particular position on "controversial" subjects is an advocacy organization subject to the "full and fair exposition" test. The IRM then lists the criteria of the methodology test as a way of establishing "full and fair exposition."[65] The IRM simply equates advocacy with controversy, reserving the bulk of its attention instead for the secondary issue of what objective criteria should be used to assess educational methodology.

In the absence of clear internal standards for defining "advocacy," identification of properly exempt educational organizations cannot be achieved merely by application of an objective test of educational methods, no matter how carefully crafted, for whether the test applies or not depends solely on subjective definitions of what is "controversial."[66] The underlying assumption that there are organizations with controversial viewpoints, some of which merit exemption and some of which do not, continues to haunt the IRS, preventing the development of a principled way of making the distinction between advocacy and non-advocacy. The choice to focus on objective methodology throughout the regulatory scheme merely disguises the problem.

B. Of Partisan Propaganda and Ideological Warfare

What legislative history exists regarding the evolution of the educational advocacy regulatory scheme indicates that its original purpose was to police the boundary between "partisan propaganda" and other forms of advocacy for social change that do not involve legislative or campaign activities. Early versions of the educational exemption regulation explicitly specified that "associations formed to disseminate controversial or partisan propaganda are not educational within the meaning of the statute."[67] The synonymous link between

64. IRM 7.25.3.7.11.5 (Feb. 23, 1999). Chapter 7.25 of the IRM constitutes the *Exempt Organizations Determinations Manual.*

65. *Id.*

66. *See, e.g.*, Gen. Couns. Mem. 34909 (June 15, 1972) (noting that an organization calling for increased corporate responsibility "involve[s] controversial matters" and "[t]hat corporations have some special responsibility for certain social conditions or that they have some special obligation to devise and finance ways of mitigating or eliminating the effects of these conditions is a proposition from which many people would dissent. Many stockholders may believe that the primary obligation of the corporation is to act as a profit-making entity rather than as an instrument for social reform.").

67. Reg. 45, Art. 517 (1920 ed.), *cited in* TNT, *supra* note 19, at n.18 ("Essentially the same provision is found in Reg. 62, Art. 517; Reg. 65, Art. 517; Reg. 69, Art. 517; Reg. 74, Art. 527; Reg. 77, Art. 527; Reg. 86, Art. 101(6)-1; Reg. 94, Art. 101(6)-1."). Under the earlier regulations, "[t]he scope of the terms 'disseminate,' 'controversial,' 'partisan,' or 'propaganda' were left for [IRS] administrators to cope with on a case by case basis." TNT, *supra* note 19, at n.36. Notably, in 1930, Judge Learned Hand wrote in *Slee v. Commissioner*, 42 F.2d 184, 185 (2d Cir. 1930) (American Birth Control League not exempt as an educational organization), that "[p]olitical

"controversial" and "partisan" positions began to erode once concerns about the use of tax-deductible contributions for partisan political activities led to the development of a separate, strict regulatory scheme governing the lobbying and political campaign activities of *all* § 501(c)(3) organizations.[68] Any remaining concerns regarding the otherwise "controversial" activities of educational organizations in particular are thus lingering vestiges of overriding fears of politicking, not of some ill-defined concept of "advocacy" in general.[69]

New concerns about the misuse of charitable resources, however, soon emerged to fill the breach. The history of the "full and fair exposition" requirement and the methodology test for educational advocacy organizations reveals that broader concerns about ideological warfare outside the political and

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agitation as such is outside the [then-existing exemption] statute, however innocent the aim, though it adds nothing to dub it 'propaganda,' a polemical word used to decry the publicity of the other side." Judge Hand noted that an organization whose purpose was to effect a change in the law might qualify for exemption if such activities were "ancillary" to a proper exempt purpose. *Id.* The "controversial or partisan propaganda" language remained in the regulation until the adoption of Treasury Regulation section 1.501(c)(3)-1(d)(3) in 1959 to implement the 1954 version of the exemption statute, I.R.C. section 501(c)(3).

68. Restrictions on lobbying activities by public charities were adopted in 1934 and were augmented in 1954 by restrictions on campaign activities in the current exemption statute, I.R.C. section 501(c)(3). *See also* Treas. Reg. § 53.4945-2. Concerns about use of the educational exemption for political gain remain, as documented in 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 (1990). *See also* Jeffery L. Yablon & Edward D. Coleman, *Intent is Not Relevant in Distinguishing Between Education and Politics*, 9 J. TAX'N EXEMPT ORG. 156 (1998) (discussing use of tax-exempt think tanks by potential political candidates to assess the viability of their campaigns and to avoid disclosure requirements for overtly political campaign organizations).

69. Underlying those fears were concerns about excessive private, as opposed to public, benefit through the use of propaganda. An internal IRS solicitor's memo written in 1919 characterized the distinction between "propaganda" benefiting an individual's own views and "education" benefiting the public as follows:

> Propaganda is that which propagates the tenets or principles of a particular doctrine by zealous determination. It is a matter of common knowledge that propaganda in the popular sense is disseminated not primarily to benefit the individual to whom it is directed, but to accomplish the purpose or purposes of the person instigating it.

TNT, *supra* note 19, at n.39 (citing S.M. 1362, 2 C.B. 153 (1919)). Of course, if the point at which public education shades into propaganda serving private purposes is "a matter of common knowledge," the fact that majority views determine which minority views are "controversial" remains a problem. For more on the history of IRS treatment of organizations engaging in "propaganda"—both with and without legislative activity—see Tommy F. Thompson, *The Availability of the Federal Educational Tax Exemption for Propaganda Organizations*, 18 U.C. DAVIS L. REV. 487, 498–511 (1985). *See also* Rev. Rul. 68-263, 1968-1 C.B. 256 (organization that "seek[s] to discredit particular institutions and individuals on the basis of unsupported opinions and incomplete information about their affiliations and activities" and whose purpose was "to promote the education of the public on patriotic, political, and civic matters, and to inform and alert the American citizenry to the dangers of an extreme political doctrine" failed to provide "full and fair exposition of pertinent facts" and merely constituted attacks on individuals); Save the Free Enterprise System v. Comm'r, 42 T.C.M. (CCH) 515, 518 (1981) (upholding denial of exemption on the ground that "a substantial purpose of [the organization] is to advance [the president's] personal attack on various agencies and institutions and to that extent petitioner serves a private, and not a public, interest").

legislative arenas eventually provided an independent purpose for the regulatory scheme. An internal IRS report prepared in the 1960s and released publicly in 1997 summarizes the evolution of the methodology test at the IRS and in numerous congressional committees, which took place against a changing political backdrop.[70] As the title of the document, "Tentative Analysis of Legal Criteria Governing Determination of Religious or Educational Qualification of Activities of Ideological Organizations,"[71] indicates, the nature of the organizations subject to this inquiry as those advocating a particular position—or ideology—was taken as self-evident.[72] Yet the types of organizations perceived to be within the scope of the regulation, not surprisingly, varied greatly over time and administrations.[73]

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70. Then-IRS Commissioner Margaret Milner Richardson released the report at the request of members of the National Commission on Restructuring the Internal Revenue Service, noting that "the material is exempt from release under the Freedom of Information Act because it is privileged as predecisional and deliberative." TNT, *supra* note 19, at 2. The Commission's final report stated that its goal was "to recommend changes to the IRS that will help restore the public's faith in the American tax system." *Report of the National Commission on Restructuring the Internal Revenue Service: A Vision of a New IRS* (Jan. 25, 1997), at 5, *at* http://www.house.gov/natcommirs/final.htm. *See also* Press Release, Joint Committee on Taxation, 00–02, Report of Investigations Relating to Internal Revenue Service Handling of Tax-Exempt Organization Matters (Mar. 10, 2000), *at* http://www.house.gov/jct/pr00-02.pdf (describing investigation commenced in 1997 "to investigate whether the IRS's selection of tax-exempt organizations (and individuals associated with such tax-exempt organizations) for audit had been politically motivated" in a partisan manner and finding no credible evidence to support such allegations).

71. TNT, *supra* note 19, at 3.

72. The report defines "ideological organization[s]" as those

> that attempt to persuade their readers or listeners to the partisan views which they entertain. The materials which these organizations distribute rely heavily on unsupported conclusions. Where facts are used they generally fail to provide the reader with an opportunity to reach any conclusion but that which the organization agitates for. This raises the question of what criteria are to be used in determining whether an organization seeks to accomplish an exclusively educational purpose.

Id. at 23. As in the current regulatory scheme, an ideological organization was thus defined largely in terms of whether it failed the methodology test or not; it is unclear whether an organization that passed the test would earn the designation "ideological" in the first place. Such organizations were described as "involved to a significant degree in what might be called ideological warfare. The organizations under examination, to a greater or lesser extent, expound some political or economic theory or system, often engaging in vituperative attacks on those who disagree with their ideas." *Id.* at 27 (citing "Memorandum prepared by Mr. Wallace J. Thomas of the Interpretative Division to Mr. Rogovin, Assistant to the Commissioner, dated December 14, 1963, entitled Political Activities of Exempt Organizations"). The report noted that "[t]he problem [of how to administer the educational exemption] has been aggravated in recent years because of the vigorous efforts of many of these ideological organizations." *Id.* at 24.

73. The organizations ranged from communist and anarchist organizations during the McCarthy era, to right-wing organizations during the Kennedy presidency, and left-wing organizations during the Nixon administration. *See* Ctr. on Corporate Responsibility v. Schultz, 360 F. Supp. 863, 872 n.19 (D.D.C. 1973) (finding evidence "that the White House staff did in fact consider using the IRS against their 'enemies'" and that certain documents the government failed to produce were discoverable). *See generally* JOHN A. ANDREW III, THE OTHER SIDE OF THE SIXTIES: YOUNG AMERICANS FOR FREEDOM AND THE RISE OF CONSERVATIVE POLITICS 157–63 (1997) (chronicling the development of the IRS' Ideological Organizations Project under the Kennedy administration to examine specifically right-wing organizations for potential violations of

Well aware that the educational advocacy regulation could target any number of organizations for advancing "controversial" views, the IRS and several congressional committees attempted to limit the potential for discriminatory enforcement on the basis of content or viewpoint by introducing objective criteria for evaluating an organization's educational methodology.[74] The internal IRS report states that studies undertaken as early as 1945 and 1958 found "controversial" "to be an inadequate criterion for determining the educational nature of particular organizations. It became apparent that almost any subject has controversial features if one gets close enough to it."[75] Ultimately, however, once "partisan propaganda" dropped out of the regulatory scheme,[76] the IRS continued to equate educational advocacy with, variously, "controversial," "ideological," and even "fanatic" viewpoints without providing—and possibly without even perceiving a need to provide—definitions of such malleable terms.[77]

As the IRS focused on the task of how to create a less baldly judgmental exemption scheme by emphasizing objective criteria for assessing educational methodology, the problem of how to identify the organizations subject to the test

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exemption regulations); Chisolm, *supra* note 25, at 245 (discussing history of IRS treatment of "ideological" organizations and use of authority as a "blatant political tool").

74. The methodology test was already in use internally at the IRS as early as 1945 when it became settled that organizations with one-sided viewpoints could qualify for educational exemption. *See supra* note 57; TNT, *supra* note 19, at 39. According to Professor Thompson, the adoption of the "full and fair exposition" language in the 1959 Treasury regulation governing educational organizations was itself the result of a compromise reached to avoid codification of the problematic methodology test. Thompson, *supra* note 69, at 506–08 (1985).

75. TNT, *supra* note 19, at n.36.

76. *See supra* note 67.

77. The authors of a 1963 political action survey acknowledged "the great difficulty in arriving at satisfactory definitional standards for identification of 'fanatic' organizations . . . It was the consensus of the group [which included outside consultants] that even though a reasonable amount of definitional precision seemed impossible to achieve, it was undesirable to place discretions to [sic] exemption or non-exemption in this area in the hands of any person at the administrative, or indeed, the judicial level, without some reasonably exact standards." TNT, *supra* note 19, at 29 (citing "Letter from Mr. Frederick Gelberg to Sidney I. Roberts (both New York practitioners)"). Still, while stressing the need to focus on objective factors of methodology, IRS statements continue to refer to the loaded terms "ideology" and "controversy." *See, e.g., id.* at 33 ("It seems clear that in order for a *controversial* subject matter to be 'useful' and 'beneficial' to the individual and the community, the instruction in regard thereto must impart sufficient knowledge and understanding of the subject matter to significantly improve the capabilities of persons to form reasoned judgments in regard thereto.") (emphasis added); *id.* at 38 ("Effective administration of the statute in the *ideological* area requires consistent application of general criteria formulated from the particular factors relevant in determining the presence of an educational methodology.") (emphasis added). Such discussions took place amid uncertainty about whether one-sided advocacy could ever be beneficial to the public, which was settled by the time the exemption statute was passed in its current form in 1954. *See supra* note 55. The educational advocacy regulation reflects remaining concerns, initially about partisan politicking, and later about "ideological warfare" more broadly. The term "ideological warfare" suggests that strong views on controversial topics may be more destructive than beneficial to society, indicating that the public benefits of one-sided advocacy remain suspect.

simply went unaddressed.[78] The IRS merely issued the requisite disclaimers noting the difficulty of the task of regulating educational advocacy and warned that specific facts and circumstances must always be taken into consideration.[79] The conclusion that an organization's views are "ideological" or controversial is thus made only after an organization's educational methods are found wanting, yet the selection of organizations subject to the test in the first instance depends, in circular fashion, on whether it is labeled "controversial." The IRS's historical focus on objective methodology thus acts as a smokescreen that hides the initial subjective inquiry from view; the issue of how to define advocacy (or controversy or ideology) simply remains unresolved.

Today, the IRM section devoted to educational advocacy organizations exhibits a persistent, anachronistic focus on the problem of how to distinguish properly educational purposes from partisan political activities. Yet, as stated above, the partisan activities of all section 501(c)(3) organizations are now governed by a separate set of regulations. The IRM states: "Public education through the mass media frequently gets into areas that are controversial. . . . [W]hat an organization claims to be educational may in fact be political or legislative activities." It continues, "[t]he extent to which partisan political topics may be considered educational has long been a problem."[80] The IRM's outdated assumption that controversy involves solely political or legislative activities suggests that other forms of educational advocacy—advancement of

78. The IRS adopted the methodology test only after repeatedly comparing its utility with an alternate inquiry into an organization's intent, namely, the "ultimate purpose," or ends, it sought to achieve. The IRS finally determined that such an inquiry in the context of educational advocacy and controversial topics would be too subjective to apply fairly. TNT, *supra* note 19, at 38–42. Yet the distinction between methods and "ultimate purposes" remained murky, and methods merely became a proxy for the subjective question of when an organization "advocate[d] a particular position":

> The methodology approach is merely an abbreviated term for the proposition that if the methods employed by an organization conform reasonably with those methods of instruction which are traditionally accepted as being educational in character, an educational result will be presumed to be accomplished through the activity, and by the same token, employment of educational methods reasonably calculated to accomplish such educational result is deemed to reflect the requisite educational purpose.

TNT, *supra* note 19, at 36. However, such a convergence of ends and means in assessing educational value is not necessarily inevitable, as Professor Chisolm notes, in part because much of the benefit of education is the "process" itself. Chisolm, *supra* note 25, at 267.

Moreover, current Treasury regulations do inquire into the "ultimate purposes" of all section 501(c)(3) organizations under the organizational and operational tests. *See supra* note 47. Such an inquiry into the intentions of educational organizations in particular does not necessarily raise concerns about discriminatory application so long as it does not depend on a threshold determination of what constitutes controversy or advocacy. *But see* Chisolm, *supra* note 25, at 209 (noting differences in application of the operational test to public charities and not only educational organizations who employ "somewhat unorthodox advocacy strategies").

79. Rev. Proc. 86-43, 1986-2 C.B. 729 (also noting "the long-standing [IRS] position that the method used by an organization in advocating its position, rather than the position itself, is the standard for determining whether an organization has educational purposes").

80. IRM 7.25.3.7.11.5 (Feb. 23, 1999).

controversial viewpoints that takes place outside the realm of electoral politics or lobbying[81]—are simply below the radar screen of the IRS. The IRM therefore concludes that the regulation's scope is narrow, precisely because partisan politicking is addressed elsewhere: "Attempts to influence legislation are now specifically covered by statute . . . The problem relating to the definition of 'educational' is now a comparatively narrow one—how to classify public discussion of controversial topics."[82]

In fact, the regulation's impact is much more significant than the IRM recognizes, for it is the danger of discrimination and not merely of inaccurate taxonomy that is the problem, and a serious one, in the absence of neutral standards for "how to classify public discussion of controversial topics." Even assuming that the scope of the regulatory regime is relatively narrow—and indeed, the IRS has rarely relied explicitly on the regulation in recent years to deny exemption[83]—the few instances in which its application has been challenged reveal the continuing risks faced by educational advocacy organizations under the existing scheme. In the early 1980s, assisted by new procedures allowing suit in federal district or tax court,[84] two organizations that were denied exemption for failure to meet the "full and fair exposition" requirement challenged their designation as educational advocacy organizations subject to higher scrutiny, as well as the characterization of their methods as insufficiently educational. The core concerns of their challenges remain unanswered today.

II.
"FULL AND FAIR EXPOSITION" MEETS THE VAGUENESS DOCTRINE

A. "Homosexual in Outlook"[85]: The Case of Big Mama Rag

Two cases decided by the Court of Appeals for the D.C. Circuit in the early 1980s establish the potentially wide reach of the educational advocacy regulation and the difficulty of accurately pinpointing the organizations subject to the regime's requirements on the shaky ground of "advoca[cy of] particular position[s] or viewpoint[s]." In *Big Mama Rag, Inc. v. United States*,[86] which involved a feminist publication, "homosexual in outlook,"[87] the court held the educational exemption regulation to be void for vagueness after engaging in a detailed inquiry into the risks of arbitrary and discriminatory administration of

81. Chisolm, *supra* note 25 (discussing various forms of advocacy by public charities).

82. IRM 7.25.3.7.11.5 (Feb. 23, 1999).

83. *See infra* note 186.

84. I.R.C. § 7428(a) (2003).

85. Big Mama Rag, Inc. v. United States, 494 F. Supp. 473, 481 (D.D.C. 1979), *rev'd and remanded*, 631 F.2d 1030 (D.C. Cir. 1980).

86. 631 F.2d 1030 (D.C. Cir. 1980).

87. *Big Mama Rag*, 494 F. Supp. at 481.

the regulation.[88] Three years later, in *National Alliance v. United States*,[89] which involved a white supremacist organization, a different panel of the same appellate court strongly suggested that subsequently unveiled IRS procedures, which emphasized educational methodology as measured by objective criteria, cured the regulation's vagueness. Neither case resolved the question of how to identify educational advocacy organizations in the first instance, and thus the risk of arbitrary or discriminatory enforcement remains.

The first recognition of potential problems with the regulatory scheme came in the case of *Big Mama Rag*.[90] In 1979, Big Mama Rag, Inc. ("BMR"), "a nonprofit organization with a feminist orientation,"[91] was denied tax-exempt status by the IRS under section 501(c)(3), in part on the ground that it was an educational organization that "advocate[d] a particular position or viewpoint" and that it failed to provide a "full and fair exposition" of facts to support its

88. While the appellate court in *Big Mama Rag* held the entire educational regulation to be vague, 631 F.2d at 1032, subsequent Tax Court decisions treated the holding as limited only to the educational advocacy language contained in Treasury Regulation section 1.501(c)(3)-1(d)(3)(i)(b). *See* Nationalist Movement v. Comm'r, 102 T.C. 558, 582 (1994), *aff'd on other grounds*, 37 F.3d 216 (5th Cir. 1994) (remainder of regulation is not unconstitutionally vague); Retired Teachers Legal Def. Fund v. Comm'r, 78 T.C. 280, 284–285 (1982) ("full and fair exposition" portion of the regulation inapplicable to the case at bar, unlike situation in *Big Mama Rag*, but first part of Treasury Regulation section 1.501(c)(3)-1(d)(3)(i)(b) not unconstitutionally vague because "the broader language of the regulation is clarified by subsequent examples [in Treasury Regulation section 1.501(c)(3)-1(d)(3)(ii)] which provide objective norms to illustrate its meaning") (footnote omitted). *See also* Shaviro, *supra* note 28, at 695 ("even before the decision in *National Alliance*, the Tax Court, in *Retired Teachers Legal Defense Fund v. Commissioner*, cast doubt on the conclusion of *Big Mama Rag* that the existing legal standards are unconstitutionally vague") (footnotes omitted). The appellate court in *Big Mama Rag* noted that the "district court [had] rejected [the first part of Treasury Regulation section 1.501(c)(3)-1(d)(3)(i)(b)] with barely a murmur of disagreement from [the government as] far too subjective." 631 F.2d at 1036 (citing *Big Mama Rag*, 494 F. Supp. at 479 n.6). The court thus focused its attention on the portion of the regulation applicable only to educational advocacy organizations, however they were identified. Later, in *Retired Teachers*, the Tax Court found a pension fund to be ineligible for exemption under I.R.C. section 501(c)(3) because its activities benefited private members, not the public. The Tax Court indicated that the application of the first part of the regulation could be neutrally and fairly applied to all educational organizations. *Retired Teachers*, 78 T.C. 280, 285 (1982) ("Reading the general statements defining 'educational' together with the examples that follow them, we find that the term 'educational' as used in the regulations concerning tax-exempt organizations is not unconstitutionally vague.").

It is possible that the first portion of the educational regulation could be fairly applied, given the fact that the distinction between community benefit and private benefit is regularly made by the IRS. By interpreting "beneficial to the community" to mean not that subjective decisions must be made on the basis of content, but merely to distinguish public from private benefit, further limits the potential for discrimination under the first part of the regulation. *See* Shaviro, *supra* note 28, at 730 n.182 ("[S]o long as the courts make clear the ["beneficial to the community"] standard's nonideological application (such as to private investment advice, or genealogical research about a single family, rather than to viewpoints that are deemed harmful or antisocial), the risk of biased application should be no greater than the inevitable bad faith risk that a standard will be willfully misapplied.").

89. 710 F.2d 868 (D.C. Cir. 1983).

90. *Big Mama Rag*, 494 F. Supp. at 473.

91. *Big Mama Rag*, 631 F.2d at 1032.

views.[92] BMR engaged in a number of public education activities, including hosting lectures, workshops, and a radio program, but its main activity was publication of a monthly newspaper, *Big Mama Rag*, which published articles on the women's movement, including articles about lesbianism.

BMR filed suit in district court seeking a declaratory judgment of exempt status, arguing that it was not subject to the educational advocacy regulation, and that even if it was, it had provided a "full and fair exposition" of the facts underlying its feminist conclusions.[93] Moreover, BMR argued that IRS officials had discriminated against the organization in their application of the regulation because they had specifically objected to BMR's publication of articles about lesbians.[94] Finally, BMR argued that the regulation itself was unconstitutionally vague because its lack of clear standards permitted arbitrary or discriminatory enforcement.[95] At the time, the IRS had not yet publicly introduced the methodology test or any other official guidance on how to apply the "full and fair exposition" standard.[96] The district court upheld the denial of exemption by the IRS, concluding that BMR had not been discriminated against and that the regulation was sufficiently clear.[97] The court stated that BMR "has adopted a stance so doctrinaire" that it could not meet the "full and fair exposition" standard as required by the regulation.[98]

BMR did not hide the fact that it favored certain perspectives, topics, and analyses over others. As the district court noted, "The editorial stance of the newspaper is that it will print anything that will advance the cause of the women's movement; it refuses to publish material it considers damaging to that cause."[99] Hence, BMR could be said to advocate a "particular position or viewpoint" on feminist issues. Yet the IRS's designation of BMR as one-sided was inextricably bound up with the particular subject matter of its views; BMR argued that IRS agents had identified the organization's real problem as its advocacy of pro-lesbian topics, not merely its feminist-only stance.[100]

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92. *Big Mama Rag*, 494 F. Supp. at 477.

93. *Id.* at 478.

94. *Id.* at 480.

95. *Id.*

96. *See* Nat'l Alliance v. United States, 81-1 U.S. Tax Cas. (CCH) P9464, 1981 U.S. Dist. LEXIS 12504, at *13 (D.D.C. 1981).

97. *Big Mama Rag*, 494 F. Supp. at 480.

98. *Id.* at 479.

99. *Id.* at 476 (citing *Big Mama Rag*, Vol. 1, No. 3, at 2, Col. 2). The court quoted a 1976 edition of the newspaper stating its "definition, goals, process, and politics" as follows:

> We retain the right to censor all copy (including advertisements) submitted to the paper. As feminists in the process of developing a political analysis, we must adopt certain values and reject others. By "censorship" we mean that we will not print any material which, by our judgment, does not affirm our struggle. We will not act to prevent the dissemination of such material via means other than Big Mama Rag.

Id. at 477 (citing *Big Mama Rag*, Vol. 4, No. 8, at 4, Col. 2).

100. The district court found no evidence of intentional anti-gay discrimination in enforcement of the regulation, cursorily dismissing the "unfortunate comments of [IRS] officials"

Neither the court of appeals nor the district court held that an organization could be denied exemption under the regulatory scheme merely because it was one-sided.[101] Rather, the issue was characterized by the district court as "whether the regulation is discriminatory in its effect"[102] in allowing IRS officials to deny exemption to "organizations the IRS knows, or suspects to be, homosexual in outlook."[103] The district court supplied no specific definition for what constitutes a "homosexual . . . outlook."[104] The IRS, however, while apparently disavowing the stance that homosexual organizations were categorically outside the range of exemption,[105] had issued numerous, albeit non-binding, IRS General Counsel Memoranda over the years indicating disapproval of "the position that homosexuality is a mere preference orientation, or propensity that is on a par with heterosexuality and should thus be regarded as normal"[106] and of organizational activities "encouraging or fostering homosexual attitudes and propensities among minors and other impressionable members of society."[107]

"at the Technical Advice Conference on September 7, 1976, that one of the reasons [BMR] was denied tax-exempt status was that BMR was engaged in 'promoting lesbianism.' . . . The IRS argues that it never adopted that view, expressly disavowing any reliance on it." *Id.* at 480 n.7 (citing plaintiff's memorandum, plaintiff's reply memorandum, and defendant's memorandum). The district court also found no evidence of discriminatory intent by Congress or the Department of the Treasury in establishing a higher threshold for advocacy organizations. Relying on unconstitutional conditions jurisprudence, the court stated: "Congress is free to grant tax exemptions to certain classes of organizations and refuse them to others as long as the purpose or effect of the refusal is not to discriminate against those with controversial views or beliefs." *Id.* at 479 (citing Cammarano v. United States, 358 U.S. 498, 513–514 (1959)). The court explained that Congress and agencies may not "condition their grant on conformance to a certain pattern of thought or belief," (citing Speiser v. Randall, 357 U.S. 513, 518 (1958)), but that "[t]here is no requirement . . . that Congress subsidize free speech." *Id.* (citing *Cammarano*, 358 U.S. at 515 (Douglas, J., concurring)).

101. *Big Mama Rag*, 631 F.2d at 1039 n.18 ("We agree with the court below that the Treasury regulation may not be read to compel an educational organization to 'present views inimical to its philosophy.'") (citation omitted). This was not always a foregone conclusion. *See supra* note 55.

102. *Big Mama Rag*, 494 F. Supp. at 480.

103. *Big Mama Rag*, 494 F. Supp. at 481.

104. *Id.* The court's use of the phrase "knows, or suspects to be," however, certainly suggests that such an outlook is at best disfavored, if not criminal. It is hard to imagine a court referring to an organization that the IRS "knows, or suspects to be" Republican in outlook.

105. *Big Mama Rag*, 631 F.2d at 1037 (noting that "[t]he one tax-exempt homosexual organization cited by the Government as evidence that the IRS does not discriminate on the basis of sexual preference was required to meet the 'full and fair exposition' standard even though it admittedly did not 'advocate or seek to convince individuals that they should or should not be homosexuals'") (citing Rev. Rul. 78-305, 1978-2 C.B. 172, 173).

106. Gen. Couns. Mem. 37,173 (June 21, 1977). General Counsel Memoranda are nonbinding expressions of current and possibly evolving legal positions within the IRS; as such, they are "an invaluable aid in analyzing and understanding the [IRS's] position." Tommy F. Thompson, *The Unadministrability of the Federal Charitable Tax Exemption: Causes, Effects, and Remedies*, 5 VA. TAX REV. 1, 7 (1985).

107. Gen. Couns. Mem. 36,556 (Jan. 16, 1976). For comprehensive analyses of various campaigns to suppress expressions of gay identity, see William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L.

The unspoken assumption, of course, was that presentation of heterosexuality as normal or encouragement of heterosexual attitudes among minors was *not* one-sided advocacy subject to the regulatory scheme.

The court's characterization of the issue does suggest that it was BMR's homosexual outlook, and not its feminist one, that led to its identification as an advocacy organization and the subsequent inquiry into its educational methods, which the district court then found to be "doctrinaire."[108] Regardless of whether BMR was denied exemption because it was "doctrinaire" in its methods or because it was "homosexual in [its] outlook," the mere possibility that under the regulation the IRS could mask one inquiry with another highlights the difficulty of identifying advocacy, or even educational methodology, in an evenhanded, consistent manner. The IRS had granted exemption to other feminist publications[109]—perhaps those that were less "doctrinaire"—but the point is that such publications may not have been considered advocacy organizations in the absence of homosexual content, and thus may never have been subjected to the test at all.[110]

Ultimately, BMR's argument that the regulation was unconstitutionally vague because its lack of clear standards permitted discriminatory enforcement prevailed on appeal. In 1980, in *Big Mama Rag, Inc. v. United States*,[111] the Court of Appeals for the D.C. Circuit reversed the district court's decision, declaring the regulation to be void for vagueness.[112] Judge Abner Mikva's

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REV. 1327 (2000); Nan D. Hunter, *Identity, Speech, and Equality*, 79 VA. L. REV. 1695 (1993). In the late 1990s, the IRS still relied on similar language to deny exemption to at least two charitable organizations formed to benefit gays and lesbians. Lambda Legal Defense and Education Fund successfully challenged two IRS denials to win exempt status for a gay and lesbian youth support group and a support group for lesbians with cancer. The IRS had required the gay youth support group to provide assurances "that counsellors [sic] and participants do not encourage or facilitate homosexual practices or encourage the development of homosexual attitudes and propensities by minor individuals." Press Release, Lambda Legal Defense and Education Fund, IRS Grants Lesbian & Gay Youth Group Tax-Exempt Status (Aug. 26, 1997), *available at* http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=66. Lambda, in turn, demanded and received assurances from the IRS that it would train its field representatives to prevent anti-gay bias. Press Release, Lambda Legal Defense and Education Fund, Lambda Prompts IRS to Tackle Anti-Gay Bias Among Agents (July 31, 1998), *available at* http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=282.

108. *Big Mama Rag*, 494 F. Supp. at 479.

109. One such publication was *Quest: A Feminist Quarterly*. *Id.* at 476 n.4. However, the court declined to address the merits of that publication's exempt status. *Id.*

110. It is hard to say, in the absence of evidence of denials of exemption or legal challenges to unfavorable IRS determinations, whether such organizations were subject to the "full and fair exposition test" or whether they passed the test. *See* discussion *infra*, note 184. Of course, singling out organizations with a "feminist orientation" but not those with sexist viewpoints would raise the same concerns.

111. *Big Mama Rag*, 631 F.2d 1030.

112. *Id.* at 1035 ("Measured by any standard, and especially by the strict standard that must be applied when First Amendment rights are involved, the definition of 'educational' contained in Treas. Reg. § 1.501(c)(3)-1(d)(3) must fail because of its excessive vagueness."). *See supra* note 86.

opinion stated that the regulation implicated First Amendment concerns and that under the vagueness doctrine it must fail because "men of common intelligence must necessarily guess at its meaning."[113] The court held the regulation to be impermissibly vague not only in defining "[w]hat . . . the '[f]ull and [f]air [e]xposition' [t]est [r]equire[s]," [114] but also, crucially, in identifying "[w]ho is [c]overed by the . . . [t]est." [115] The court confirmed: "The initial question . . . is

113. *Id.* at 1035. The court found "that the definition of 'educational' contained in Treas. Reg. § 1.501(c)(3)-1(d)(3) is unconstitutionally vague in violation of the First Amendment." *Id.* at 1032. "[R]egulations authorizing tax exemptions may not be so unclear as to afford latitude for subjective application by IRS officials." *Id.* at 1034. According to the court, "the [vagueness] doctrine is concerned with providing officials with explicit guidelines in order to avoid arbitrary and discriminatory enforcement." *Id.* at 1035 (citing Hynes v. Mayor of Oradell, 425 U.S. 610, 622 (1976); Smith v. Goguen, 415 U.S. 566, 573 (1974); Papachristou v. City of Jacksonville, 405 U.S. 156, 170 (1972)). The court noted "an even greater degree of specificity is required, where, as here, the exercise of First Amendment rights may be chilled by a law of uncertain meaning." *Id.* (citing Hynes v. Mayor of Oradell, 425 U.S. at 620 (1976); Smith v. Goguen, 415 U.S. at 572–73 (1974); NAACP v. Button, 371 U.S. 415, 432–33 (1963)).

On the vagueness doctrine, see generally Anthony G. Amsterdam, Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 88 (1960) (articulating additional pressures requiring the vagueness doctrine beyond "an isolated judicial concern for fair notice," including "intricate problems of judicial-administrative, judicial-legislative, and federal-state relationships, of individual standing to raise constitutional questions, of scope of review, and of the effect of an invalidating decision by the Court") (footnotes omitted); Comment, *supra* note 55. *See also* Jeffrey I. Tilden, Big Mama Rag*: An Inquiry into Vagueness*, 67 VA. L. REV. 1543 (1981) (characterizing *Big Mama Rag* as an "abrupt departure from previous case law" because it marked "the first time since 1925 that a federal court" declared a federal civil provision instead of a state criminal statute to be void for vagueness). *Cf.* Shaviro, *supra* note 28, at 729 (contrasting "constitutionally suspect vagueness" with "mere vagueness," which "arises in the consideration of issues (for example, whether a publication is nonprofit, and whether it varies from commercial practices) relatively unrelated to general social ideology. This type of vagueness is fundamental to tax law, and could not be discarded without a substantial sacrifice of economic realism."). Arguably, the requirement that all exempt organizations meet neutral tests, such as that they benefit the public or comport with fundamental public policy, *see infra* Part III, also would not suffer from constitutional vagueness.

114. *Big Mama Rag*, 631 F.2d at 1037.

115. *Id.* at 1036. Despite the court's emphasis on this initial problem, the part of the court's opinion that has garnered the most attention is its analysis of the specific requirements of the full and fair exposition test. *See, e.g.*, Tilden, *supra* note 113, at 1561 (quoting the court's rhetorical questions: "What makes an exposition 'full and fair'? Can it be 'fair' without being 'full'? Which facts are 'pertinent'? How does one tell whether an exposition of the pertinent facts is 'sufficient . . . to permit an individual or the public to form an independent opinion or conclusion'? And who is to make all of these determinations?" *Big Mama Rag*, 631 F.2d at 1037); Comment, *supra* note 55.

In particular, the court focused on the regulation's requirement that individuals "or the public" be able to "form an independent opinion or conclusion." *Big Mama Rag*, 631 F.2d at 1037 ("That portion of the test is expressly based on an individualistic—and therefore necessarily varying and unascertainable—standard: the reactions of members of the public."). The court noted that "statutes phrased in terms of individual sensitivities are suspect and susceptible to attack on vagueness grounds." *Id.* (citing Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971); Kingsley Int'l Pictures Corp. v. Regents of the Univ. of New York, 360 U.S. 684, 701–02 (1959) (Clark, J., concurring in the result); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 504–05 (1952)). *But see* Nationalist Movement v. Comm'r, 102 T.C. 558, 586 (1994) (noting that the regulation does not speak in terms of individual sensitivities).

whether or not BMR, Inc. is an advocacy group at all."[116] Noting that the regulation itself offers little explanation of "exactly what organizations are intended to be covered by the 'full and fair exposition' standard,"[117] the court went on to reject the description contained in the IRM, which

> define[s] "advocates a particular position" as synonymous with "controversial." Such a gloss clearly cannot withstand First Amendment scrutiny. It gives IRS officials no objective standard by which to judge which applicant organizations, whose views are not in the mainstream of political thought, have been deemed advocates and held to the "full and fair exposition" standard.[118]

Under the vagueness doctrine, even in the absence of evidence of actual discriminatory intent or effect, a potential risk of discrimination may suffice to warrant voiding a statute or regulation.[119] Going further, the court of appeals found that the district court below had erred in dismissing BMR's argument that IRS field agents had singled out the organization for its pro-homosexual outlook in particular, and not necessarily for its one-sided views on feminism.[120] The

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116. *Big Mama Rag*, 631 F.2d at 1037.

117. *Id.*

118. *Id.* at 1037 n.11 (citing 3 Int. Rev. Manual-Admin. (CCH) pt. 7751, § 345.(12), at 20,572 (Apr. 28, 1977)). The language relied on by the court remains in the current version of the IRM, IRM 7.25.3.7.11.5 (Feb. 23, 1999). *See supra* text accompanying notes 64–65. The district court purported "not [to] find it objectionable that [BMR] is outside the mainstream of political thought in this country," but upheld denial of exemption because "the organization has chosen to present its views as an advocate and has eschewed a policy" of full and fair exposition. *Big Mama Rag*, 494 F. Supp. at 478–79. The district court thus took for granted the "controversial" nature of BMR's views.

119. *Big Mama Rag*, 631 F.2d at 1040 ("[S]tandards may not be so imprecise that they afford latitude to individual IRS officials to pass judgment on the content and quality of an applicant's views and goals and therefore to discriminate against those engaged in protected First Amendment activities."). *See also* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 153–54 (2d ed., 1986) (comparing the potential for irresponsible exercises of discretion and selective prosecution under vague criminal statutes with the desuetude of universally unenforced statutes, in which "a series of prosecutors have registered, relatively responsibly, the play of political forces which, being in fine balance, could will no more than that the statute remain unrepealed but quiescent").

120. In contrast to the district court, the court of appeals noted that the IRS had advised BMR that

> exemption could be approved only if the organization "agree(d) [sic] to abstain from advocating that homosexuality is a mere preference, orientation, or propensity on par with heterosexuality and which should otherwise be regarded as normal." Whether or not this view represented official IRS policy is irrelevant. It simply highlights the inherent susceptibility to discriminatory enforcement of vague statutory language. Big Mama Rag, 631 F.2d at 1040 (citation omitted). The court also noted that some organizations, including a homosexual organization that was granted exemption and on which the government relied as proof of non-discriminatory application of its "full and fair exposition" standard, may have been subject to the "full and fair exposition" despite the fact that they do not "advocate[] a particular position," but merely provide support services. The court stated that the grant of exemption to the homosexual organization proved nothing because the IRS itself found that the organization "did not 'advocate or

court concluded, "the latitude for subjectivity afforded by the regulation has seemingly resulted in selective application of the 'full and fair exposition' standard—one of the very evils that the vagueness doctrine is designed to prevent."[121] The court's focus on impermissible standardless discretion highlighted what the district court had ignored: the potential for the regulation's "full and fair exposition" test to be used as a pretext to exclude certain organizations—here, those with homosexual outlooks—from exemption, while other advocacy organizations could escape scrutiny by avoiding initial identification as advocacy organizations with controversial views. Whether the controversy of the moment centered on lesbianism, feminism, or some other topic, such a risk of discriminatory effect was impermissible.

Moving on from the threshold issue of the impossibility of clearly and fairly identifying educational advocacy organizations under the regulation, the court of appeals proceeded to deconstruct the similarly vague "full and fair exposition" requirement, demonstrating that its application depended on false dichotomies the IRS purported to be able to apply fairly and clearly, such as those between facts and opinions, and appeals to emotions versus appeals to the mind.[122] Notably, the IRS did not rely on the methodology test as such to argue that sufficient standards existed to guide organizations in structuring their activities and IRS agents in administration of exemption. Still, the IRS's arguments appear to map directly onto what would later be published as prongs of the methodology test.[123]

First, the court discussed the government's reliance on the distinction between facts and unsupported opinions.[124] The regulation itself states that organizations relying entirely on "mere presentation of unsupported opinions" do not qualify for exemption.[125] Yet even under a quantifiable measure, such as an

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seek to convince individuals that they should or should not be homosexuals'" and thus was never subject to the "full and fair exposition" test.

Id. at 1037 (citing Rev. Rul. 78-305, 1978-2 C.B. 172, 173).

121. *Big Mama Rag*, 631 F.2d at 1037.

122. *Id.* at 1038–39.

123. *See* Nat'l Alliance v. United States, 81-1 U.S. Tax Cas. (CCH) ¶ 9464, at 87,345 (1981) (noting that the government acknowledged "that the [methodology] approach resurrects the standard used by the IRS before the enactment of the 1954 Internal Revenue Code and was, in fact, the approach embodied in the regulation struck down in *Big Mama Rag*").

124. *Big Mama Rag*, 631 F.2d at 1038 ("[D]istinguishing facts, on the one hand, and opinion or conclusion, on the other, does not provide an objective yardstick by which to define 'educational.'"). The district court's resort to the subjective term "doctrinaire" also reveals a lack of "objective, principled" application of the fact/opinion distinction. *Id.* ("We can conceive of no value-free measurement of the extent to which material is doctrinaire."). The court also questioned the language of the regulation itself that stated that although an advocacy organization could merit exemption if it presented a full and fair exposition, "an organization is not educational if its principal function is the mere presentation of unsupported opinion." *Id.* at 1037. The government argued that unsupported opinion comprising "a substantial portion" of a publication's content sufficed to deny exemption. The court, however, found that "the language of the regulation does not resolve this issue." *Id.*

125. Treas. Reg. § 1.501(c)(3)-1(d)(3)(i)(b).

acceptable ratio of facts to opinion, the court stated, a requirement of "factual" support would not provide enough guidance to IRS officials for how "to judge when any given statement must be bolstered by another supporting statement."[126] Nevertheless, the "unsupported opinion" and "distortion of facts" prongs remain in the current version of the methodology test.[127] The government also relied on "a related distinction—between appeals to the emotions and appeals to the mind," under which overly emotional appeals indicate a failure to provide a "full and fair exposition."[128] The court rejected this dichotomy as unclear as well, calling it "a problem which is compounded if the difference between the two relies on the aforementioned fact/opinion distinction."[129] In the absence of any indication in the regulation that "the definition of 'educational' is to turn on the fervor of the organization or the strength of its language,"[130] an organization would have no notice of the proper standard. The possible result would be a chilling effect, in which potentially strident organizations would resort to dispassionate language and risk complete ineffectiveness in calling attention to their already unpopular views.[131] Moreover, the court stressed, "the emotional content of a word is an important component of its message."[132] Again, the current methodology test retains an

126. *Big Mama Rag*, 631 F.2d at 1038. The court noted, "[m]oreover, we fail to understand the preoccupation of the district court and the IRS with facts, statistics, surveys, and such, which can be easily distorted and therefore of questionable value." *Id.* at 1038 n.14.

127. *See* Rev. Proc. 86-43, 1986-2 C.B. 729 (listing as factors establishing non-educational methodology "viewpoints or positions unsupported by facts" and "facts that purport to support the viewpoints or positions are distorted").

128. *Big Mama Rag*, 631 F.2d at 1038–39.

129. *Id.* at 1039. The court stated, "[o]ne can only speculate how a poetry publication would be classified under such a dichotomy." *Id.* at 1039 n.16. However, a poetry publication would be unlikely to be subjected to the "full and fair exposition" standard in the first place, since it could qualify independently as "literary" and avoid categorization as an educational advocacy organization.

130. *Id.* at 1039. Pre-*Big Mama Rag* interpretations of the "full and fair exposition" test by the IRS shed little light on how to distinguish between "overzealous" advocacy of "a particular position" and "moderate" presentations thereof. *See, e.g.*, Gen. Couns. Mem. 34340 (Aug. 28, 1970) ("Although [an anti-Communist organization] . . . might be considered to be *overzealous* in its designation of persons, statements, actions, etc. as ['liberal-social' rather than 'conservative-traditionalist'], we believe the . . . communications are, for the most part, of the appropriate educational methodology.") (emphasis added); Gen. Couns. Mem. 33617 (Sept. 12, 1967) ("The materials distributed by the organization are not so lacking in integrity and competence that they will not substantially improve understanding of those to whom they are directed . . . .The articles are generally *moderate* in tone and responsible in nature, being without rancor, irresponsible assertions and other indications of unfair presentation.") (emphasis added) (citing *In re: Ideological Organizations Criteria for Determining Educational and Religious Purposes*, Off. Mem. 14766 (I-1523) at 12 (Jan. 25, 1965) [presumably the document released in TNT, *supra* note 19]).

131. *See Big Mama Rag*, 494 F. Supp. at 479 ("This is not to say that a publication may not advocate a particular point of view and still be educational, or that it must necessarily present views inimical to its philosophy, only that in doing so it must be sufficiently dispassionate as to provide its readers with the factual basis from which they may draw independent conclusions.").

132. *Big Mama Rag*, 631 F.2d at 1039 (citing Cohen v. California, 403 U.S. 15, 26 (1971)).

emphasis on appeals to "strong emotional feelings" as indicating a lack of educational methodology.[133]

The *Big Mama Rag* court acknowledged the difficult task facing the IRS in providing clear guidelines to organizations seeking educational exemption.[134] It also appreciated the difficult task facing BMR in providing sufficient facts and analysis to readers seeking information on the women's movement. In both cases, the problem is how to give sufficiently specific guidance, without regard to content or viewpoint, to provide, in the one case, fair "notice—informing those subject to the law of its meaning,"[135] and, in the other, "full and fair exposition" of facts to allow readers to draw independent conclusions.[136] Nevertheless, the court recognized that educational methods themselves take many forms, even including poetic license and hyperbole.[137] Moreover, even if an inquiry into methodology could be based on objective factors, such objectivity counts for little when predicated on an initially subjective determination of "controversial" advocacy in the first place.

Here, the court relied on a hypothetical example related to language in public service ads:

> The American Cancer Society's cause may be better served by a bumper sticker picturing a skull and crossbones and saying "Smoking rots your lungs" than by one that merely states "Smoking is hazardous to your health." Both are intended to impart the same message, and they are identical in degree of specificity of the underlying facts. Although the first may be said to appeal more to the emotions, and the second to the mind, that distinction should not obscure the similarities between the two. They should be considered equal in educational content.

Id.

133. Rev. Proc. 86-43, 1986-2 C.B. 730.

134. The court acknowledged that some organizations could legitimately be denied exemption: "[W]e by no means intend to suggest that tax-exempt status must be accorded to every organization claiming an educational mantle." Still, applications for exemption "must be evaluated . . . on the basis of criteria capable of neutral application . . . Objective standards are especially essential in cases such as this involving those espousing nonmajoritarian philosophies." *Big Mama Rag*, 631 F.2d at 1040. Nevertheless, the court recognized the uphill battle facing the IRS in creating regulations of the required level of specificity:

> We do not minimize the difficulty and delicacy of the task delegated to the Treasury . . . Words such as "religious," "charitable," "literary," and "educational" easily lend themselves to subjective definitions at odds with the constitutional limitations we describe . . . Treasury bravely made a pass at defining "educational," but the more parameters it tried to set, the more problems it encountered.

Id. at 1035. However, other safeguards exist to provide limits on unwarranted exemptions. *See infra* Part III.

135. *Big Mama Rag*, 631 F.2d at 1035 (citing Smith v. Goguen, 415 U.S. 566, 572 (1974); Grayned v. City of Rockford, 408 U.S. 104, 108 (1972)).

136. Treas. Reg. § 1.501(c)(3)-1(d)(3)(i)(b).

137. *Big Mama Rag*, 631 F.2d at 1039, n.16.

B. *Retreating from* Big Mama Rag*: The National(ist) Line of Cases*[138]

The decision by the court of appeals in *Big Mama Rag* did not resolve the matter. The IRS and BMR came to an accommodation, but the vague Treasury regulation remained on the books.[139] Shortly after the appellate decision in *Big Mama Rag* the D.C. District Court decided the parallel case of *National Alliance v. United States*,[140] which included a second vagueness challenge against the same regulation. National Alliance ("NA") described its educational purpose as "developing in Americans of all ages 'an understanding of and a pride in their racial and cultural heritage and an awareness of the present dangers to that heritage'" through lectures and publications.[141] The racial and cultural heritage to be celebrated was limited to that of the white race, as evidenced by the content of the organization's monthly newsletter, *Attack!*, and membership bulletin, *Action*.[142] The IRS denied section 501(c)(3) status to NA in part on the ground that the organization failed to meet the "full and fair exposition" requirement.[143]

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138. Although the three white supremacist organizations discussed in this section do not necessarily share exactly the same views with respect to specific issues, I group them together for convenience for the purposes of this article because of their broadly overlapping perspectives on race and immigration. *See, e.g.*, National Alliance, http://www.natvan.com.

139. As the court of appeals noted in *National Alliance*,

> The [*Big Mama Rag* appellate] court did not direct the district court to enter judgment declaring BMR, Inc. tax-exempt, nor did it direct remand to IRS. The court may have assumed that the district court would take the latter course and that IRS would decide the matter under some other standard or analysis, perhaps reworking its regulation. In fact, however, the parties reached some sort of accommodation, and the district court dismissed the action with prejudice upon stipulation by the parties.

Nat'l Alliance, 710 F.2d at 874. Thus, the IRS did not meet head-on "the burden involved in reformulating the definition of 'educational' to conform to First Amendment requirements." *Big Mama Rag*, 631 F.2d at 1040. The IRS may in fact have wished away the problem, in spite of the *Big Mama Rag* court's warning that "the difficulty of the task neither lessens its importance nor warrants its avoidance." *Id.*

The vagueness doctrine, so heavily relied upon by the *Big Mama Rag* appellate court, has itself been described as an avoidance mechanism, a way of evading sticky interpretive questions by voiding offending rules in their entirety in order to trigger legislative action. BICKEL, *supra* note 119, at 150–52 ("[W]hen the Court finds a statute unduly vague, it withholds adjudication of the substantive issue in order to set in motion the process of legislative decision. It does not hold that the legislature may not *do* whatever it is that is complained of but, rather, asks that the *legislature* do it, if it is to be done at all.").

140. Nat'l Alliance v. United States, 81-1 U.S. Tax Cas. (CCH) ¶ 9464 (1981).

141. *Id.* at 87,342 (citing "Joint Exh. 1 at 13").

142. *Id.*

143. The proposed IRS determination letter denying exempt status to NA stated:

> It appears that your publications are being used as an outlet by your organization to spread its racial *propaganda* which is often inflammatory and unsupported opinion under the guise of being educational. Moreover, the tone and subject matter potentially serves to influence the prejudices and passions of its readers and the opinions of its creators.
>
> A review of your publications establishes that you present articles on subjects of prominent national and world concern, which are *exceptionally controversial.*

Id. at 87,343 (emphasis added). *See also Nat'l Alliance*, 710 F.2d at 870 n.3 ("Your organization has not presented a study or discussion of issues on which it has made a policy stand. It has,

This time, the IRS relied on a "methodology approach" to the application of the "full and fair exposition" requirement, which, it argued, cured the vagueness of the regulation declared void in *Big Mama Rag*. However, finding *Big Mama Rag* to be controlling, the district court concluded that the IRS "may not avoid the impact of *Big Mama Rag* by relying on its proposed 'methodology' approach."[144]

Two years later, the Court of Appeals for the D.C. Circuit[145] reversed and went so far as to order entry of judgment declaring NA "not tax-exempt."[146] The court based its decision solely on its finding that NA did not meet *any* conceivable standard for "educational" organizations exempt under section 501(c)(3), much less any standard set forth in the statute's implementing regulations.[147] By putting NA so far outside the educational pale, the court avoided announcing the specific standards by which it made its determination.[148] At the same time, the court strongly suggested in dicta that the additional IRS procedures of the methodology test, which the IRS described as "explanatory gloss" to the "full and fair exposition" requirement, did reduce the vagueness of the regulation invalidated in *Big Mama Rag*:[149] "The four criteria tend toward ensuring that the educational exemption be restricted to material which substantially helps a reader or listener in a learning process."[150] In concluding that the methodology test solved many of the regulation's failings, however, the court entirely ignored the initial inquiry into which organizations are considered to "advocate[] a particular position or viewpoint."[151] Indeed, the court's own

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instead, published its own narrow, unsupported, politically and racially agitative statements of judgment, regarding several highly complex and volatile national issues.") (citing IRS letter in "Joint Appendix . . . at 22–23.").

144. *Nat'l Alliance*, 81-1 U.S. Tax Cas. (CCH) ¶ 9464, at 87,345 (1981). The court also found that the methodology test introduced by the IRS "merely rewords the regulation it is intended to circumvent, without creating criteria any less vague or more capable of neutral application." *Id.*

145. Judge Tamm was on both panels.

146. *Nat'l Alliance*, 710 F.2d at 876.

147. *Id.* at 873. The court declared, "[i]n the present case we see no possibility that the National Alliance publication can be found educational within *any* reasonable interpretation of the term." *Id.* at 874 (emphasis added). "Significantly, National Alliance has not suggested before the IRS or the district court or here *any* definition of 'educational' which would arguably be met by its material." *Id.* at 873. The court thus refused to "reach the question whether the application of the Methodology Test, either as a matter of practice or under an amendment to the regulation would cure the vagueness found in the regulation by this court in *Big Mama*." *Id.* at 876.

148. *Id.* at 873 ("We do not attempt a definition, but we are convinced that the National Alliance material is far outside the range Congress could have intended to subsidize in the public interest by granting tax exemption.").

149. *Id.* at 871.

150. *Id.* at 875.

151. *Id.* at 869. As in *Big Mama Rag*, the court "recognize[d] the inherently general nature of the term 'education' and the wide range of meanings Congress may have intended to convey." *Id.* at 873. The task of crafting a "definition suitable for all comers . . . is beset with difficulties which are obvious." *Id.* The court also noted that "it is clear that in formulating its regulation, IRS was attempting to include as educational some types of advocacy of views not generally accepted. But

language suggests the possibility that the threshold inquiry might turn on whether "a particular public officer may strongly disagree with the proposition advocated."[152] Thus, the court contemplated that the additional factors of the methodology test would apply only after an organization has been singled out based on a subjective determination.[153]

The IRS subsequently published the methodology test as Revenue Procedure 86-43; since then, the IRS has only rarely expressly relied on the test to deny exemption,[154] and even then, only in cases involving other "Nationalist" organizations, which have continued unsuccessfully to challenge the regulation. The only court that has applied the methodology test as published in Revenue Procedure 86-43 to deny tax exemption is the Tax Court in *Nationalist Movement v. Commissioner*[155] and *Nationalist Foundation v. Commissioner*.[156] Still, the uneasy administration of an ostensibly objective test, especially in light of other available alternative grounds for disposition,[157] allows the IRS to engage in the pre-*Big Mama Rag* process of subjecting organizations to a test without clear standards in its initial identification of educational advocacy organizations. Under such a rule, the IRS may come to determinations on grounds that remain as vague and vulnerable to subjective, discriminatory, or arbitrary enforcement as they were in 1979. Throughout its opinions, the Tax Court makes no findings as to what made the denied organizations subject to the "full and fair exposition" and methodology tests in the first place, namely, the standards to be used to identify advocacy "of particular position or viewpoint." Like most members of mainstream society, it merely takes for granted the controversial nature of advocating white supremacy.[158]

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in order to be deemed 'educational' and enjoy tax exemption some degree of intellectually appealing development of or foundation for the views advocated would be required." *Id.* Be that as it may, such an inquiry only for controversial advocacy organizations raises serious problems.

152. *Id.* ("Accordingly IRS has attempted 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."). *Id.* at 874.

153. *Id.* at 875 ("The government does argue that the Methodology Test goes about as far as humanly possible in verbalizing a line separating education from non-educational expression."). The court appeared to accept this argument, as well as that the methodology test provided sufficient safeguards (namely, administrative and judicial review) against arbitrary exercise of discretion by IRS officials. *Id.* at 873–74. What creates the most serious problems, however, is the IRS' position that only certain kinds of advocacy—those that avoid controversial issues—are sufficiently educational to bypass the methodology test altogether.

154. *See infra* note 184.

155. 102 T.C. 558 (1994).

156. 80 T.C.M. (CCH) 507 (2000).

157. *See infra* Part III.

158. Certainly the white supremacist views of the National(ist) organizations that were the subject of the cases discussed above are far beyond the mainstream. *But see* Southern Poverty Law Center, *Active Hate Groups in the U.S. in 2000*, *available at* http://www.splcenter.org/intel/intelreport/article.jsp?aid=233 (last visited April 2, 2004) (listing 602 separate hate groups active in the United States in 2000). Other aspects of their ideology, however, such as anti-immigration views, may not be as far beyond the pale as many would wish.

In *Nationalist Movement*, the Tax Court held that an organization that "advocate[d] social, political, and economic change in the United States," purported to provide social and legal services, published a monthly newsletter, and "espouse[d] a 'pro-majority' philosophy, which generally favor[ed] those Americans who are white, Christian, English-speaking, and of northern European descent,"[159] did not use educational methodology to provide a "full and fair exposition" of its one-sided views, and thus was not operated exclusively for educational purposes.[160] Now that the methodology test was available to the public as an official revenue procedure, organizations were on notice of the test's factors.[161] Hence, the Tax Court squarely ruled on the issue avoided in *National Alliance*,[162] and, based largely on that court's apparent approval of the methodology test as curing the vagueness of the educational advocacy regulatory scheme,[163] held that the methodology test and the regulation were sufficiently clear and therefore valid.[164] The court then

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For example, a New Jersey borough councilman resigned from his appointed government post after only two weeks because members of his constituency objected to his active membership in the National Alliance. He later resigned from NA as well, saying that "he [initially] joined the National Alliance because he agreed with its views on illegal immigration and civil liberties. However, he now only has harsh words for the organization and says he is ashamed he did not fully investigate the group." *Ex-Official Drops Out of Aryan Group*, N.J. STAR LEDGER, July18, 2003, at 24.

159. *Nationalist Movement*, 102 T.C. at 560.

160. *Id.* at 591–94. Because publication of the newsletter constituted a substantial part of Nationalist Movement's activities, the newsletter's lack of educational methodology led to the organization's failure of the operational test. Under Treasury Regulation section 1.501(c)(3)-1(c)(1), an organization must "engage[] primarily" in properly exempt activities, in this case, education. *Id.* at 594. *See supra* note 49. Yet Nationalist Movement had attempted to turn attention away from its newsletter as a primary activity. *Nationalist Movement*, 102 T.C. at 589 ("Petitioner . . . now argues that the newsletter is an 'insubstantial part' of its activities."). Hence, the Fifth Circuit later affirmed the opinion on the ground that the organization had failed the operational test, but based on its other activities—namely a phone counseling line and First Amendment litigation—which did not adequately further charitable purposes. *Nationalist Movement v. Comm'r*, 37 F.3d 216, 221 n.5 (5th Cir. 1994) ("Because Appellant's non-exempt social and legal activities are themselves sufficient to defeat exemption we need not consider Appellant's contention that the methodology test used to evaluate its educational activities is unconstitutional.").

161. *Nationalist Movement*, 102 T.C. at 588–89.

162. *Id.* (noting that while "revenue procedures are not binding on this Court, they do constitute official statements of IRS procedure. Accordingly, we cannot avoid, as did the court in *National Alliance*, considering the constitutionality of the revenue procedure's methodology test as applied by respondent to petitioner.") (citations omitted).

163. *Id.* at 585–86 (noting the *National Alliance* court's favorable language, "albeit in dictum, about the informal methodology test that served as the forerunner of the published revenue procedure").

164. *Id.* at 588–89. The court treated Nationalist Movement's claim that the regulation was overbroad as analogous to a vagueness challenge. *Id.* at 585. Like the district court's approval of the "full and fair exposition" requirement in *Big Mama Rag* even without the guidance of the methodology test, *Big Mama Rag*, 631 F.2d at 1035–36, the *Nationalist Movement* court found the test set forth in Revenue Procedure 86-43 to be "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. . . . Petitioner has not persuaded us

proceeded to apply the methodology test to Nationalist Movement's newsletter and found that the organization failed the test.[165]

Specifically, the court found that "[w]ithout question, the newsletter does present viewpoints unsupported by facts,"[166] citing examples of the publication's summary statements based on "purportedly 'common sense' standards," such as that Supreme Court Justices should be required to have "No odd or foreign name" and "No beard."[167] The court also found evidence of "substantial use of inflammatory and disparaging terms" and of "conclusions more on the basis of strong emotional feelings than of objective evaluations" in the organization's derogatory use of the terms "queers" and "perverts."[168] Nationalist Movement

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that either the purpose or the effect of the revenue procedure is to suppress disfavored ideas." *Nationalist Movement*, 102 T.C. at 589. The court also viewed the escape hatch provision allowing exemption in "exceptional circumstances" even where the methodology test is not otherwise met as "clearly written as a second chance for an organization. . . . [T]he exercise of IRS' discretion can only resurrect tax exemption, not displace it." *Id.* at 587 (analogizing methodology test's "exceptional circumstances" provision to administrative discretion to waive restrictions that may reduce overbreadth). However, the perceived safeguards offered by a second chance to pass the methodology test through the escape hatch apply only after an organization is singled out for additional scrutiny in the first instance. Finally, the court found that the absence of a requirement that an organization present opposing viewpoints "tend[s] to *lessen* administrative discretion" because "the IRS is not called upon to evaluate how accurately or completely an organization presents such views." *Id.* (emphasis added). This statement seems to assume that IRS evaluation of only one viewpoint on an issue cuts its discretion in half. Yet it is precisely the characterization of an organization as one that "advocates a particular position or viewpoint"—that is, only one side of a controversial issue—that subjects it to higher scrutiny in the first instance.

165. Nationalist Movement also attempted to establish an equal protection violation by arguing that no "White" organizations were listed in IRS Publication 78, "Cumulative List of Organizations Described in Section 170(c) of the Internal Revenue Code of 1986," while several "Black" and "Gay" organizations were listed as exempt. *Id.* at 595. As the court pointed out, "Nationalist" Movement itself proved that a white supremacist organization need not necessarily call itself "White." *Id.* For a provocative suggestion that an organization with a better supported claim to white identity, such as a racist social club, might have a right not only to advocate race discrimination but also to exclude non-white members, see Nan D. Hunter, *Accommodating the Public Sphere: Beyond the Market Model*, 85 MINN. L. REV. 1591, 1611 (2001).

166. *Nationalist Movement*, 102 T.C. at 591.

167. *Id.* The publication also listed "groups of people who should be excluded from United States citizenship," including, with no further explanation, "Boat people, wetbacks and aliens who are incompatible with American nationality and character, such as Nicaraguan refugees or Refusnik immigrants." An additional example is found in the newsletter's "Q & A" section. In response to the question "WHAT IS 'BLACK HISTORY' MONTH ANYHOW?", the newsletter's complete response was as follows: "No such thing. Nary a wheel, building or useful tool ever emanated from non-white Africa. Africanization aims to set up a tyranny of minorities over Americans." *Id.* at 591–92.

The court came to no conclusion about whether the organization distorted facts under the second prong of the methodology test, since "[a]lthough such latent distortions may exist in the newsletters, they are not readily apparent from the record." *Id.* at 592. The IRS also "neither emphasize[d] the distortion factor on brief nor point[ed] to specific distorted or erroneous facts. In the totality of these circumstances, we are unable to conclude whether or not the newsletter fails the distortion standard." *Id.* In light of the difficulty of proving this prong, it is not surprising that the IRS chose not to rely on it.

168. *Id.* at 592.

also referred to black activists as "invaders"[169] and characterized "those resisting the 'invaders' . . . as 'patriots' and 'martyrs.'"[170] Still, as the *Big Mama Rag* court recognized, an organization does not necessarily reduce its educational value by resorting to strong terminology to advance its views.[171]

Finally, the court stated, "young people are at least a substantial portion of petitioner's intended readership for the newsletter. . . . Petitioner derives much of its ideological impetus from the civil unrest of the 1960s. . . . Young readers, by virtue of age alone, might have a somewhat limited 'background or training in the subject matter.'"[172] The court found that Nationalist Movement failed to address this lack of training, in violation of the fourth prong of the methodology test.[173] The question arises: how much history, and what kind, must an organization provide in order to meet this prong of the test? In the absence of lived experience, younger readers, even of daily newspapers, must rely on written accounts of most historical events, all of which are subject to interpretation, especially on controversial issues.[174]

In 2000, the Tax Court again applied the methodology test in *Nationalist Foundation v. Commissioner*,[175] in which the chairman and attorney for Nationalist Movement represented a similar organization[176] in a new attempt to win tax-exempt status and mount an equal protection challenge to the educational advocacy regulation.[177] Based on what little material it had before it in a scant administrative record, the court decided that the issues and analysis were identical to those already decided in *Nationalist Movement*, and relied heavily on that decision to uphold denial of exemption.[178] This time, the court

169. *Id.*

170. *Id.* at 593. Of course, the IRS has itself referred to organizations as "controversial," "ideological," "doctrinaire," or even "fanatic," which are at the very least value-laden terms susceptible to many interpretations. *See supra* Part I.B.

171. *See supra* note 130.

172. *Nationalist Movement*, 102 T.C. at 593.

173. *Id.* at 593–94. ("The newsletter . . . often refers to news and events from [the 1960s], including legislation such as the Civil Rights Act and the Voting Rights Act. [Reverend Martin Luther King, Jr.], whose activities are the subject of so many negative references in the newsletter, was assassinated in 1968.") *See also* Rev. Proc. 86-43, 1986-2 C.B. 729.

174. Indeed, particularly with regard to homosexual youth, the fact that homosexuality has largely been hidden from mainstream history (and school curricula) is part of the problem. *See generally* HIDDEN FROM HISTORY (Martin Duberman et al. eds., 1990).

175. 80 T.C.M. (CCH) 507 (2000).

176. *Id.* at 508 (noting that "petitioner seeks to become the legal and educational arm of rightist and promajority Americans" through use of public forums, cable television, First Amendment litigation, and an internet site).

177. *Id.* at 510. Here, however, the petitioner's attempts to withdraw material from the administrative record appear to have harmed its own case. *Id.* (noting the "vague and inconsistent" record). Moreover, Nationalist Foundation apparently refused to provide some information sought by the IRS. *Id.* at 508.

178. *Id.* at 510–11. The court also noted that the organization's activities, namely "lessen[ing] neighborhood tension" and "eliminat[ing] prejudice and discrimination," were "antithetical" to purposes listed in the regulation defining "charitable," Treas. Reg. § 1.501(c)(3)-

also found evidence of distortions of fact under the second prong of the methodology test.[179]

Nationalist Movement's newsletter and National Foundation's materials thus failed several prongs of the methodology test, thereby failing to provide a "full and fair exposition" of the organizations' points of view. At the same time, both organizations' wholesale failure to use educational methods provides little guidance as to how a similar organization could *pass* the test.[180] Ultimately, whether or not the methodology test for educational advocacy organizations withstands constitutional scrutiny any more than the "full and fair exposition" language alone did in *Big Mama Rag*, it fails to resolve the threshold question of what organizations are held to advocate, triggering the test in the first place—an issue raised by the *Big Mama Rag* court but as yet unaddressed.[181] The question remains: what test, if any, *could* properly be used both to cure the regulation's vagueness and to winnow out educational organizations truly undeserving of exemption?

Alternatives that have been suggested continue to focus on the secondary issue of how to measure educational methodology, while the prior inquiry remains inherently subjective and therefore rife with the intolerable risk of arbitrary and discriminatory enforcement. Thus, a better solution would be to abandon the advocacy distinction, the "full and fair exposition" requirement, and the methodology test altogether.

1(d)(2). *Id.* at 510. The IRS listed failure of the operational test (presumably because of failure of the educational advocacy regulation's "full and fair exposition" test), serving private rather than public interests, and allowing net earnings to inure to the benefit of private individuals as reasons for denial of exemption. *Id.* at 509.

179. *Id.* at 510. The court also found that a Nationalist Foundation fundraising letter's statement that

> "avowed homosexuals advertised that they would attack patriots" was fabricated from a newspaper article that reads "Members of the National Peoples [sic] Campaign plan to SHADOW Barrett outside the State House . . . to oppose his ultra-conservative views. And they are looking for all the picketers they can get." (Emphasis added.) The same solicitation letter also claims that petitioner has in its possession "actual photos of the terrorists in the act of attacking the Anti-King Rally at the State Capitol." Petitioner, however, has only one photograph of three individuals holding a banner, which opposes the views of petitioner. The individuals depicted in the photograph are not engaged in any kind of attack on Barrett or his fellow demonstrators.

Id. at 509 (emphasis in original).

180. *See, e.g.*, Shaviro, *supra* note 28, at 707 n.72 ("The court did not consider the possibility that these very gaps in reasoning, by encouraging thoughtful readers to disagree with *Attack!*'s conclusions, established that it met the 'full and fair' test. Perhaps a reprint of *Attack!*, accompanied by a cover sheet asserting that it was provided as an example of specious reasoning, would qualify as educational.").

181. According to Edward D. Coleman and Jeffery Yablon, who was of counsel to BMR, "the IRS has acted as if the problem has disappeared, but that may be wishful thinking. After all, the Regulation was held to be unconstitutional by a court of appeals[,] and Revenue Procedures normally are not regarded as having greater precedential value." Yablon & Coleman, *supra* note 68, at 160.

III.
ABANDONING THE METHODOLOGY TEST AND EXPANDING *BOB JONES UNIVERSITY*

To the cynical observer, the contrary results in *Big Mama Rag* and *National Alliance* may seem justified only by the desirability of divergent outcomes on facts that inspire different levels of sympathy rather than consistent application of either the vagueness doctrine or the regulatory scheme itself.[182] Whether or not white supremacist views are more "controversial" than a "homosexual outlook," use of educational methods may not render controversial viewpoints any more palatable—or beneficial—to the public.[183] And whether the methodology test's criteria are truly objective, selection of only some organizations for an inquiry into educational methods is problematic. Still, a few commentators have suggested alterations of or alternatives to the methodology test in order to formulate more objective criteria for evaluating educational methodology and, thus, for determining the exemption status of educational advocacy organizations.[184] While such recommendations may indeed improve

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182. Yablon and Coleman note:

> While both cases were wending their ways through the administrative process, the lawyers for the Big Mama Rag met with the lawyers for the National Alliance. . . . [I]t was decided that the Big Mama Rag should proceed first. This was in part because of the belief that while the constitutionality of the Regulation should present the same question in both situations, the people who were involved with the Big Mama Rag were more sympathetic than those involved with the National Alliance.

Id. at 160 n.14.

183. For example, according to its website, the Institute for Historical Review ("IHR"), "offers scholarly information and thoughtful commentary, from a revisionist perspective, on a wide range of historical issues, including the 'Holocaust,' Auschwitz, World War II, Stalin, Hitler, Winston Churchill, Franklin Roosevelt, Hiroshima, Pearl Harbor, the Palestine/Israel conflict, Zionism, the 'Jewish question,' the Bolshevik revolution, and much more," and purports to be "non-ideological, non-political, and non-sectarian." The organization lists its exempt status under I.R.C. section 501(c)(3) at http://www.ihr.org/about.html. The increasing availability of scholarly support for controversial viewpoints such as holocaust denial may render such organizations' methods sufficiently educational to pass the methodology test. The IHR, for example, states that it is "at the center of a worldwide network of scholars and activists who are working—sometimes at great personal sacrifice—to separate historical fact from propaganda fiction. . . . Devoted to truth and accuracy in history, the . . . Institute's purpose is, in the words of [Harry Elmer] Barnes, to 'bring history into accord with the facts.'" *A Few Facts About the Institute for Historical Review*, at http://www.ihr.org/main/about.shtml.

184. Even before the appellate decision in *Big Mama Rag* declaring the educational advocacy regulation void for vagueness, commentators had called for elimination of the "full and fair exposition" test. *See, e.g.*, Comment, *supra* note 55. The IRS had engaged in its own internal debates over the relative worth of an objective methodology test or a more subjective intent test even prior to enactment of section 501(c)(3) in 1954. *See* discussion *supra* notes 74, 78.

One early alternative to the methodology test was an intent, or "ultimate purpose" test, under which an organization's intent to educate the public would suffice for it to earn exempt status. This test was thoroughly debated and repeatedly rejected by the IRS as involving too subjective an inquiry. *See* discussion *supra* note 78. Nevertheless, a similar inquiry is already required of all organizations under the general organizational and operational tests, under which a section 501(c)(3) organization must be organized and operated primarily for exempt purposes. *See*

upon some of the methodology test's shortcomings, they remain limited to addressing the question of what constitutes "full and fair exposition," whether under a methodology test or some substitute test, rather than what constitutes advocacy of "a particular position or viewpoint," and are therefore inadequate for resolving the core problems of the scheme. Ultimately, the fact that some educational advocacy organizations may pass a truly objective test for demonstrating "full and fair exposition of facts" or may avoid triggering its application altogether is beside the point.

The concerns to which the *Big Mama Rag* court alone responded will remain so long as application of the regulatory regime depends on identification of an educational organization as one that advocates particular viewpoints—likely to be viewpoints that, in the *Big Mama Rag* court's words, fall outside "the mainstream of political thought." As the regulatory scheme's legislative history and case law show, the difficulty of clearly defining advocacy, much less "controversy," is itself the root of the problem, and an insurmountable one. Rather than tolerate the lingering risk of discriminatory enforcement in the initial selection of organizations subject to the methodology test and "full and fair exposition" requirement, regardless of how objective the test itself is, the wiser course is to abandon the educational advocacy organization scheme altogether and to allow all otherwise qualified educational organizations to qualify for exemption regardless of whether they "advocate[] a particular position or viewpoint."

The question then becomes: do any organizations exist for which the "full and fair exposition" requirement is the *only* way properly to police the borders of exemption? If so, then abandoning the regulatory scheme would deprive the IRS of a necessary tool for denying exempt status to organizations that should not qualify. The National(ist) organizations would seem to be the best candidates for this category, given the courts' strong and repeated refusals to sanction their educational methods. While the *Nationalist Movement* and *Nationalist*

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discussion *supra* note 49. While such tests may also be overly formalistic, some subjective inquiry into content could be justified as a condition of exemption so long as it applied to all organizations rather than only those that may "advocate[] a particular position or viewpoint." *See* Thompson, *supra* note 69 (advocating inquiry into intent). *But see* Yablon & Coleman, *supra* note 68 (arguing that intent is irrelevant for exemption inquiry); TNT *supra* note 19, at 37.

Professor Shaviro advocates a different kind of intent standard specifically for educational publications. Shaviro would distinguish between exempt publications that seek to educate and non-exempt ones that seek primarily to entertain their audiences, inspired in part by complaints about unfair competition by tax-exempt publications. Such a standard, Professor Shaviro argues, would properly direct any tax subsidy toward publications that would not otherwise survive and would comport with general rationales for exemption. Shaviro, *supra* note 28, at 731. *Cf.* Colombo, *supra* note 9, at 880 (donative theory would render unnecessary several exemption doctrines, such as the public benefit requirement, since support from donors would indicate public orientation). *But see* Chisolm, *supra* note 25, at 285 (acknowledging that broad public financial support indicates focus on public rather than private benefit, but noting that "[t]he ability of an organization to draw broad-based financial support does not necessarily correlate with its capacity to reflect the needs and desires of the distressed and disadvantaged target group").

Foundation courts could have followed *National Alliance* to find the organizations non-exempt under *any* possible definition of "educational," they dutifully accepted the invitation to apply the methodology test to cases with similar facts instead. Indeed, the *National Alliance* court may have welcomed the existence of the methodology test in part to bolster its cursory interpretation of the broad statutory term "educational." In the absence of any other guidance regarding educational exemption,[185] the *National Alliance* court's ringing endorsement of the methodology test as a way of measuring "full and fair exposition" may seem justified as an indispensable way to eliminate unworthy organizations from exemption.

In contrast to the blank slate of the "educational" category, however, interpretation of the broad statutory term "charitable" has a much more robust history in case law than that of the "educational" category and provides an alternate stopgap against unwarranted exemption that is applicable to all section 501(c)(3) organizations. Thus, in each of the National(ist) cases, resort to the methodology test may simply have been unnecessary, not because the range of organizations subject to the educational advocacy organization scheme is narrow, as the IRM suggests,[186] but because existing safeguards applicable to all public charities under section 501(c)(3)—educational or otherwise, advocacy and non-advocacy alike—may be relied upon to eliminate organizations that truly fail to benefit the public from the realm of exemption.

Courts may have relied on the dubious methodology test to deny exemption to the National(ist) organizations only because the IRS has hesitated to use an even rarer but potentially more fair ground for denial of exemption to otherwise

185. *See* sources cited *supra* note 88 and accompanying text (discussing the educational exemption regulation as a whole).

186. IRM 7.25.3.7.11.5 (Feb. 23, 1999). Post-*Big Mama Rag* legal challenges to the regulatory scheme for educational advocacy organizations outside the white supremacist context have been non-existent. Whether this is because no other organization has been denied under the test, or no other organization has been subjected to the test is unclear. The precise range of affected organizations is difficult to delineate because only those organizations that are denied exemption have an incentive to bring a legal challenge, and those who are granted exemption may not be aware they have been subjected to the test at all. Moreover, as Professor Shaviro points out, "For many [educational] publications, which cannot afford the expensive and time-consuming process of seeking judicial review, the views of the [IRS] are effectively final." Shaviro, *supra* note 28, at 700 (footnotes omitted). Finally, only where requests are made for technical advice by organizations applying for recognition of exempt status or when internal clarification of evolving legal positions is required does the IRS issue Private Letter Rulings (heavily redacted to protect privacy) or (non-binding) General Counsel Memoranda. A lack of public information on the reasons for denials and grants of exemption to individual organizations, therefore, renders it difficult to state with certainty how often the IRS engages in analysis of educational methodology.

While the IRS may be exercising restraint by limiting its use of the methodology test, or in its application of the test, it is also possible that a lack of use of the methodology test by the IRS is itself an indication of the difficulty of identifying educational advocacy organizations and of applying the methodology test consistently. *See* Chisolm, *supra* note 25, at 246 ("Exempt organizations should not have to rely on the unwieldiness of the bureaucracy, nor on the reassurance that the IRS has only infrequently abused its discretion.").

qualified organizations under the well-established common law of charitable trusts: namely, the prohibition on charitable status for activities that are illegal or that violate fundamental public policy.[187] While this option also raises serious concerns about discriminatory application and agency authority and discretion, its application to all public charities otherwise qualified for exemption under section 501(c)(3), regardless of advocacy of a particular position, makes it a better safeguard against unwarranted exemptions than the "full and fair exposition" and methodology tests, which are applicable only to educational advocacy organizations. Thus, the educational advocacy scheme could safely be abandoned without fear of unleashing a flood of unwarranted exemptions.

The contours of the public policy/illegality limitation on exemption under section 501(c)(3) were established in *Bob Jones University v. United States*, which was combined with the similar case *Goldsboro Christian Schools v. United States*.[188] In 1983, the Supreme Court upheld the IRS's denial of exemption under section 501(c)(3) to the two private schools, both of which openly engaged in racially discriminatory admissions policies ostensibly based on religious beliefs mandating racial purity.[189] The IRS had acted pursuant to a revenue ruling issued in the wake of lower court decisions holding such admissions policies to be unconstitutional under the Equal Protection Clause; the IRS ruling interpreted those decisions to support denial of tax exemption to schools that implemented such policies.[190]

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187. *Bob Jones Univ. v. United States*, 461 U.S. 574, 579 (1983).

188. *Id.*, 461 U.S. 574 (1983).

189. Specifically, Bob Jones University ("BJU") prohibited interracial dating and marriage, and had in the past limited admission to "unmarried Negroes" (with an exception for some staff members). *Id.* at 580, 580 n.5. Goldsboro Christian Schools had "for the most part accepted only Caucasians," although it had on occasion accepted students who had only one Caucasian parent. *Id.* at 583. The policy apparently was adopted because of an Asian student's family's objections to his impending marriage to a white student. *See* Evangelical Press, *Bob Jones University Drops Interracial Dating Ban*, CHRISTIANITY TODAY, March 6, 2000, *available at* http://www.christianitytoday.com/ct/2000/110/53.0.html. In 2000, BJU abandoned its policy in the wake of controversy surrounding presidential candidate George W. Bush's visit to the school. BJU conceded its policy had no basis in the Bible. *See Bob Jones University Ends Ban on Interracial Dating*, CNN.COM, March 4, 2000, *at* http://www.cnn.com/2000/US/03/04/bob.jones.

The Court also held that the denial did not violate the schools' constitutional right to free exercise of religion because the government's "fundamental, overriding interest in eradicating racial discrimination in education . . . substantially outweighs whatever burden denial of tax benefits places on [the schools'] exercise of their religious beliefs." *Bob Jones Univ.*, 461 U.S. at 604. Moreover, even as both religious and educational institutions, the private religious schools were properly subject to revenue guidelines applicable to all private schools. *Id.* at 605 n.32.

As traditional schools, BJU and Goldsboro Schools might pass any educational methodology test even if their religious and discriminatory views were held to be advocacy of a particular position. *See* Treas. Reg. § 1.501(c)(3)-1(d)(3)(ii) (stating that an institution with "a regularly scheduled curriculum, a regular faculty, and a regularly enrolled body of students in attendance at a place where the educational activities are regularly carried on" exemplifies properly educational organization). The record does not disclose whether the curriculum included advocacy of racial purity, or if discrimination essentially ended at the admissions stage.

190. *See Bob Jones Univ.*, 461 U.S. at 578–79 (citing Rev. Rul. 71-447, 1971-2 C.B. 230,

In *Bob Jones*, the Supreme Court held first that the IRS's adoption of the common law requirement that charitable trusts refrain from violating law or public policy for all categories of organizations listed in section 501(c)(3) was supported by congressional intent. Based on legislative history and its interpretation of the exemption statute, the Court concluded that "Congress deemed the [enumerated categories of organizations] entitled to tax benefits because they served desirable public purposes,"[191] which made them subject to charitable trust law's prohibition on *un*desirable violations of law or public policy. The Court then went on to find the public policy against racial discrimination in schools so well established that the IRS's revenue ruling merely implemented a "fundamental public policy" as already clearly expressed by all three branches of the government:[192] "Over the past quarter of a century, every pronouncement of this Court and myriad Acts of Congress and Executive Orders attest a firm national policy to prohibit racial segregation and discrimination in public education."[193] The Court concluded, "there can no longer be any doubt that racial discrimination in education violates deeply and widely accepted views of elementary justice."[194]

While the Court narrowed its holding to apply only to racially discriminatory admissions policies in private schools on the grounds of

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enacted after related decisions in *Green v. Kennedy*, 309 F. Supp. 1127 (D.C. Dist. 1970) (granting preliminary injunction prohibiting IRS from granting tax-exempt status to private schools that discriminated on the basis of race) and *Green v. Connally*, 330 F. Supp. 1150 (D.D.C. 1971) (decision on the merits that such schools are not entitled to exemption under section 501(c)(3))).

191. *Id.* at 589. The Court read section 501(c)(3) in light of its "mirror" statute, I.R.C. section 170, *id.* at 588 n.11 (citing Rehnquist, J., dissenting), which governs tax deductions for contributions to qualifying charitable organizations, to find that the common law condition on charitable trusts could be read into the section 501(c)(3) exemption provision. *Id.* at 585–92. The Court acknowledged that the plain language of section 501(c)(3), which grants exemption to "religious, charitable . . . *or* educational" organizations (emphasis added), does not require that organizations qualifying for exemption under particular enumerated categories, such as "religious" and "educational," also qualify as "charitable." *Id.* at 585. However, the Supreme Court found that the language of section 170 parrots that of section 501(c)(3) in its characterization of donations made to "religious, charitable . . . or educational" organizations broadly as "charitable contributions." I.R.C. § 170(a)(1). Moreover, the Court found that the legislative history of section 501(c)(3) repeatedly referred to the law of charitable trusts to support enactment of the exemption provision. *Bob Jones Univ.*, 461 U.S. at 588–91. Hence, "[t]o be entitled to tax-exempt status under section 501(c)(3), an organization must first fall within one of the categories specified by Congress, and *in addition* must serve a valid charitable purpose." *Id.* at 592 n.19 (emphasis added). Still, the Court was careful not to state that all precedent under the common law of charitable trusts would automatically apply to section 501(c)(3). *Id.* at 588 n.12.

192. *Id.* at 592.

193. *Id.* at 593. As many commentators have noted, the Court's investigation of legislative acquiescence, executive pronouncements, and court decisions ironically ignored a contested change of position on the part of the Reagan administration from the Carter administration's support for the IRS ruling. *See* FISHMAN & SCHWARZ, *supra* note 8, at 113 (noting the "political firestorm" that surrounded the Court's decision to hear the case after the Reagan administration changed its position).

194. *Bob Jones Univ.*, 461 U.S. at 592.

especially strong public policy in that arena,[195] the decision legitimately could be extended to apply to other types of organizations and other contexts—so long as similarly "fundamental" public policy may be established, presumably by reference to similarly clear enactments by each governmental branch.[196] While it is unclear what other policies are as fundamental as the prohibition against discrimination on the basis of race in schools, arguably, public policy prohibiting discrimination on the basis of gender approaches the same "fundamental" level.[197] Prohibitions against discrimination on the basis of sexual orientation may not yet have reached the same level of interbranch agreement, but protections against such discrimination are increasingly being upheld at the state and federal levels, suggesting that fundamental public policy may eventually be established in this arena as well.[198]

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195. *Id.* at 598.

196. *Id.* (contemplating that in the future, determination of whether an organization is "charitable" may "in turn . . . necessitate later determinations of whether given activities so violate public policy that the entities involved cannot be deemed to provide a public benefit worthy of 'charitable' status"). The Court stated, "We emphasize . . . that these sensitive determinations should be made only where there is no doubt that the organization's activities violate fundamental public policy." *Id.*

197. A detailed examination of specific prohibitions that may rise to the level of fundamental public policy is beyond the scope of this article. Nevertheless, it appears that some forms of discrimination on the basis of gender may violate fundamental public policy. *See, e.g.*, United States v. Virginia, 518 U.S. 515 (1996) (state may not exclude women from the unique educational experience of its military institute by providing alternate program for women only). *See also* MICHAEL HATFIELD, ANNE MILGRAM & MICHELLE D. MONTICCIOLO, BOB JONES UNIVERSITY: DEFINING VIOLATIONS OF FUNDAMENTAL PUBLIC POLICY 20–95 (Nat'l Ctr. on Philanthropy & the Law, Topics in Philanthropy No. 6, 2000) (cataloging pronouncements of each branch of government in the areas of discrimination on the basis of race, gender, age, disability, religion, and sexual orientation).

Fears that recognition of such strong policy barring discrimination on the basis of race or gender might, under the logic of *Bob Jones*, place all school affirmative action admissions policies in jeopardy because of the threat of revocation of exempt status appear to have been laid to rest by the recent decisions in *Grutter v. Bollinger*, 539 U.S. 306 (2003) (holding that "the Equal Protection Clause does not prohibit the [University of Michigan] Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body"), and *Gratz v. Bollinger*, 539 U.S. 244 (2003) (University of Michigan's undergraduate affirmative action policy not narrowly tailored), at least regarding so-called "benign discrimination" on the basis of race. *See* Brennen, *supra* note 4.

198. The extent to which *Lawrence v. Texas*, 539 U.S. 558 (2003) (state law criminalizing homosexual sodomy violates right to liberty under the due process clause) establishes a fundamental public policy against discrimination on the basis of sexual orientation remains unsettled, especially in light of legislation and other court decisions that permit such discrimination. For example, the Defense of Marriage Act absolves states and the federal government from recognizing same-sex marriages under another state's law. 28 U.S.C. § 1738C (2003) ("No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship."). *See also* Boy Scouts of America v. Dale, 530 U.S. 640 (2000) (upholding the right of the Boy Scouts of America to discriminate against a scoutmaster because he was openly gay on the grounds that as a private entity it fell outside the purview of state public

Even in the absence of interbranch agreement on public policy regarding discrimination on the basis of sexual orientation, an organization's mere *advocacy* of homosexual conduct or "outlook,"[199] short of constituting

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accommodations law prohibiting such discrimination). Still, the tide may be turning as more states extend anti-discrimination protections. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 624 (1996) (striking down state amendment banning "all legislative, executive or judicial action at any level of state or local government designed to protect . . . homosexual persons or gays and lesbians"); Boy Scouts of America v. Wyman, 335 F.3d 80 (2d Cir. 2003) (holding state agency's exclusion of Boy Scouts from workplace contribution campaign, a nonpublic forum, because the organization's policy of discriminating against homosexuals as members or employees violates state anti-discrimination law does not violate First Amendment).

Lawrence v. Texas explicitly discusses faulty historical assumptions, non-enforcement of sodomy laws, and changing state and international norms to support overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986). Lawrence v. Texas, 539 U.S. at 570, 573 (noting that "[i]t was not until the 1970's that any State singled out same-sex relations for criminal prosecution, and only nine States have done so . . . The 25 States with laws prohibiting the relevant conduct referenced in the *Bowers* decision are reduced now to 13, of which 4 enforce their laws only against homosexual conduct. In those States where sodomy is still proscribed, whether for same-sex or heterosexual conduct, there is a pattern of nonenforcement with respect to consenting adults acting in private. The State of Texas admitted in 1994 that as of that date it had not prosecuted anyone under those circumstances." And further, "[t]he right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries.") (citations omitted).

199. As Professor Hunter suggests, the dichotomy between status and conduct is largely a legal construct. Hunter, *supra* note 107 (tracing the history of gay rights litigation from decriminalization of homosexual conduct to advocacy of expressions of sexual identity). The difficulty of distinguishing between conduct and speech plagues the IRS; where an organization's conduct violates the law or contravenes fundamental public policy, the IRS may revoke tax exemption, but where the organization merely advocates such disfavored conduct, the result is less clear. Organizations that engage in or advocate civil disobedience present a prime example of the difficulty of drawing clear lines between advocacy of illegal conduct and actual illegal acts. *See, e.g.*, Rev. Rul. 75-384, 1975-2 C.B. 204 (organization that sponsors "antiwar protest demonstrations in which demonstrators are urged to commit violations of local ordinances and breaches of public order" does not qualify as charitable under section 501(c)(3) because it "induces or encourages the commission of criminal acts . . . The intentional nature of this encouragement precludes the possibility that the organization might unfairly fail to qualify for exemption due to an isolated or inadvertent violation of a regulatory statute"); Gen. Couns. Mem. 36,218 (Mar. 31, 1975) (anarchist organization does not qualify as social welfare organization under I.R.C. section 501(c)(4), using educational advocacy standard, because "the [IRS] can . . . properly point to the subject organization's regular dissemination of writing[s] that advocate the violent overthrow of all existing governments without concurrently advising those to whom these writings are so distributed that it does not endorse such a view.").

The distinction between an organization's exclusion and affirmative inclusion of certain classes of people is also significant, since some anti-discrimination laws have been upheld against free association claims. *See, e.g.*, Roberts v. United States Jaycees, 468 U.S. 609 (1984) (state law requiring nonprofit organization to admit women as voting members does not violate right to free association). In the absence of clear discriminatory acts, however, the right to free association may still support advocacy of discrimination. *See* Hunter, *supra* note 165 (exploring the notion of an "expression-exclusion continuum" as a way of thinking about conflicts between freedom of association and freedom of expression in public accommodations law); Nan D. Hunter, *Expressive Identity: Recuperating Dissent for Equality*, 35 HARV. C.R.-C.L. L. REV. 1 (2000) (exploring the intersection and tensions among equal protection claims and freedom to associate or to advocate discrimination). *But see* Church of Scientology of Cal. v. Comm'r, 83 T.C. 381, 502–09 (1984), *aff'd* 823 F.2d 1310 (9th Cir. 1987) (rejecting church's argument that loss of exemption for violations of law or public policy is an overbroad regulation on freedom of association).

discrimination against any class, is far from being against fundamental public policy, while an organization's active *exclusion* of gays and lesbians as a class comes much closer to violating fundamental policies favoring equal protection and the right to privacy.[200] Similarly, an organization that calls for white supremacy but falls short of engaging in actually discriminatory conduct might escape denial of exemption under a narrow reading of *Bob Jones*.[201] Nevertheless, *Bob Jones'* safeguards may be sufficient to enforce exemption standards, even if more educational advocacy organizations would receive recognition of exempt status under the Court's limited holding. Given the serious risk of discrimination under the existing regulatory scheme for educational advocacy organizations, the possibility that some controversial organizations might qualify for exemption in the absence of the scheme, yet fail to be filtered out by the *Bob Jones* test because they do not go so far as to violate fundamental public policy, may be a tolerable, and even desirable, result.

At the very least, as the majority in *Bob Jones* noted, extreme examples, such as a school for "guerilla warfare and terrorism" or a school for pickpockets would certainly fail to pass IRS muster under *Bob Jones*;[202] likewise, a white supremacist group that actively engaged in violent activities would be denied exemption. In fact, the IRS did raise the argument in the district court that NA was not charitable because it condoned illegal acts and violence in contravention of law and public policy.[203] While the district court refused to read the broad

200. *See Lawrence*, 539 U.S. 558 (state law criminalizing homosexual sodomy violates right to liberty under the due process clause); *Romer*, 517 U.S. at 624 (1996) (striking down state amendment banning "all legislative, executive or judicial action at any level of state or local government designed to protect . . . homosexual persons or gays and lesbians" as violation of equal protection). For a strong critique of the opinion in *Dale v. Boy Scouts of America*, 530 U.S. 640 (2000) (Boy Scouts not subject to state public accommodations law prohibiting discrimination on the basis of sexual orientation), see Hunter, *supra* note 165.

201. The *National Alliance* court noted that the IRS could "arguably" have denied exemption to NA on the basis of its discriminatory membership policy, but found it unnecessary to reach the question. 710 F.2d at 876 n.14.

202. *Bob Jones Univ.*, 461 U.S. at 592 n.18. While such schools might employ the methods of traditional schools as listed in the illustrating examples of Treasury Regulation section 1.501(c)(3)-1(d)(3)(b)(ii), the IRS could still deny them exemption as engaging in activities that violate law or fundamental public policy. Justice Rehnquist's dissent argued that the requirement of Treasury Regulation section 1.501(c)(3)(i)(b) that an educational organization address "subjects . . . beneficial to the community" sufficed to screen out such organizations. *Id.* at 618–19. Either way, an emphasis on methodology seems to miss the point.

203. The IRS argued that NA "induces, condones[,] and advocates violence and crime" against blacks and Jews. Nat'l Alliance v. United States, 81-1 U.S. Tax Cas. (CCH) ¶ 9464, at 87,343 n.2 (1981). The appellate court in *National Alliance* also stated, "National Alliance repetitively appeals for action, including violence, to put to disadvantage or to injure persons who are members of named racial, religious, or ethnic groups. It both asserts and implies that members of these groups have common characteristics which make them sufficiently dangerous to others to justify violent expulsion and separation." Nat'l Alliance v. United States, 710 F.2d 868, 873 (D.C. Cir. 1983). The court cited an issue of *Attack!* that referred to the possibility of "armed confrontation." *Id.* at 873 n.12.

At issue but unspoken in all the National(ist) cases was the degree to which advocacy of illegal conduct, namely violence against people of color and immigrants, could be restricted. If

common law condition on charitability into section 501(c)(3)'s requirements for educational organizations,[204] the later decision in *Bob Jones* may have vindicated the IRS's argument. The IRS did not raise the argument at the appellate level, but the D.C. Circuit Court's opinion, released shortly after *Bob Jones*, noted that decision's holding, suggesting that it remains available in other circumstances.[205]

Sensitive decisions about when an organization crosses the line between protected free association or speech and unprotected discrimination or conduct are frequently subjective and raise legitimate concerns about unwarranted government intrusion into private affairs.[206] Indeed, hesitation to extend *Bob*

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such speech falls short of inciting immediate acts, it would presumably be constitutionally protected under the strict test established by *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969) (speech falling short of "incitement to imminent lawless action" is protected under the First Amendment), though not necessarily worth subsidizing through tax exemption. *See* Cammarano v. United States, 358 U.S. 498, 515 (1959) (Douglas, J., concurring). Indeed, the line between advocacy and action, speech and conduct, is not always clear-cut. Several commentators argue that the IRS should err on the side of exemption. *See* Shaviro, *supra* note 28, at 713–15 (arguing against expansion of the *Bob Jones* standard, especially as applied to advocacy because "[w]hereas the government has a compelling interest in eradicating the practice of discrimination, it has no valid interest in preventing the advocacy thereof"). *See also* Thompson, *supra* note 69, at 547–48 (advocacy that falls short of being illegal should not bar exemption).

204. *Nat'l Alliance*, 81-1 U.S. Tax Cas. (CCH) ¶ 9464, 87,343 n.2.

205. *Nat'l Alliance*, 710 F.2d at 870 n.4. In *Nationalist Movement*, the IRS initially argued during the administrative process that the organization's activities violated law or public policy, following *Bob Jones*, but later abandoned the argument. 102 T.C. 558, 571 (1994).

206. Justice Powell's opinion concurring in the judgment in *Bob Jones* reflects careful consideration of the "broader implications" of reading a common-law public policy limitation into section 501(c)(3). *Bob Jones Univ.*, 461 U.S. at 606 (Powell, J., concurring in part and concurring in the judgment). While Justice Powell agreed that "if any national policy is sufficiently fundamental to constitute such an overriding limitation on the availability of tax-exempt status under section 501(c)(3), it is the policy against racial discrimination in education," *id.* at 607, as well as with the Court's reasoning regarding free exercise of religion, *id.* at 606, he objected strongly to language in the majority opinion characterizing the "justifications for the tax exemptions provided to charitable organizations," namely, references to "the common community conscience" and organizations that "demonstrably serve and [are] in harmony with the public interest." *Id.* at 608. Stressing the diversity of missions and views held by exempt organizations, *id.* at 609 n.3, and citing Justice Brennan's concurring opinion in *Walz v. Tax Comm'n*, 397 U.S. 664, 689 (1970) (supporting "a vigorous pluralistic society"), Justice Powell stated that "the provision of tax exemptions to nonprofit groups is one indispensable means of limiting the influence of governmental orthodoxy on important areas of community life." *Bob Jones Univ.*, 461 U.S. at 609. Far from requiring exempt organizations "to act on behalf of the Government in carrying out governmentally approved policies," *id.* at 609, then, exempt organizations should properly reflect a range of critical and controversial views.

The majority's finding of unmistakable and fundamental public policy against racially discriminatory school admissions policies was so strong that it obviated the need to inquire whether an organization might nevertheless provide a sufficient public benefit to override its shortcomings. *Id.* at 596 n.21. A countervailing fundamental public policy in favor of the long-term public benefits of free speech and criticism of the government could potentially outweigh other strong public policies. An overly narrow interpretation of "charitable" to mean widely supported and government-sanctioned, then, could in fact be contrary to a community's long-term best interests. Identifying where the balance would properly be struck is beyond the scope of this article.

Jones to other contexts may result from the fear that IRS *enforcement* of fundamental public policy may inevitably lead to IRS *determinations* of public policy.[207] In his concurring opinion in *Bob Jones*, Justice Powell strongly objected to "any suggestion that the [IRS] is invested with authority to decide which public policies are sufficiently 'fundamental' to require denial of tax exemptions."[208] Yet the majority stated that such fears were unfounded, given the clarity of the policy against racial discrimination; so long as the IRS refrained from declaring policy, it could act to enforce it.[209] The *Bob Jones* Court was careful to state that the IRS's authority, even duty, to act under its revenue ruling in that case derived from its role as enforcer of already established public policy rather than as independent policymaker, since "it would be anomalous for the Executive, Legislative, and Judicial Branches to reach conclusions that add up to a firm public policy on racial discrimination, and at the same time have the IRS blissfully ignore what all three branches of the Federal Government had declared."[210]

Ultimately, the IRS's possible reluctance to expand its limited mandate in *Bob Jones* and to enforce similarly fundamental public policies suggests that it should show even greater restraint in determining "controversy" under the educational advocacy regulatory scheme. Instead of risking vagueness, discrimination, and inaccuracy in its quest for ever more objective standards for educational methodology, the IRS should abandon such attempts. While it may seem to matter little whether the IRS must determine if an organization is controversial enough to be "advocat[ing] a particular position or viewpoint" under its own regulatory scheme or "violating fundamental public policy" as established by the three branches of government, in fact the distinction makes a difference, even if the outcome is the same in both cases. For even if public policy enforcement may seem to allow the IRS too much discretion, the IRS is on much safer ground applying clear national policy, as formulated by the three governmental branches, to all section 501(c)(3) organizations than it is judging the controversial nature of only some educational organizations' views.

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207. *See, e.g.*, Charles O. Galvin & Neal Devins, *A Tax Policy Analysis of Bob Jones University v. United States*, 36 VAND. L. REV. 1353, 1380 (1983) (arguing that "Congress, as a more capable legislator than the courts or the IRS, is better equipped to formulate a tax exemption policy"). *See also* Shaviro, *supra* note 28; Thompson, *supra* note 69.

208. *Bob Jones Univ.*, 461 U.S. at 611 (Powell, J., concurring in part and concurring in the judgment). *See also id.* at 617 (Rehnquist, J., dissenting).

209. This is especially true where, as in *Bob Jones*, Congress chose not to act itself to prohibit racially discriminatory admissions policies in private religious schools. The Court relied heavily on what it characterized as strong evidence of "longstanding" legislative acquiescence to the IRS's revenue ruling. *Id.* at 599 n.23. The Court also took great pains to clarify that in denial of tax exemption the IRS was not itself determining public policy, but merely enforcing already clear federal policy as established by the three branches of government. *Id.* at 598. *Cf.* I.R.C. § 501(i) (2003), enacted in response to *McGlotten v. Connally*, 338 F. Supp. 448 (D.C. Dist. 1972), which prohibits discrimination on the basis or "race, color, or religion" by tax-exempt social clubs. *See also Bob Jones Univ.*, 461 U.S. at 601 n.26.

210. *Bob Jones Univ.*, 461 U.S. at 598.

The purpose of this article is not to suggest that certain organizations should or should not receive tax exemption, whether under the educational advocacy regime or through enforcement of fundamental public policy under *Bob Jones*, nor even to argue that Congress should or should not exercise its legislative authority to amend the exemptions in the Internal Revenue Code in any particular way. Rather, my goal is to bring to light the problems of possible discriminatory application created when IRS regulations and procedures purporting to clarify and implement statutory exemptions instead inject potentially unfair requirements into the exemption scheme for some organizations, but not for others, depending on subjective assessments of the viewpoints advocated by those organizations. The *Bob Jones* Court's emphasis on the IRS's authority to implement clear statutory commands rather than on its authority to engage in actual policymaking suggests that the *Bob Jones* public policy limitation on exemption could and should be enforced by the IRS, albeit with restraint, while the educational advocacy scheme should be abandoned.

CONCLUSION

This article has attempted to show, through examination of the educational advocacy regulatory scheme, legislative history, case law, and the elements of charitable trust common law as read into section 501(c)(3) in *Bob Jones*, that the current educational exemption scheme raises unacceptable risks of arbitrary and discriminatory enforcement. The scheme's focus on the ostensibly objective methodology test for "full and fair exposition" applicable only to educational organizations that "advocate[] a particular position or viewpoint" obscures the threshold question of which organizations are controversial enough to be subject to the test. Methodology thus offers a mask of objectivity that merely shifts the subjective inquiry to the earlier and less explicit determination of when an organization's controversial views constitute advocacy of "a particular position." The danger that the content of an organization's ideology alone could be grounds for denial of tax exemption[211] counsels abandonment of the regulatory scheme governing exemption for educational advocacy organizations in favor of reliance on existing safeguards under *Bob Jones* that are applicable to all section 501(c)(3) organizations regardless of advocacy.

The role of tax-exempt organizations in providing innovative and flexible non-governmental services is a time-honored and invaluable one. By harnessing the individual preferences and charitable contributions of private donors to meet needs that might otherwise be impossible or impractical to fulfill, such organizations provide important vehicles for promoting public policies that may augment the social safety net or increase opportunities for advancement through job training or education. Offered the crucial incentive of tax exemption, public charities and other organizations may serve functions deemed worthy of support

211. *See* discussion *supra* note 15.

by the government, while operating largely independently. Among tax-exempt public charities, the role of educational advocacy organizations is equally important. By voicing viewpoints and positions that are marginal and controversial, such organizations ensure that a free marketplace of ideas about the proper policies to be advanced or the social goals to be met thrives within the sphere of tax exemption.

As recent political debates on affirmative action and homosexuality reveal, public policy on highly charged issues such as race and sexuality may never be fully settled or free from controversy. While the Supreme Court's decisions in *Lawrence v. Texas*[212] and *Grutter v. Bollinger*[213] may have put some issues—the illegitimacy of criminalizing homosexual sodomy and the legitimacy of diversity in education as a compelling state interest—to rest for the time being, and may even herald the establishment of fundamental, though not fixed, public policy, the public debates surrounding court decisions, legislative enactments, and executive pronouncements on these issues show that even when fundamental public policy does emerge, controversy and advocacy remain in the eye of the beholder. Rather than relying on laws or public policies that are carved in stone, a healthy and evolving democratic republic thrives on continuity and change.[214] Because educational advocacy organizations play a vital role in the process of social transformation,[215] they should be permitted to flourish as much as possible. It remains to be seen whether the IRS has learned that lesson.

212. Lawrence v. Texas, 539 U.S. 558 (2003) (state law criminalizing homosexual sodomy violates right to liberty under the Due Process Clause).

213. Grutter v. Bollinger, 539 U.S. at 343 (2003) ("[T]he Equal Protection Clause does not prohibit the Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body.").

214. *See* Chisolm, *supra* note 25, at 270 ("The very nature of the policymaking process, as well as the public policy which results, is distorted when some views are chronically underrepresented.").

215. *See, e.g.*, Colombo, *supra* note 9, at 853, 865 n.143.