Defunding Hate: Charity, Epistemology, Speech Incantations, And Federal Tax Exemption

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Abstract

That it would strike most people as entirely absurd to refer to hate groups as charitable has, to this point, not discouraged more than a few scholars from doing exactly that. Thus, conventional wisdom holds that hate groups – groups that teach people how and why they should hate the "other" – educate and are ipso facto entitled to tax exemption under IRC 501(c)(3). It is not that sloven minds truly believe hate groups are charities, it is that they think there is no justification for denying tax exemption to hate groups other than that government – we the people – despise their ideas. Even tax scholars understand that government may not interact with people on the basis of their ideas. Those who have thrown up their hands, even in the face of absurdity, recognize that our instinct is to deny tax exemption because we don't like what hate groups say when they teach. This is an admitted fact in my thesis. I nevertheless prove a constitutional justification for excluding hate groups from tax exemption.

But it may not be necessary to trigger a constitutional battle between government of the good and free speech. Those who have already conceded are incorrect about a condition precedent that avoids constitutional inquiry. They assume that charity and education – two "purposes" for which tax exemption is granted – are so ill-defined and incapable of precise definition that to deny any teaching activity is necessarily to run afoul of the free speech guarantee. As regards hate groups, denial of tax exemption is thought analogous enough to direct prohibition that denial should be treated as speech prohibition. But this equates the "carrot" of subsidy to the "stick" of prohibition, something the Supreme Court seems especially reluctant to do, though it admits of the possibility. In any event, charity has been sufficiently defined in both positive law and by the Supreme Court to exclude invidious discrimination. Teaching hate does just that. Scholars miss this point, and that government may regulate activity even if doing so impacts speech. Education, too, can be adequately defined to exclude the processes used by hate groups to teach what they teach. This paper labels those processes, "indoctrination," the illiberal and undemocratic connotation of which could not have been what government sought to subsidize through tax exemption. In either case – defining charity or education – the only real constitutional concern is vagueness. Vague laws chill speech or grant government discretion to deny tax exemption because we hate certain ideas. I show that vagueness concerns are hardly insurmountable.

The analysis might end there, except that my admitted bias wants to prove that government may, and perhaps must deny tax exemption to hate groups by name. In other words, government must affirmatively deny tax exemption to groups that teach hate precisely because of what they teach, rather than because what they teach is neither charitable nor educational in purpose. We need not dance around the First Amendment elephant in the room, even as we admit that free speech jurisprudence is full of "incantations" that hardly illuminate a dark landscape. Ultimately, the argument rests on the distinction between the carrot and the stick. Taking away the carrot does not prohibit speech – it does not implicate the normative values protected by free speech –

precisely because denying subsidy is not prohibition. The Supreme Court has admitted as much even as it sometimes equates subsidy and prohibition. But not only that. Government may talk and spend money for the public good. Under the government speech doctrine, government may express its ideas – thereby adopting the center's views and rejecting others. Government may discriminate amongst ideas in the marketplace when government speaks for itself. Government may also discriminate when it spends for the public good. It may buy family planning services for citizens, for example, while declining to purchase abortion counseling for those citizens. Likewise, government may patronize education that counsels love and boycott education that counsels hate. In both examples, government is a legitimately discriminating buyer for the public good. Whatever service or speech is left unfunded does not implicate free speech. In some circumstances, though, government's spending and speaking power is constrained. Government may not post a billboard proclaiming, "America is a Christian nation." To do so government would exercise its right to speak for the center, but in a manner that violated the First Amendment's Establishment Clause. The center has no right to make the proclamation. Government's speech would be unconstitutional. Likewise, government could not proclaim from a billboard that "African Americans are dangerous, and Jews are greedy." Government could not post that billboard itself because the center is constitutionally prohibited from having that view. Government may not prohibit expression of that view, but government is as much prohibited from indirectly expressing the view as it is directly. Can it be that tolerating hate speech, if we must, demands subsidizing hate groups? To that question Justice Stevens once stated, "[a] free society must tolerate such groups. It need not subsidize them, give them its official imprimatur, or grant them equal access to . . . facilities."