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## Subsidizing Hate: A Proposal to Reform the Internal Revenue Service's Methodology Test

Alex Reed

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## Subsidizing Hate: A Proposal to Reform the Internal Revenue Service's Methodology Test

### Cover Page Footnote

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SUBSIDIZING HATE:  
A PROPOSAL TO REFORM THE  
INTERNAL REVENUE SERVICE'S  
METHODOLOGY TEST

*Alex Reed*

**SUBSIDIZING HATE:  
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*Alex Reed\**

**ABSTRACT**

Although a wide variety of organizations may qualify as tax-exempt public charities, reform is needed to ensure that hate groups masquerading as educational organizations do not receive preferential tax treatment. Since 1986, the Internal Revenue Service has utilized a methodology test to determine when advocacy of a particular viewpoint may be deemed educational so as to qualify the underlying organization as a public charity. Because Service has been reluctant to apply the test rigorously, however, a number of hate groups have been able to obtain charitable status under the guise of operating as legitimate educational organizations. This Article argues that application of the methodology test must be more robust to prevent hate groups from receiving federal subsidies in the form of certain tax advantages. Additionally, the Article proposes reforms designed to limit hate groups’ ability to operate as public charities while ensuring that educational organizations advocating hate-neutral minority viewpoints may continue to receive the tax benefits associated with charitable status.

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### INTRODUCTION

“[O]ne of the primary goals of the homosexual rights movement is to abolish all age of consent laws and to eventually recognize pedophiles as the ‘prophets’ of a new sexual order.”<sup>1</sup>

“Immigrants don’t come [to the United States] all church-loving, freedom-loving, God-fearing. . . . Many of them hate America, hate everything the United States stands for.”<sup>2</sup>

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1. Frank V. York & Robert H. Knight, *Homosexual Activists Work to Normalize Sex with Boys*, 19, <http://web.archive.org/web/20000815094428/http://www.frc.org/misc/> (click on the link titled “Homosexual Activists Work to Lower the Age of Sexual Consent” underneath the heading “Special Publications Archive”) (last visited Feb. 13, 2012).

“Blacks and whites are different. When blacks are left entirely to their own devices, Western Civilization – any kind of civilization – disappears.”<sup>3</sup>

The organizations to which the aforementioned quotes are attributable have two things in common – they have been classified as hate groups by a leading civil rights organization, and they have been accorded charitable status by the Internal Revenue Service (the “Service”). The practical consequence of the latter designation is that these groups are exempt from federal income taxation<sup>4</sup> and are eligible to receive tax-deductible contributions.<sup>5</sup> Because such tax benefits are the equivalent of a cash grant,<sup>6</sup> the federal government – and U.S. taxpayers indirectly<sup>7</sup> – may be said to subsidize these groups’ existence.

Whereas charitable status has historically been reserved for organizations furthering some desirable public purpose,<sup>8</sup> the dissemination of prejudiced propaganda serves only to fuel societal discord and unrest.<sup>9</sup> Nonetheless, a number of hate groups have been able to obtain charitable status under the guise of operating as legitimate educational organizations. These groups include white nationalists,<sup>10</sup> anti-gay<sup>11</sup> and anti-immigrant<sup>12</sup> organizations, and those who would deny the Holocaust,<sup>13</sup> among others.

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2. Tucker Carlson, *The Intellectual Roots of Nativism*, WALL ST. J., Oct. 2, 1997, at A22 (quoting Dan Stein, Executive Director of the Federation for Immigration Reform).

3. Jared Taylor, *Africa in Our Midst*, AM. RENAISSANCE, Oct. 2005, at 1, 8, available at <http://www.amren.com/ar/pdfs/2005/200510ar.pdf>.

4. I.R.C. §§ 501(a), (c)(3) (2006).

5. *Id.* § 170(a).

6. *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.”).

7. *Bob Jones Univ. v. United States*, 461 U.S. 574, 591 (1983) (“When the Government grants exemptions or allows deductions all taxpayers are affected; the very fact of the exemption or deduction for the donor means that other taxpayers can be said to be indirect and vicarious ‘donors.’”).

8. *Id.* at 589-90.

9. *See Nationalist Found. v. Comm’r*, 80 T.C.M. (CCH) 507 (2000).

10. *E.g.*, New Century Foundation, Vdare Foundation and Charles Martel Society.

11. *E.g.*, Family Research Council, American Family Association and Family Research Institute.

12. *E.g.*, Federation for American Immigration Reform.

13. *E.g.*, Legion for the Survival of Freedom.

For its part, Service has demonstrated a reluctance to revoke or otherwise challenge these groups' continued tax-exempt status as educational organizations.<sup>14</sup> Although this inaction may be attributable to something as innocuous as a lack of resources, a more troubling explanation can be found in the procedures Service utilizes to evaluate whether an entity qualifies as a tax-exempt educational organization. Over the past thirty years, Service has been forced to defend the constitutionality of its procedures vis-à-vis educational organizations on a number of occasions. Despite a lull in litigation following Service's adoption of a methodology test, serious constitutional concerns remain. Consequently, as long as Service permits these groups to retain their tax-exempt status for fear that any revocation will provoke a constitutional challenge to Service's procedures, all manner of hate groups are free to subsidize their operations on the U.S. taxpayer's dime.

This Article concludes that application of the methodology test must be more rigorous to prevent hate groups masquerading as educational organizations from receiving government subsidies in the form of certain tax advantages. Part I discusses the statutory and regulatory framework applicable to public charities, particularly educational organizations. Part II examines a series of constitutional challenges to the Department of the Treasury's regulations concerning educational organizations and Service's ensuing adoption of a methodology test. Part III applies the methodology test to two ostensible educational organizations and concludes that they are not entitled to charitable status under Service's existing procedures. Finally, Part IV proposes reforms designed to limit hate groups' ability to operate as public charities while ensuring that educational organizations advocating hate-neutral minority viewpoints may continue to enjoy preferential tax treatment.

## I. STATUTORY AND REGULATORY FRAMEWORK

Section 501(a) of the Internal Revenue Code (the "Code") exempts certain types of organizations from federal income taxation.<sup>15</sup> Among

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14. See IRS Pub. 78, Cumulative List of Organizations Described in Section 170(c) of the Internal Revenue Code of 1986 (2012), available at <http://www.irs.gov/app/pub-78/> (confirming the continued charitable status of the groups referenced *supra* notes 10 through 13).

15. I.R.C. § 501(a) (2006).

these exempted groups are religious and apostolic associations, certain pension, profit-sharing and stock plans and twenty-nine other categories of organizations, including those commonly referred to as public charities.<sup>16</sup> Unlike most exempt organizations, however, charities are eligible to receive tax-deductible contributions from individuals and grant-making organizations.<sup>17</sup> Thus, prospective donors have a financial incentive to direct their contributions to public charities vis-à-vis other types of tax-exempt organizations.<sup>18</sup> This ability to raise funds via receipt of tax-deductible contributions is critical, as illustrated by the fact that many charities could not survive without them.<sup>19</sup>

To qualify for charitable status, an organization must comply with the requirements set forth in section 501(c)(3) of the Code.<sup>20</sup> Specifically, the organization must be “organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes. . . .”<sup>21</sup> Additionally, no part of the organization’s net earnings may inure to the benefit of a private individual, and the organization cannot participate in political campaigns.<sup>22</sup> Lastly, to be eligible for charitable status under section 501(c)(3), organizations must not devote a substantial portion of their activities to lobbying.<sup>23</sup>

Using its quasi-legislative power, the Department of the Treasury (the “Treasury”) promulgated additional regulations governing public

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16. *Id.* §§ 401(a), 501(a), (c)-(d).

17. *Id.* §§ 170(a), (c)(2).

18. See Joseph S. Klapach, *Thou Shalt Not Politic: A Principled Approach to Section 501(c)(3)’s Prohibition of Political Campaign Activity*, 84 CORNELL L. REV. 504, 505 (1999); Shannon Weeks McCormack, *Taking the Good with the Bad: Recognizing the Negative Externalities Created by Charities and Their Implications for the Charitable Deduction*, 52 ARIZ. L. REV. 977, 979 (2010).

19. See Lynn Lu, *Flunking the Methodology Test: A Flawed Tax-Exemption Standard for Educational Organizations that “Advocate a Particular Position or Viewpoint,”* 29 N.Y.U. REV. L. & SOC. CHANGE 377, 384-85 (2004) (“Hence, for organizations that would generate little income to tax in any event, [charitable] status is most valuable not as a way to save money by avoiding payment of taxes, but as a way actively to generate funds.”).

20. I.R.C. § 501(c)(3).

21. *Id.*

22. *Id.*

23. *Id.* The Supreme Court has imposed an additional requirement. See *Bob Jones Univ. v. United States*, 461 U.S. 574, 591 (1983) (holding that an organization’s purpose cannot be illegal or violate established public policy if it is to be accorded 501(c)(3) status).



charities, particularly educational organizations.<sup>24</sup> To be educational within the meaning of section 501(c)(3), an organization's primary purpose must be "the instruction or training of the individual for the purpose of improving or developing his capabilities" or "the instruction of the public on subjects useful to the individual and beneficial to the community."<sup>25</sup> Examples of educational organizations include traditional brick-and-mortar schools, correspondence courses, "museums, zoos, planetariums, [and] symphony orchestras" and institutions presenting "public discussion groups, forums, panels, [or] lectures."<sup>26</sup>

Historically, Service has construed the educational exemption liberally. Over the years, Service has awarded charitable status to organizations providing instruction in everything from handicrafts to sailboat racing.<sup>27</sup> In evaluating whether a group is entitled to charitable status as an educational organization, Service has demonstrated a willingness to assume the existence of both individual and societal benefits, absent any glaring indications to the contrary.<sup>28</sup>

The one area in which Service's analysis has been more searching concerns so-called propaganda organizations. Following the passage of the Revenue Act of 1918,<sup>29</sup> Treasury promulgated a regulation denying educational status to "associations formed to disseminate controversial or partisan propaganda."<sup>30</sup> Although the restriction on propaganda has evolved with each subsequent revision of the code, the rationale for the restriction has remained largely the same. Whereas genuine education "is directed at and for the benefit of the individual" such that it serves a desirable social purpose worthy of government support, propaganda "is directed at the individual only as a means to accomplish the purpose of

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24. Treas. Reg. § 1.501(c)(3)-1 (as amended in 2008).

25. *Id.* § 1.501(c)(3)-1(d)(3)(i).

26. *Id.* § 1.501(c)(3)-1(d)(3)(ii).

27. I.T. 2296, 5-2 C.B. 65 (1926); Rev. Rul. 64-275, 1964-2 C.B. 142.

28. See Tommy F. Thompson, *The Availability of the Federal Educational Tax Exemption for Propaganda Organizations*, 18 U.C. DAVIS L. REV. 487, 497 (1985).

29. Pub. L. No. 254, 40 Stat. 1057 (1919). As the precursor to section 501(c)(3), section 231(6) of the Revenue Act of 1918 exempted from taxation: "Corporations organized and operated exclusively for religious, charitable, scientific, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual." *Id.* at 1076.

30. Lu, *supra* note 19, at 391.

the organization instigating it.”<sup>31</sup> It is such ostensibly selfish motivations that render propaganda groups distinguishable from their more altruistic educational brethren and precludes them from conferring any cognizable societal benefits.

Under the current version of the Code, propaganda groups may qualify as 501(c)(3) educational organizations if they meet certain requirements. In relevant part, Treasury Regulation section 1.501(c)(3)-1(d)(3) provides:

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.<sup>32</sup>

Thus, rather than define educational to exclude all propaganda organizations categorically, Treasury’s current regulation allows advocacy groups to obtain charitable status as educational organizations if they can provide factual support for their arguments.

## II. THE EVOLUTION OF THE FULL AND FAIR EXPOSITION STANDARD

Since its promulgation in 1959, the “full and fair exposition” standard has been the subject of extensive litigation. Beginning in 1979 and continuing through the year 2000, litigants brought a series of declaratory judgment actions seeking recognition of their status as tax-exempt educational organizations or, alternatively, to have the full and fair exposition standard struck down as unconstitutional.<sup>33</sup> Although one circuit court of appeals was persuaded on the latter point, Treasury did

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31. Thompson, *supra* note 28, at 498.

32. Treas. Reg. § 1.501(c)(3)-1(d)(3)(i) (2008).

33. Big Mama Rag, Inc. v. United States (*Big Mama I*), 494 F. Supp. 473 (D.D.C. 1979); Big Mama Rag, Inc. v. United States (*Big Mama II*), 631 F.2d 1030 (D.C. Cir. 1980); Nat’l Alliance v. United States, No. 79-1885, 1981 WL 1799 (D.D.C. May 27, 1981); Nat’l Alliance v. United States, 710 F.2d 868 (D.C. Cir. 1983); Nationalist Movement v. Comm’r, 102 T.C. 558 (1994); Nationalist Foundation v. Comm’r, 80 T.C.M. (CCH) 507 (2000).

not revise or amend its regulations.<sup>34</sup> Instead, Service adopted a methodology test to inform its application of the full and fair exposition standard and thereby alleviate the constitutional concerns raised by the circuit court. To date, the methodology test has received tepid approval from the courts as a means of remedying the constitutional ails that otherwise plague the full and fair exposition standard.<sup>35</sup>

#### A. THE CASE OF BIG MAMA RAG

Big Mama Rag, Incorporated (the “Group”) was a nonprofit organization whose stated purpose was “to create a channel of communication for women that would educate and inform them on general issues of concern to them.”<sup>36</sup> Group’s primary activity was the publication of a monthly newspaper,<sup>37</sup> *The Big Mama Rag* (the “Newspaper”). Newspaper had an unabashedly feminist orientation such that it refused to print any material that might be harmful to the women’s movement.<sup>38</sup>

Seeking to increase its revenue from donations, the Group applied for tax-exempt status as an educational and charitable organization.<sup>39</sup> One of Service’s district directors initially denied the Group’s application on the basis that the Newspaper “was indistinguishable from an ‘ordinary commercial publishing practice.’”<sup>40</sup> The National Office affirmed the denial on appeal, citing the presence of political commentary and certain pro-lesbian content.<sup>41</sup> Thereafter, the District Director issued a final determination letter denying the Group tax-exempt status on the grounds that the Newspaper’s content was not

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34. See *Big Mama II*, 631 F.2d at 1034-36 (finding the full and fair exposition standard unconstitutionally vague).

35. See *Nationalist Movement v. Comm’r*, 37 F.3d 216, 218 n.2 (5th Cir. 1994) (noting that the test’s constitutionality had not been decided by any federal circuit court but that the D.C. Circuit had endorsed the test in dictum).

36. *Big Mama II*, 631 F.2d at 1032.

37. *Big Mama I*, 494 F. Supp. at 475.

38. See *id.* at 476. The Group’s censorship policy was 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.” *Id.* at 477.

39. *Big Mama II*, 631 F.2d at 1032 n.2.

40. *Id.* at 1033.

41. *Id.*

educational; “the preparation of the [Newspaper did] not follow methods educational in nature, [and] the distribution of the [Newspaper was] not valuable in achieving an educational purpose.”<sup>42</sup>

Having exhausted its administrative remedies, the Group exercised its right under a newly-enacted federal statute<sup>43</sup> to bring a declaratory judgment action in the United States District Court for the District of Columbia.<sup>44</sup> Although the court ultimately concluded that the Group was not an educational organization within the meaning of section 501(c)(3), it was not for the reasons set forth in Service’s final determination letter.<sup>45</sup> Instead, the court premised its holding on the Group’s failure to satisfy the full and fair exposition standard.<sup>46</sup> According to the court, the Group advocated “a stance so doctrinaire” that compliance with the standard was impossible.<sup>47</sup>

Although the Group raised a number of arguments on appeal, the D.C. Circuit limited its analysis to a single issue: Whether the definition of “educational” found in Treasury Regulation section 1.501(c)(3)-1(d)(3) was unconstitutionally vague in violation of the First Amendment.<sup>48</sup> After discussing the policy rationales underlying the Supreme Court’s vagueness jurisprudence, the D.C. Circuit held that Treasury’s definition of “educational,” specifically the full and fair exposition standard contained therein, was unconstitutionally vague to the extent it was not clear which organizations were subject to the standard or what was required to comply with the standard.<sup>49</sup>

In regard to the first point, the court found that the regulation failed to specify in sufficient detail when an organization may be said to “advocate[] a particular position or viewpoint” so as to be subject to the full and fair exposition standard.<sup>50</sup> The court recognized that the

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42. *Id.* at 1033 n.4.

43. *See* 26 U.S.C. § 7428 (2006). “Congress granted the U.S. Tax Court and the U.S. Court of Claims concurrent jurisdiction with the U.S. District Court for the District of Columbia over cases arising under section 7428.” *Big Mama I*, 494 F. Supp. at 474 n.1.

44. *See Big Mama II*, 631 F.2d at 1033.

45. *See id.*

46. *See Big Mama I*, 494 F. Supp. at 478-79.

47. *Id.* at 479. The court responded to the Group’s constitutional arguments as follows: “(1) the [full and fair exposition] standard is facially valid; (2) the standard was properly applied in this case; and (3) the standard is not . . . used to discriminate against organizations . . . homosexual in outlook.” *Id.* at 481.

48. *See Big Mama II*, 631 F.2d at 1034-35.

49. *See id.* at 1035-36.

50. *Id.* at 1036-37.

definition of “advocacy” in subsection (d)(2),<sup>51</sup> which defines “charitable,” may have been meant to apply with equal force to subsection (d)(3), which defines “educational.”<sup>52</sup> However, it was “difficult to ascertain . . . whether or not the definitions of advocacy groups are the same for both educational and charitable organizations.”<sup>53</sup>

The standard’s ambiguity was further illustrated by Service’s tendency to treat the term “advocacy” as a synonym for “controversial.”<sup>54</sup> As recognized by the court, this policy had the effect of introducing an even greater amount of subjectivity into what was already an inherently individualized inquiry: “It gives IRS officials no objective standard by which to judge which applicant organizations are advocacy groups—the evaluation is made solely on the basis of one’s subjective notion of what is ‘controversial.’”<sup>55</sup> Service’s records, moreover, confirmed that only organizations “whose views [were] not in the mainstream of political thought” had been labeled advocacy organizations subject to the full and fair exposition standard.<sup>56</sup>

With respect to the standard’s substantive requirements, the court was even more indignant. After quoting the full and fair exposition standard in its entirety, the court posed a series of rhetorical questions: “What makes an exposition ‘full and fair’? Can it be ‘fair’ without being ‘full’? Which facts are ‘pertinent’? [And] [h]ow 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?’”<sup>57</sup> Thus, the court highlighted Treasury’s failure to provide any meaningful guidance vis-à-vis application of the standard.

The D.C. Circuit also failed to embrace the fact/opinion distinction advocated by Service and endorsed by the lower court. The district court found that the full and fair exposition standard was “‘capable of

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51. “The fact that an 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 of any one of the types described in paragraph (c)(3) of this section.” Treas. Reg. § 1.501(c)(3)-1(d)(2) (2008).

52. See *Big Mama II*, 631 F.2d at 1036.

53. *Id.*

54. See *id.*

55. *Id.*

56. *Id.* at 1036-37.

57. *Id.* at 1037 (quoting Treas. Reg. § 1.501(c)(3)-1(d)(3) (2008)).

objective application’ because ‘it asks only whether the facts underlying the conclusions are stated.’”<sup>58</sup> The D.C. Circuit, however, was not convinced that such a fact/opinion distinction could be applied in a principled and objective manner as illustrated by the district court’s inability to apply the very test it articulated: “The [district] court did not analyze the contents of [the Newspaper] under its proposed test but merely stated, without further explication, that the publication was not entitled to tax-exempt status because it had ‘adopted a stance so doctrinaire that it cannot satisfy this standard.’”<sup>59</sup> Consequently, the D.C. Circuit held that the fact/opinion distinction could not save the full and fair exposition standard from a vagueness challenge.<sup>60</sup>

The court acknowledged that revising the full and fair exposition standard to conform to the First Amendment would not be an easy task, but stressed that “[i]n this area the First Amendment cannot countenance a subjective ‘I know it when I see it’ standard[,] and neither can we.”<sup>61</sup>

## B. “THE NATIONAL(IST) LINE OF CASES”<sup>62</sup>

### 1. *National Alliance*

While *Big Mama Rag, Inc. v. United States* was pending before the D.C. Circuit, a second constitutional challenge to the full and fair exposition standard was filed in the D.C. District Court<sup>63</sup> by a group named National Alliance (“Alliance”).<sup>64</sup> Service had rejected Alliance’s application for tax-exempt status on the grounds that its publications presented “‘unsupported opinion’ rather than a ‘full and fair exposition

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58. *Id.* at 1038 (quoting *Big Mama I*, 494 F. Supp. at 480).

59. *Id.* (quoting *Big Mama I*, 494 F. Supp. at 479).

60. *See id.* at 1030. The court likewise rejected a second distinction that purported to differentiate between appeals to the emotions versus appeals to the mind. *See id.* at 1038-39.

61. *Id.* at 1040.

62. Lu, *supra* note 19, at 406.

63. Nat’l Alliance v. United States (*Alliance I*), No. 79-1885, 1981 WL 1799 (D.D.C. May 27, 1981).

64. Alliance’s stated purpose was to “arous[e] in white Americans of European ancestry ‘an understanding of and a pride in their racial and cultural heritage and an awareness of the present dangers to that heritage.’” Its activities included the publication of a monthly newsletter and membership bulletin consistent with that purpose. Nat’l Alliance v. United States (*Alliance II*), 710 F.2d 868, 869 (D.C. Cir. 1983).

of the pertinent facts.”<sup>65</sup> After exhausting its administrative remedies, Alliance sought a declaratory judgment that it was entitled to tax-exempt status under section 501(c)(3) of the Code and that Treasury Regulation section 1.501(c)(3)-1 was unconstitutional both on its face and as applied.<sup>66</sup>

Following the D.C. Circuit’s ruling in *Big Mama Rag*, Service offered a second, previously undisclosed justification for refusing to recognize Alliance as a tax-exempt educational organization.<sup>67</sup> Specifically, Service argued that Alliance did not employ an educational methodology in its publications.<sup>68</sup> As defined by Service, “the methodology approach looks to whether the presentation of the ideas, beliefs, etc., is such that it encourages an increased understanding of the subject matter.”<sup>69</sup> Service identified four factors to consider when assessing whether an organization employs an educational methodology:

1. Whether or not the presentation of viewpoints unsupported by a relevant factual basis constitutes a significant portion of the organization’s communications.
2. To the extent viewpoints purport to be supported by a factual basis, are the facts distorted.
3. Whether or not the organization makes substantial use of particularly inflammatory and disparaging terms, expressing conclusions based more on strong emotional feelings than objective factual evaluations.
4. Whether or not the approach to a subject is aimed at developing an understanding on the part of the addressees, by reflecting consideration of the extent to which they have prior background or training.<sup>70</sup>

According to Service, these factors indicated that Alliance did not employ an educational methodology but instead published “distorted, inflammatory and unfounded hate material.”<sup>71</sup>

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65. *Alliance I*, 1981 WL 1799, at \*2.

66. *See id.*

67. *See id.* at \*4 n.4.

68. *Id.* at \*4.

69. *Id.*

70. *Id.*

71. *Id.*

The district court was not persuaded. After finding that Service's "methodology approach merely reworded the regulation it [was] intended to circumvent, without creating criteria any less vague or more capable of neutral application," the district court vacated Service's denial of tax-exempt status and remanded the matter for further proceedings in light of *Big Mama Rag*.<sup>72</sup>

On appeal, the D.C. Circuit did not have occasion to address whether Service's methodology approach provided a sufficient explanatory gloss to the full and fair exposition standard, as to eliminate the constitutional infirmities identified in *Big Mama Rag*.<sup>73</sup> The court, nevertheless, signaled its approval of the methodology approach in dictum:

We observe that, starting from the breadth of terms in [Treasury Regulation section 1.501(c)(3)-1(d)(3)(i)], application by IRS of the Methodology Test would move in the direction of more specifically requiring, in advocacy material, an intellectually appealing development of the views advocated. The four criteria tend toward ensuring that the educational exemption be restricted to material which substantially helps a reader or listener in a learning process. The test reduces the vagueness found by the *Big Mama* decision.<sup>74</sup>

Following this rather timid endorsement, Service published the methodology test as Revenue Procedure 86-43.<sup>75</sup>

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72. *Id.* at \*5-\*6.

73. See *Alliance II*, 710 F.2d at 876. The D.C. Circuit's decision to reverse and remand the case was instead predicated on the fact that Alliance's publications could not be deemed "educational within any reasonable interpretation of the term." *Id.* at 875.

74. *Id.*

75. Rev. Proc. 86-43, 1986-2 C.B. 729. The revenue procedure sets forth the criteria to evaluate whether advocacy by an organization is educational within the meaning of Treasury Regulation section 1.501(c)(3)-1(d)(3):

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.

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.



## 2. *The Nationalist Movement*

The Nationalist Movement (the “Movement”) was the first group to bring a declaratory judgment action challenging the denial of its application for tax-exempt status as an educational organization under Revenue Procedure 86-43.<sup>76</sup> Movement advocated social, political and economic change to counteract “minority tyranny” while extolling “freedom as the highest virtue, America as the superlative nation, Christianity as the consummate religion, social justice as the noblest pursuit, English as the premier language, the White race as the supreme civilizer, work as the foremost standard and communism as the paramount foe.”<sup>77</sup> Movement’s activities included publication of a monthly newsletter (the “Newsletter”), litigation of First Amendment issues and the provision of telephone counseling services.<sup>78</sup>

At the outset of its analysis, the United States Tax Court acknowledged that the state of the law had changed in the eleven years since the D.C. Circuit issued its ruling in *National Alliance v. United States*.<sup>79</sup> Whereas in *National Alliance* the methodology test was merely an argument put forth by Service, the standard had since been formally adopted as Revenue Procedure 86-43. Thus, the Tax Court could not “avoid, as did the court in *National Alliance*, considering the constitutionality of the” methodology test.<sup>80</sup>

In regard to substance, the methodology test was found to cure two of the deficiencies noted by the D.C. Circuit in *Big Mama Rag*.<sup>81</sup> First, unlike the full and fair exposition standard, the methodology test was not phrased in terms of individual sensitivities.<sup>82</sup> Second, although Treasury Regulation section 1.501(c)(3)-1(d)(3) failed to specify the amount of unsupported opinion necessary to disqualify an organization from receiving educational status, the methodology test clarified that

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Even if one or more of these factors are present in an organization’s presentations, however, “there may be exceptional circumstances . . . where an organization’s advocacy may [nonetheless] be educational” such that “Service will look to all the facts and circumstances” in making its determination. *Id.*

76. *Nationalist Movement v. Comm’r*, 102 T.C. 558 (1994).

77. *Id.* at 560.

78. *Id.* at 564-69.

79. *Id.* at 583.

80. *Id.*

81. *See id.* at 586.

82. *See id.*

such presentations may not constitute a “significant portion of the organization’s communications.”<sup>83</sup> Together, these improvements counseled in favor of upholding the test as constitutional.

The Tax Court was also not persuaded by Movement’s arguments to the contrary. The court rejected Movement’s interpretation of the test as requiring “organizations to present and rebut opposing views.”<sup>84</sup> Although the court acknowledged that such a presentation would likely have educational value, the test did not expressly call for it.<sup>85</sup> Moreover, Service’s obligation to consider all the facts and circumstances prior to making a determination regarding an applicant’s educational status was found to support, rather than impugn, the test’s constitutionality.<sup>86</sup>

After acknowledging that drafting a more precise standard would be difficult, if not impossible, the court held:

In our view, Rev. Proc. 86-43 . . . is not unconstitutionally vague or overbroad on its face, nor is it unconstitutional as applied. Its provisions are sufficiently understandable, specific, and objective both to preclude chilling of expression protected under the First Amendment and to minimize arbitrary or discriminatory application by the IRS. The revenue procedure focuses on the method rather than the content of the presentation. In contrast, it was the potential for discriminatory denials of tax exemption based on speech content that caused the [D.C. Circuit] to hold that the vagueness of the “full and fair exposition” standard violates the First Amendment. [Movement] has not persuaded us that either the purpose or the effect of [Rev. Proc. 86-43] is to suppress disfavored ideas.<sup>87</sup>

Since three of the four factors were present in Movement’s Newsletter, the publication failed the methodology test and Movement was not entitled to 501(c)(3) status as an educational organization.<sup>88</sup>

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83. *Id.* (quoting Rev. Proc. 86-43, 1986-2 C.B. 729, 730).

84. *Id.*

85. *See id.* at 586-87.

86. *See id.* at 587.

87. *Id.* at 588-89 (quoting *Big Mama Rag, Inc. v. United States*, 631 F.2d 1030, 1034 (D.D.C. 1980)).

88. *See id.* at 591-94. On appeal, the Fifth Circuit declined to address the constitutionality of Revenue Procedure 86-43. *See Nationalist Movement v. Comm’r*, 37 F.3d 216 (5th Cir. 1994).

### 3. *The Nationalist Foundation*

Six years after the ruling in *Nationalist Movement*, the Tax Court had occasion to reaffirm the constitutionality of the methodology test in *Nationalist Foundation v. Commissioner of Internal Revenue*.<sup>89</sup> The Nationalist Foundation (the “Foundation”), like Movement, was a Mississippi nonprofit corporation having its principal place of business in Jackson, Mississippi.<sup>90</sup> Similar to Movement, Foundation espoused a pro-majority philosophy favoring Americans of northern European descent.<sup>91</sup> Moreover, Foundation’s activities were comparable to those of Movement to the extent they consisted of presenting seminars, publishing articles, and litigating First Amendment issues.<sup>92</sup>

After exhausting its administrative remedies, Foundation brought a declaratory judgment action to challenge Service’s denial of its application for tax-exempt status.<sup>93</sup> Although the administrative record was largely silent regarding Foundation’s activities, the Tax Court found from what little information existed that Foundation was not operated exclusively for exempt purposes.<sup>94</sup> Specifically, one of Foundation’s donation request letters contained distortions of fact in violation of the methodology test.<sup>95</sup> Moreover, because Foundation’s constitutional arguments were “identical to those of the taxpayer in *Nationalist Movement*,” there was “no reason to change the analysis or the result reached in that opinion.”<sup>96</sup> The Tax Court thus upheld Service’s determination that Foundation was not entitled to tax-exempt status as an educational organization.<sup>97</sup>

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89. *Nationalist Found. v. Comm’r*, 80 T.C.M. (CCH) 507 (2000). The Tax Court last applied the methodology test in 2007. *See Families Against Gov’t Slavery v. Comm’r*, 93 T.C.M. (CCH) 958 (2007) (finding that “factors one, two, three, and four of Rev. Proc. 86-43 . . . clearly apply to the activities of petitioner”).

90. *Nationalist Found.*, 80 T.C.M. (CCH) at 508.

91. *See id.*

92. *See id.* at 507-08. Furthermore, the chairman of Movement was also Foundation’s attorney and registered agent. *See id.* at 507, 512.

93. *Id.* at 507.

94. *See id.* at 509-12.

95. *Id.* at 512.

96. *Id.* at 513.

97. *Id.*

### III. EDUCATIONAL ORGANIZATIONS OR HATE GROUPS?

Although there is no universally accepted definition of the term “hate group,” the various definitions reveal that the term has a relatively uniform meaning.<sup>98</sup> According to the Federal Bureau of Investigation (the “Bureau”), a hate group is “[a]n organization whose primary purpose is to promote animosity, hostility, and malice against persons belonging to a race, religion, disability, sexual orientation, or ethnicity/national origin which differs from that of the members of the organization, e.g., the Ku Klux Klan, American Nazi Party.”<sup>99</sup> Similarly, the Southern Poverty Law Center (the “SPLC”)<sup>100</sup> defines a hate group as an association of two or more persons having “beliefs or practices that attack or malign an entire class of people, typically for their immutable characteristics.”<sup>101</sup> Unlike Bureau, SPLC publishes a complete listing of the organizations it considers to be hate groups.<sup>102</sup>

As of 2010, there were 1002 active hate groups in the United States.<sup>103</sup> Service grants a small, yet significant number of these groups charitable status as educational organizations.<sup>104</sup> Included among these groups are white nationalists, anti-gay and anti-immigrant organizations and those who would deny the Holocaust. As demonstrated, *infra*, a rigorous application of the methodology test reveals that at least two of these groups do not merit 501(c)(3) status as educational organizations.

#### A. NEW CENTURY FOUNDATION

According to its website, “New Century Foundation [“New Century”] is a 501(c)(3) organization founded in 1994 to study

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98. Most dictionaries do not even attempt a definition. *See, e.g.*, Black’s Law Dictionary, Oxford English Dictionary, Merriam-Webster Dictionary, American Heritage Dictionary.

99. CRIMINAL JUSTICE INFO. SERVS. DIV., FED. BUREAU OF INVESTIGATION, HATE CRIME DATA COLLECTION GUIDELINES 3 (1999), *available at* <http://www.fbi.gov/about-us/cjis/ucr/hate-crime/hcguidelinesdc99.pdf>.

100. SPLC “is a nonprofit civil rights organization dedicated to fighting hate and bigotry, and to seeking justice for the most vulnerable members of society.” *Who We Are*, SOUTHERN POVERTY LAW CENTER, <http://www.splcenter.org/who-we-are> (last visited Feb. 13, 2012).

101. *Hate Map*, SOUTHERN POVERTY LAW CENTER, <http://www.splcenter.org/get-informed/hate-map> (last visited Feb. 13, 2012).

102. *See id.*

103. *Id.*

104. *See groups cited supra* notes 10-13.

immigration and race relations so as to better understand the consequences of America's increasing diversity."<sup>105</sup> The organization's primary activity is the publication of *American Renaissance* ("AmRen"), "a monthly magazine dealing with race and racial issues [in the U.S.] and abroad."<sup>106</sup> AmRen is edited by Jared Taylor, a Yale-educated business consultant and former west coast editor of *PC Magazine*.<sup>107</sup> Taylor is also New Century's founder and president.<sup>108</sup>

From its inception, AmRen has been a strong proponent of race realism, "a body of views [holding] that . . . race is an important aspect of individual and group identity, that different races build different societies that reflect their natures, and that it is entirely normal for whites (or for people of any other race) to want to be the majority race in their own homeland."<sup>109</sup> A central tenet of race realism is that "[i]f whites permit themselves to become a minority population, they will lose their civilization, their heritage, and even their existence as a distinct people."<sup>110</sup> Although couched in terms of "white pride," much of AmRen's content is devoted to disparaging persons of other races, particularly African-Americans and Hispanics.<sup>111</sup>

AmRen's advocacy for the inferiority of "non-white" peoples implicates the first three factors of the methodology test. First, "the presentation of viewpoints or positions unsupported by facts is a significant portion of [New Century]'s communications."<sup>112</sup> Second, "the facts that purport to support [New Century's] viewpoints or positions are distorted."<sup>113</sup> Third, New Century'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."<sup>114</sup> Consequently, AmRen arguably fails the methodology test because three of the four factors set forth in Revenue

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105. NEW CENTURY HOME PAGE, <http://www.nc-f.org/> (last visited Feb. 13, 2012).

106. NEW CENTURY, *supra* note 105.

107. CURRICULUM VITAE OF JARED TAYLOR, <http://www.jaredtaylor.org/> (last visited Feb. 13, 2012).

108. *Id.*

109. *The AR Reader's Guide*, AMERICANRENAISSANCE.COM, [http://www.amren.com/siteinfo/readers\\_guide.html](http://www.amren.com/siteinfo/readers_guide.html) (last visited Feb. 13, 2012).

110. *Id.*

111. *See infra* Part III.A.1-3.

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

113. *Id.*

114. *Id.*

Procedure 86-43 are present in the publication. New Century is therefore not an educational organization within the meaning of section 501(c)(3) of the Code, such that it is incumbent upon Service to revoke the group's status as a public charity.

*1. Presentation of Viewpoints or Positions Unsupported by Facts  
Is a Significant Portion of New Century's Communications*

In *Nationalist Movement*, the Tax Court held that a “pro-majority” group was not entitled to 501(c)(3) status as an educational organization because the group's newsletter failed the methodology test.<sup>115</sup> With respect to the first factor, the court found:

Without question, the newsletter does present viewpoints unsupported by facts, as exemplified by the purportedly “common sense” standards advocated for Justices of the Supreme Court, including “No odd or foreign name” and “No beard.” Moreover, in its listing of those groups of people who should be excluded from United States citizenship, the newsletter includes, 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 Anyway?”, 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.<sup>116</sup>

These three examples, “as well as others,” led the court to conclude that “a significant portion of the [group's] newsletters consist[ed] of the presentation of viewpoints unsupported by facts.”<sup>117</sup>

As of July 2011, New Century had published approximately 250 issues of AmRen, and electronic copies of all but sixty were available on the magazine's website.<sup>118</sup> In an attempt to cull a representative sample, this Article focuses primarily on those issues highlighted in the

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115. See *Nationalist Movement*, 102 T.C. at 591-94.

116. *Id.* at 591-92.

117. *Id.* at 592. The administrative record contained approximately twenty issues of Movement's four-page monthly newsletter. See *id.* at 591.

118. See *American Renaissance Archives*, AMERICANRENAISSANCE.COM, <http://www.amren.com/ar/index.html> (last visited Feb. 13, 2012).

“*American Renaissance* Reader’s Guide.” The Guide purports to compile “some of the best articles”<sup>119</sup> from AmRen’s archives and represents the editorial board’s “suggestions about classic articles on key subjects.”<sup>120</sup> A review of these articles reveals the following unsupported viewpoints or positions:

- “The well-documented cultural poverty of Africa before contact with whites or Arabs is almost certainly due to low average intelligence. No sub-Saharan people had the wheel, a written language, mechanical devices, multi-story buildings, or a calendar. Their words for counting consisted of *one, two, few, and many*, though some tribes could count to seven by combining twos and ones.”<sup>121</sup>
- “[B]lacks are the greatest consumers of premixed cocktails, wine coolers and other sweet drinks. Although the sugar-sweetened version of Kool-Aid claims to have 25 percent less sugar than Coca-Cola or Pepsi-Cola, blacks prefer to buy the unsweetened version and add lots of sugar.”<sup>122</sup>
- “To be sure, the story of Hurricane Katrina does have a moral for anyone not deliberately blind. The races are different. Blacks and whites are different. When blacks are left entirely to their own devices, Western Civilization – any kind of civilization – disappears. And in a crisis, it disappears overnight.”<sup>123</sup>
- “Only the most unusual non-whites even pretend to work for the country as a whole or to consider the interests of other racial groups. When non-whites do call for ‘fairness’ or ‘justice’ it is almost always an attempt to make a narrow, racial demand look like a principled appeal.”<sup>124</sup>

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119. *How to Use This Site*, AMERICANRENAISSANCE.COM, <http://www.amren.com/siteinfo/information.html> (last visited June 28, 2011).

120. *Id.*

121. Jared Taylor, *Northwest Passage*, AM. RENAISSANCE, June 2006, at 7, 8 (reviewing RICHARD LYNN, *RACE DIFFERENCES IN INTELLIGENCE: AN EVOLUTIONARY ANALYSIS* (2006)), available at <http://www.amren.com/ar/pdfs/2006/200606ar.pdf>.

122. Arthur Holloway, *Race and Health*, AM. RENAISSANCE, May 1996, available at <http://www.amren.com/ar/1996/05/index.html>.

123. Taylor, *Africa in Our Midst*, *supra* note 3, at 8.

124. Jared Taylor, *Twelve Years of American Renaissance*, AM. RENAISSANCE, Nov. 2002, at 1, 1, available at <http://www.amren.com/ar/pdfs/2002/200211ar.pdf>.

- “While the explicit racial hatred of whites expressed in black-directed films is well known . . . .”<sup>125</sup>
- “Wherever Asians gather in sufficient numbers they will assert racial interests, but will never do so as crudely as blacks and Hispanics because Asians can often succeed on their own merits.”<sup>126</sup>
- “It is commonly objected that ‘racist’ police practices account for figures [indicating that African-Americans are more likely than Caucasians to commit certain types of crimes], that police are arresting non-whites for crimes committed by whites. In fact, it is virtually impossible to pin the blame for a mugging or a rape on a non-white if a white person actually did it. The victim almost always gets a good enough look at the criminal to know what race he is, so no matter how ‘racist’ the police were, they couldn’t just round someone up and claim they had the perpetrator.”<sup>127</sup>
- “‘If the races are equally intelligent,’ [Michael Levin] writes, ‘it should be possible to find a task intuitively requiring intelligence that blacks perform as well as whites.’ No such task has ever been found.”<sup>128</sup>
- “Crime and bad schools would hardly be a problem were it not for blacks and Hispanics . . . .”<sup>129</sup>
- “The Superdome and the Convention Center were certainly unpleasant places to spend three or four days [during Hurricane Katrina], but 50,000 whites would have behaved completely differently. They would have established rules, organized supplies, cared for the sick and dying. They would have organized games for children. The papers would be full of stories of selflessness and community spirit.”<sup>130</sup>

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125. Samuel Francis, *Why Race Matters*, AM. RENAISSANCE, Sept. 1994, available at <http://www.amren.com/ar/1994/09/index.html>.

126. Taylor, *Twelve Years of American Renaissance*, *supra* note 124, at 3.

127. Marian Evans, *Race, Crime, and Numbers*, AM. RENAISSANCE, Nov. 1990, at 2, available at <http://www.amren.com/ar/pdfs/1990/199011ar.pdf>.

128. Jared Taylor, *Why Race Matters*, AM. RENAISSANCE, Oct. 1997, at 1, 3-4 (reviewing MICHAEL LEVIN, *WHY RACE MATTERS: RACE DIFFERENCES AND WHAT THEY MEAN* (1997)), available at <http://www.amren.com/ar/pdfs/1997/199710ar.pdf>.

129. Taylor, *Twelve Years of American Renaissance*, *supra* note 124, at 4.

130. Taylor, *Africa in Our Midst*, *supra* note 3, at 7.



- “Immigration control is an almost exclusively white concern, and would be nothing like the issue it is if all the newcomers were handsome, high-IQ, English-speaking white people.”<sup>131</sup>
- “When blacks commit outrages against whites, media executives not only downplay black misbehavior but believe they must protect whites from ‘negative stereotypes’ about blacks. If they must report such crimes, they are likely to link them to editorials calling for tolerance, and pointing out that the criminals were individuals, not a race. When whites commit outrages against blacks there are no such cautions; white society at large is to blame.”<sup>132</sup>
- “The other prominent black deviation from white morality is reckless procreation, but other traits are just as striking: unwillingness to do volunteer work, support charities, donate organs, volunteer as medical test subjects, keep quiet in theaters, recycle trash, save money, exercise, or keep houses in good repair.”<sup>133</sup>

Thus, even a limited review of New Century’s primary publication provides numerous examples<sup>134</sup> of viewpoints or positions unsupported by facts such that AmRen arguably fails the first factor of the methodology test.

2. *The Facts That Purport to Support New Century’s Viewpoints or Positions Are Distorted*

In *Nationalist Foundation*, the Tax Court held that a “pro-majority” group was not entitled to 501(c)(3) status as an educational organization because the group distributed a letter containing “several” distortions of fact in violation of the methodology test.<sup>135</sup> Specifically, the court noted that:

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131. Taylor, *Twelve Years of American Renaissance*, *supra* note 124, at 6.

132. Stephen Webster, *The Wichita Massacre*, AM. RENAISSANCE, Aug. 2002, at 1, 6, available at <http://www.amren.com/ar/pdfs/2002/200208ar.pdf>.

133. Taylor, *Why Race Matters*, *supra* note 128, at 5.

134. The Author chose to withhold additional examples on the grounds they were superfluous.

135. *Nationalist Found.*, 80 T.C.M. (CCH) at 509.

[Foundation]’s statement, in its solicitation letter, that “avowed homosexuals advertised that they would attack patriots” was fabricated from a newspaper article that reads “Members of the National Peoples Campaign plan to *shadow* [Foundation’s registered agent] outside the State House beginning at 8 a.m. to oppose his ultra-conservative views. And they are looking to get all the picketers they can get.” The same solicitation letter also claims that [Foundation] has in its possession “actual photos of the terrorists in the act of attacking the Anti-King Rally at the State Capitol.” [Foundation], however, has only one photograph of three individuals holding a banner, which opposes the views of [Foundation]. The individuals depicted in the photograph are not engaged in any kind of attack on [Foundation’s registered agent] or his fellow demonstrators.<sup>136</sup>

Although the Tax Court failed to specify whether any additional distortions were present in Foundation’s materials, the court indicated that two instances in a single publication were sufficient to implicate the methodology test’s second factor.<sup>137</sup>

The articles highlighted in the “*American Renaissance Reader’s Guide*” provide at least three examples of New Century’s proclivity to engage in factual distortions. The first and arguably least offensive distortion is found in the July 2000 issue of AmRen wherein Samuel Francis addresses the ostensible “war on white heritage.”<sup>138</sup> In the article, Francis characterizes a controversy in Richmond, Virginia as follows: “Black city councilman Sa’ad El-Amin demanded that [a mural of Confederate general Robert E. Lee] be removed [from the city’s floodwall] and threatened violence if it were not. ‘Either it comes down or we jam,’ he said.”<sup>139</sup> Francis, thus, chose to equate the term “jam” with the threat of physical violence, despite the term’s ambiguity.<sup>140</sup> As

136. *Id.*

137. *See id.* at 512. The Tax Court’s opinion in *Nationalist Movement* is also instructive. Although “unable to conclude whether or not [Movement’s] newsletter fails the distortion standard[,]” the court identified the following as an example of a blatant factual distortion: “[T]he newsletter . . . stated that the Anti-Defamation League ‘recently called for Nationalists to be prosecuted and even killed for pamphleteering and exercising free speech.’” *Nationalist Movement*, 102 T.C. at 592. Further on, however, “the article implied that the ‘killed’ reference was an extrapolation by the writer or editor from the quoted phrases ‘must be stopped’ and ‘pay the price.’” *Id.*

138. Samuel Francis, *The War on White Heritage*, AM. RENAISSANCE, July 2000, available at <http://www.amren.com/ar/pdfs/2000/200007ar.pdf>.

139. *Id.* at 1, 3.

140. El-Amin subsequently defined “jam” as a street term for “getting very active, pumping up the volume” and indicated that he was prepared to initiate a boycott of the

noted by the Tax Court, however, “[t]his type of distortion . . . is presumably less serious than one not apparent on its face.”<sup>141</sup>

A second, more troubling distortion appears in the October 2005 issue of *AmRen*. In an article titled “Africa in Our Midst,” Jared Taylor asserts that New Orleans’ response to Hurricane Katrina was hindered by the fact that the city had a predominately African-American police force. According to Taylor: “New Orleans has had only black mayors since 1978, and has spent decades making the police force as black as possible. It established a city-residency requirement for officers to keep suburban whites from applying for jobs, and lowered recruitment standards so blacks could pass them.”<sup>142</sup>

However, New Orleans’ residency requirement is not limited to police officers, but instead applies with equal force to all municipal workers.<sup>143</sup> The city’s decision to impose a residency requirement, moreover, was not based on race.<sup>144</sup> Rather, it was predicated on the City Council’s finding that “the morale and efficiency of the City civil service will be enhanced by increasing the number of City officers and employees that have an ‘actual domicile’ in the City and who therefore have a stronger and more direct interest and a greater stake in the City’s general welfare and in the quality of life enjoyed by those who have their principal home in the City.”<sup>145</sup> Although it is true that a larger percentage of Caucasian officers oppose the residency requirement relative to their African-American colleagues, the requirement is opposed by a majority of officers from both races.<sup>146</sup> Lastly, New Orleans relaxed its police recruiting standards because low pay combined with the city’s residency requirement made it difficult to

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city if the mural was not taken down. See Mark Holmberg, *El-Amin Reasserts Stance on Mural*, RICHMOND TIMES-DISPATCH, June 6, 1999, at B1.

141. *Nationalist Movement*, 102 T.C. at 592.

142. Jared Taylor, *Africa in Our Midst*, *supra* note 3, at 3.

143. See NEW ORLEANS, LA., CODE ch. 2, art. 10, § 2-973 (1956).

144. See *Police Ass’n of New Orleans v. City of New Orleans*, 94-1078 (La. Jan. 17, 1995); 649 So. 2d 951 (1995).

145. *Id.* at 962. Additional justifications for the residency requirement included the promotion of economic development and protection of the city’s tax base. *Id.* at 962-63.

146. SUSAN HOWELL, NEW ORLEANS SURVEY RESEARCH CENTER, NEW ORLEANS POLICE DEPARTMENT RECRUITMENT AND RETENTION SURVEY 14 (2004), available at [http://scholarworks.uno.edu/cgi/viewcontent.cgi?article=1011&context=src\\_pubs&sei-redir=1#search=%22new+orleans+police+residency%22](http://scholarworks.uno.edu/cgi/viewcontent.cgi?article=1011&context=src_pubs&sei-redir=1#search=%22new+orleans+police+residency%22).

attract qualified candidates of any race, not because the city was seeking to recruit African-American officers specifically.<sup>147</sup>

Taylor's "Africa in Our Midst" article contains an additional factual distortion. In recounting the plight of thirty British students who sought shelter in the Louisiana Superdome during Hurricane Katrina, Taylor asserted: "[Jamie] Trout [a twenty-two year old economics major] said the National Guard finally recognized how dangerous the threat was from blacks, and moved the British under guard to the basketball area, which was safer."<sup>148</sup>

In reality, however, neither Trout nor any other student made such a statement. The relevant passage from the original source, a British tabloid, provides:

[Marisa Haigh and Claire Watkins] were in the Superdome when Katrina hit.

Marisa said: "There was a series of almighty bangs when the roof went and a panel flew off. There was a woman screaming, 'We're gonna die, we're all gonna die.'"

Eventually many of the students were moved to the nearby basketball arena, thanks to Sgt. Garland Ogden, a full-timer with the National Guard.

Jane Wheeldon, 20, said: "He went against a lot of rules to get us moved."<sup>149</sup>

The National Guard's decision to relocate the students to the basketball arena thus appears to have been designed to protect them from the storm rather than any supposed threat from African-Americans. This is precisely the sort of "latent distortion" that the Tax Court has identified as being particularly egregious.<sup>150</sup>

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147. Lieutenant Daniel Allen, E.M.U. School of Police Staff and Command, *Police Recruiting and its Impact on Corruption*, EASTERN MICHIGAN UNIVERSITY 7 (May 27, 2003), <http://www.emich.edu/cerns/downloads/papers/PoliceStaff/Police%20Personnel%20%28e.g.,%20Selection,%20%20Promotion%29/Police%20Recruiting%20and%20Its%20Impact%20on%20Corruption.pdf>.

148. Taylor, *Africa in Our Midst*, *supra* note 3, at 4-5.

149. Ryan Parry, *Brits' Hell Inside the Terror Dome*, THE DAILY MIRROR, Sept. 2, 2005, <http://www.mirror.co.uk/news/top-stories/2005/09/02/exclusive-brits-hell-inside-the-terror-dome-115875-15922236/>.

150. *See Nationalist Movement*, 102 T.C. at 592.

Thus, provided the articles listed in the “Reader’s Guide” are representative of the magazine’s publications generally, AmRen may be said to fail the second factor of the methodology test.

*3. New Century’s Presentations Make Substantial Use of  
Inflammatory and Disparaging Terms and Express Conclusions  
Based More on Strong Emotional Feelings than  
Objective Evaluations*

In *Nationalist Movement*, the Tax Court held that a “pro-majority” group’s newsletter did not employ an educational methodology to the extent it made substantial use of inflammatory and disparaging terms.<sup>151</sup> The court catalogued the following violations of the methodology test’s third factor:

[Movement] refers to “queers” and “perverts” in the newsletter. In a vocabulary information sheet distributed . . . to supporters, these two words are described as good for “dramatic emphasis” and at least somewhat “caustic.”

In addition, the words “invasion” and “invaders” often appear in the newsletter, usually to describe the January 1987 march [led by civil rights leader Hosea Williams] in Forsyth County, Georgia, and its “black-power” participants. The November 1987 newsletter urged readers to prepare “to purify the ground defiled by the Invaders.” Similarly, an audio cassette distributed by [Movement] was entitled “We Cleanse This Ground of the Invaders’ Stain.” [Movement’s registered agent] himself was quoted in the January 1988 newsletter as saying: “Just say no’ to the never-ending demands of rioters, looters, burners and invaders.” In the same issue and other issues of the newsletter, those resisting the “invaders” were characterized as “patriots” and “martyrs.” A “patriot,” as defined in [Movement]’s vocabulary information sheet, is “A lover of his country; a Nationalist.”<sup>152</sup>

Based on “these and similar examples,” the Tax Court determined that the group was not entitled to 501(c)(3) status as an educational organization.<sup>153</sup>

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151. *Id.* at 560, 593.

152. *Id.* at 592-93.

153. *Id.* at 593.

New Century makes substantial use of inflammatory and disparaging terms in advocating that “non-whites” are inferior to Caucasians:

- “From a genetic standpoint, immigrants are no different from armed invaders.”<sup>154</sup>
- “The logical meaning of the [Martin Luther King, Jr.] holiday is the ultimate destruction of the American Republic as it has been conceived and defined throughout our history, and until the charter for revolution that it represents is repealed, we can expect only further installations of the destruction and dispossession it promises.”<sup>155</sup>
- “[M]yths about [racial equality] encourage interracial sex and miscegenation, which often put white women at the mercy of violent non-whites and further reduce our numbers.”<sup>156</sup>
- “At the most extreme, the anti-white racist movement resembles the ideology of German National Socialism. It offers a conspiratorial interpretation of history in which whites are systematically demonized as the enemies of the black race, and a myth of black racial solidarity and supremacy. ‘Afro-racism’ is the ideological and political apparatus by which an explicit race war is prepared against the white race and its civilization, not as part of ‘rage’ nor as a response to ‘injustice’ and ‘neglect’ but, like any war, as part of a concerted strategy to acquire power. It is not confined to blacks but extends also to other non-whites who care to sign up.”<sup>157</sup>
- “[Caucasian individuals’] choices reflect their deep desire not to be part of a darkening, alien America but they refuse to admit they are fleeing the rising tide of color.”<sup>158</sup>

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154. Jared Taylor, *What We Owe Our People*, AM. RENAISSANCE, Jan. 2005, at 1, 5 (reviewing FRANK SALTER, ON GENETIC INTERESTS: FAMILY, ETHNY AND HUMANITY IN AN AGE OF MASS MIGRATION (2003)), available at <http://www.amren.com/ar/pdfs/2005/200501ar.pdf>.

155. Samuel Francis, *The King Holiday and Its Meaning*, AM. RENAISSANCE, Feb. 1998, at 1, 6-7, available at <http://amren.com/ar/1998/02/index.html>.

156. Taylor, *Twelve Years of American Renaissance*, *supra* note 124, at 5.

157. Francis, *Why Race Matters*, *supra* note 125.

158. Taylor, *Twelve Years of American Renaissance*, *supra* note 124, at 3-4.

- “If and when [the self-declared enemies of the white race] should triumph and those enemies come to kill us as the Tutsi people have been slaughtered in Rwanda, they will do so not because we are ‘Westerners’ or ‘Americans’ or ‘Christians’ or ‘conservatives’ or ‘liberals’ but because we are white.”<sup>159</sup>
- “With perhaps the single exception of Iceland, every white country is besieged by non-white immigrants. Whites have built the most successful societies in human history, and non-whites from failed societies are flooding into them.”<sup>160</sup>
- “What is happening in our interesting times, then, to summarize briefly, is this. A concerted and long-term attack against the civilization of white, European and North American man has been launched, and the attack is not confined to the political, social and cultural institutions that characterize the civilization but extends also to the race that created the civilization and continues to carry and transmit it today. The war against white civilization sometimes (indeed often) invokes liberal ideals as its justification and as its goal, but the likely reality is that the victory of the racial revolution will end merely in the domination or destruction of the white race and its civilization by the non-white peoples . . . .”<sup>161</sup>
- “Non-whites close ranks around their own, no matter how criminal or degenerate. Blacks, especially, like to riot when some thug gets rough treatment at the hands of a white policeman.”<sup>162</sup>
- “At some point is [sic] must have become obvious the [African-American defendants] intended to kill all witnesses . . . . Why, therefore, did five young whites-men or women-kneel obediently in the snow to be shot one by one? Were their spirits completely broken from hours of [sexual] humiliation? Were they so stiff from cold they could hardly move? Or had they simply been denatured by the anti-white zeitgeist of guilt that implies whites deserve

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159. Francis, *Why Race Matters*, *supra* note 125.

160. Taylor, *Twelve Years of American Renaissance*, *supra* note 124, at 5.

161. Francis, *Why Race Matters*, *supra* note 125.

162. Taylor, *Twelve Years of American Renaissance*, *supra* note 124, at 3.

whatever they get? One does not wish to think ill of the dead, but these three [Caucasian] men showed little manliness.”<sup>163</sup>

- “Ultimately, the odds of victory [for restricting “non-white” immigration] are not a preoccupation for those who know their cause is just. We fight for our children, in the name of our ancestors. We fight so that generations to come will walk in the ways of their forefathers, so that they will live as men and women rooted in the West rather than as waifs without loyalty or destiny. We fight so that our grandchildren will be the unmistakable descendants – biologically, culturally, and spiritually – of our grandparents. Like all who fight with conviction, we fight for what we love, and if there is justice in this world we will surely win.”<sup>164</sup>
- “For centuries, people as different as Arabs and Englishmen have judged Africans to be unintelligent, lascivious, jolly, and keen on rhythm. Today, in whatever corner of the globe one looks, blacks behave in certain consistent ways.”<sup>165</sup>

As a supplement to the text, *New Century* includes several images in each issue of *AmRen*. Generally, these images seem designed to elicit a strong emotional reaction in the reader rather than to convey any substantive information.<sup>166</sup> Moreover, the images are often accompanied by captions utilizing inflammatory and disparaging terms.<sup>167</sup>

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163. Webster, *The Wichita Massacre*, *supra* note 132, at 6.

164. Taylor, *Twelve Years of American Renaissance*, *supra* note 124, at 6.

165. Taylor, *Why Race Matters*, *supra* note 128, at 1.

166. *See infra* note 167.

167. *See, e.g.*, Taylor, *Twelve Years of American Renaissance*, *supra* note 124, at 6 (including a photograph of a young Caucasian girl looking skyward under the caption, “[s]he looks to you for a better world”); Peter Bradley, *Mexifornia Today, Meximerica Tomorrow?*, *AM. RENAISSANCE*, Oct. 2003, at 6, 6 (reviewing VICTOR DAVIS HANSON, *MEXIFORNIA: A STATE OF BECOMING* (2003)), *available at* <http://www.amren.com/ar/pdfs/2003/200310ar.pdf> (including a photograph of what appear to be Hispanic immigrants climbing over a fence under the caption, “[h]ere they come”); Thomas Jackson, *Blood and Soil*, *AM. RENAISSANCE*, Dec. 1997, at 7, 8 (reviewing MILICA ZARKOVIC BOOKMAN, *THE DEMOGRAPHIC STRUGGLE FOR POWER: THE POLITICAL ECONOMY OF DEMOGRAPHIC ENGINEERING IN THE MODERN WORLD* (1997)), *available at* <http://www.amren.com/ar/pdfs/1997/199712ar.pdf> (including a drawing of three Caucasian children under the caption, “[r]ecruits for the struggle”); Thomas Jackson, *Who Was the ‘Father of Racism’?*, *AM. RENAISSANCE*, July 2007, at 6, 9, *available at*



Thus, even a limited review of New Century's primary publication reveals that the group makes substantial use of inflammatory and disparaging terms and routinely expresses conclusions based more on strong emotional feelings than objective evaluations.<sup>168</sup>

AmRen fails the methodology test due to the presence of three of the four factors set forth in Revenue Procedure 86-43 and a lack of "exceptional circumstances" by which the magazine's advocacy might otherwise be rendered educational. Thus, New Century is not an educational organization within the meaning of section 501(c)(3) of the Code, such that Service can and must revoke the organization's status as a public charity.

#### B. FAMILY RESEARCH COUNCIL

The Family Research Council (the "FRC") bills itself as "the leading voice for the family in our nation's halls of power."<sup>169</sup> Founded in 1983 by James Dobson, Armand Nicholi, Jr. and George Rekers, the organization's "immediate goal was to counter the credentialed voices arrayed against life and family with equally capable men and women of faith."<sup>170</sup> FRC's first president, Gerald Regier, was a former Reagan administration official who gained notoriety for the organization by

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<http://www.amren.com/ar/pdfs/2007/200707ar.pdf> (including a photograph of a semi-nude statue of a Caucasian female under the caption, "[o]nly whites could achieve true beauty"); Jared Taylor, *Africa in Our Midst*, *supra* note 3, at 6 (including a photograph of a weeping Caucasian woman holding a nude Caucasian child under the caption, "[w]hite woman with an 11-month-old baby at the [New Orleans] Convention Center"); Jared Taylor, *What We Owe Our People*, *supra* note 154, at 6 (including a photograph of a smiling Caucasian woman hugging a black toddler under the caption, "[a] genetic loss"); Jared Taylor, *Black Racial Consciousness, Part I*, AM. RENAISSANCE, Sept. 2006, at 1, 9, *available at* <http://www.amren.com/ar/pdfs/2006/200609ar.pdf> (including a photograph of a shirtless black male carrying a machine gun under the caption, "Liberia is reserved for Negroes"); Derek Turner, *The Island Race Debate*, AM. RENAISSANCE, May 2006, at 1, 6, *available at* <http://www.amren.com/ar/pdfs/2006/200605ar.pdf> (including a photograph of the World Trade Center after the terrorist attacks of September 11, 2001 under the caption, "[i]s multiculturalism going up in smoke too?").

168. The Author chose to withhold additional examples on the grounds they were superfluous.

169. *About FRC*, FAMILY RESEARCH COUNCIL, <http://www.frc.org/about-frc> (last visited Feb. 13, 2012).

170. *History/Mission*, FAMILY RESEARCH COUNCIL, <http://www.frc.org/history/mission> (last visited Feb. 13, 2012).

“arrang[ing] for Congressional testimony, provid[ing] reports to elected officials, amass[ing] evidence for legal briefs on family issues, help[ing] secure appointments on government panels, and offer[ing] media commentary.”<sup>171</sup>

In 1988 FRC merged with and became a division of Focus on the Family,<sup>172</sup> a group founded by James Dobson in 1977 for the purpose of preserving traditional values and the institution of the family.<sup>173</sup> Gary Bauer, former Under Secretary of Education and domestic policy adviser to President Reagan, became FRC’s second president following the merger.<sup>174</sup> In 1992, however, FRC severed its ties with Focus on the Family. FRC thus became an independent nonprofit organization, although Dobson and two other Focus on the Family directors continued to serve on the organization’s board.<sup>175</sup>

FRC’s “expert and grassroots networks grew exponentially” throughout the 1990s, and in 2000, Kenneth Connor became the organization’s third president after Bauer announced his intention to seek the Republican presidential nomination.<sup>176</sup> Between 2000 and 2003, Connor “sought to sharpen FRC’s public policy agenda, with special focus on the sanctity of human life, defense of man-woman marriage, humane elder care, religious liberty, parental choice in education, and family tax relief.”<sup>177</sup>

Tony Perkins became FRC’s fourth president in 2003 and continues to serve in that capacity today.<sup>178</sup> Perkins “began his tenure at FRC just as the nationwide struggle to preserve man-woman marriage exploded”<sup>179</sup> following the Massachusetts Supreme Court’s ruling in *Goodridge v. Department of Public Health*.<sup>180</sup> Under Perkins’ leadership, FRC has sought to stimulate “cultural engagement” among

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171. *Id.*

172. *Id.*

173. *See About Focus on the Family*, FOCUS ON THE FAMILY, [http://www.focusonthefamily.com/about\\_us.aspx](http://www.focusonthefamily.com/about_us.aspx) (last visited Feb. 13, 2012).

174. *See History/Mission*, FAMILY RESEARCH COUNCIL, *supra* note 170.

175. *See id.*

176. *Id.*

177. *Id.*

178. *See id.*

179. *Id.*

180. 798 N.E.2d 941 (Mass. 2003).

the nation's pastorate<sup>181</sup> in an effort to "engag[e] Christians in civic affairs as never before."<sup>182</sup>

In 1992, Service recognized FRC as a tax-exempt educational organization such that it was eligible to receive charitable contributions from individual donors and grant-making organizations.<sup>183</sup> For the year ended on September 30, 2011, the group reported more than \$13,000,000 in revenue.<sup>184</sup>

In November 2010, the Southern Poverty Law Center announced that it would designate FRC as a hate group based on the organization's "propagation of known falsehoods – claims about [lesbian, gay, bisexual, and transgender] people that have been thoroughly discredited by scientific authorities – and repeated, groundless name-calling."<sup>185</sup> In a full-page advertisement run in two Washington, D.C. newspapers, FRC responded as follows:

The surest sign one is losing a debate is to resort to character assassination. The Southern Poverty Law Center, a liberal fundraising machine whose tactics have been condemned by observers across the political spectrum, is doing just that.

The group, which was once known for combating racial bigotry, is now attacking several groups that uphold Judeo-Christian moral views, including marriage as the union of a man and a woman.

How does the SPLC attack? By labeling its opponents "hate groups." No discussion. No consideration of the issues. No engagement. No debate!

181. FAMILY RESEARCH COUNCIL, *supra* note 170.

182. *Biography of Tony Perkins*, FAMILY RESEARCH COUNCIL, <http://www.frc.org/get.cfm?i=by03h27> (last visited Feb. 13, 2012).

183. *See FAQs*, FAMILY RESEARCH COUNCIL, <http://www.frc.org/faqs> (click on the first question underneath the "Government Affairs and Media" heading) (last visited Feb. 13, 2012).

184. *See Evangelical Council for Financial Accountability*, <http://www.ecfa.org/ComparativeFinancialData.aspx?ID=10064&Type=Member> (last visited Feb. 13, 2012). FRC directs persons seeking financial information about the organization to visit the Evangelical Council for Financial Accountability's website. *See FAQs*, FAMILY RESEARCH COUNCIL, *supra* note 183.

185. Evelyn Schlatter, *18 Anti-Gay Groups and Their Propaganda*, INTELLIGENCE REP., Winter 2010, available at <http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2010/winter/the-hard-liners>. The SPLC was careful to note that "[v]iewing homosexuality as unbiblical does not qualify organizations for listing as hate groups." *Id.*

....

This is intolerance pure and simple. Elements of the radical Left are trying to shut down informed discussion of policy issues that are being considered by Congress, legislatures, and the courts.

Tell the radical Left it is time to stop spreading hateful rhetoric attacking individuals and organizations merely for expressing ideas with which they disagree. Our debates can and must remain civil – but they must never be suppressed through personal assaults that aim only to malign an opponent’s character.<sup>186</sup>

According to FRC’s ad, twenty-three members of Congress were signatories on the statement, including Speaker-designate John Boehner and Majority Leader-elect Eric Cantor, as well as four individuals who would go on to become candidates for the 2012 Republican presidential nomination: Michele Bachmann, Herman Cain, Tim Pawlenty and Rick Santorum.<sup>187</sup>

The forcefulness of FRC’s response was arguably attributable to two interrelated concerns. First, potential donors might be reluctant to give money to an organization that has been designated as a hate group. Second, Service might revoke FRC’s status as a 501(c)(3) educational organization thereby rescinding the group’s exemption from federal income taxation and, more importantly, eliminating its ability to receive tax-deductible contributions.

The latter concern is likely well-founded, as application of the methodology test seems to confirm that FRC is not operated for educational purposes. In contravention of the methodology test’s first and third factors, “the presentation of viewpoints or positions unsupported by facts is a significant portion of [FRC’s] communications” and “[FRC’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.”<sup>188</sup> Consequently, FRC does not qualify as an educational organization within the meaning of section 501(c)(3) of the Code, such that it is incumbent upon Service to revoke the group’s status as a public charity.

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186. START DEBATING STOP HATING, <http://www.startdebatingstophating.com/> (click on the link at the bottom of the page titled “View FRC’s Newspaper Ad”) (last visited Feb. 13, 2012).

187. *See id.*

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

*1. Presentation of Viewpoints or Positions Unsupported by Facts  
Is a Significant Portion of FRC's Communications*

Unlike Nationalist Movement and New Century, FRC's publishing activity has not been limited to a single newsletter.<sup>189</sup> Over the years, FRC has published a number of different journals, pamphlets, policy papers, newsletters and books.<sup>190</sup> Although a comprehensive review of these materials is beyond the scope of this Article, a survey of FRC's publications at various points in time reveals the following unsupported viewpoints or positions:

- "The homosexual rights movement has tried to distance itself from pedophilia, but only for public relations purposes."<sup>191</sup>
- "If homosexual 'marriage' is legalized, the percentage of homosexual couples that remain together for a lifetime will always be lower than the percentage of heterosexual couples that do so; but the percentage of heterosexual couples demonstrating lifelong commitment will also decline, to the harm of society as a whole."<sup>192</sup>
- "[H]omosexual groups are actively recruiting 'gay youth' through such groups as . . . AIDS service providers and various agencies that assist runaways."<sup>193</sup>
- "The sexual abuse scandal rocking the Catholic Church, routinely labeled a 'pedophilia' scandal in the press, in most cases actually involves the homosexual assault on adolescent males by a small number of morally corrupt priests."<sup>194</sup>
- "Marriage-based kinship is essential to stability and continuity. A man is more apt to sacrifice himself to help a

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189. *See Papers & Publications*, FAMILY RESEARCH COUNCIL, <http://web.archive.org/web/20020610192612/http://www.frc.org/papers.cfm?CFID=845040&CFTOKEN=71171342> (last visited Feb. 13, 2012).

190. *See id.*

191. York & Knight, *supra* note 1.

192. Peter Sprigg, Family Research Council, *The Top Ten Harms of Same-Sex "Marriage"* 5 (2011), available at <http://downloads.frc.org/EF/EF11B30.pdf>.

193. York & Knight, *supra* note 1.

194. *Media Hides Homosexuality Connection in Sex Abuse Scandal*, CULTURE FACTS (Family Research Council, Washington, D.C.), Apr. 5, 2002, <http://web.archive.org/web/20020608203914/http://www.frc.org/get/cu02d1.cfm>.

son-in-law than some unrelated man (or woman) living with his daughter. Kinship entails mutual obligations and a commitment to the future of the community. Homosexual relationships are a negation of the ties that bind—the continuation of kinship through procreation of children. To accord same-sex relationships the same status as a marriage is to accord them a value that they cannot possibly have. Marriages benefit more than the two people involved, or even the children that are created. Their influence reaches children living nearby, as young minds seek out role models. The stability they bring to a community benefits all.”<sup>195</sup>

- “No amount of tinkering with the language can change the fact that [the Employment Non-Discrimination Act] is built entirely on a false premise. Sexual orientation is simply not like the other characteristics protected under our civil rights laws (such as race, sex, national origin, age, religion or disability). Each of those characteristics share one or more of the following qualities—they are inborn, involuntary, immutable, innocuous, and/or in the Constitution. The groups seeking civil rights protection have also usually suffered from political powerlessness and economic deprivation. None of those factors apply to homosexuals or homosexual behavior.”<sup>196</sup>
- “Many teens who identify themselves as gay face despair and anguish; they become objects of scorn by classmates. Yet many teens experience anguish and difficulty relating to peers for reasons having little to do with sexual orientation. In fact, alienated teens with no homosexual proclivities are targets for gay activists. The activists will embrace these youngsters while offering them an identity by claiming—without credible scientific evidence—that the teens were probably born gay, and then suggest that their alleged homosexuality explains their adjustment problems.

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195. Robert H. Knight, *Gay “Marriage,” Hawaii’s Assault on Matrimony*, FAM. POL’Y, Feb. 1996, available at <http://web.archive.org/web/19991005204646/http://frc.org/fampol/fp96bhs.html>.

196. *Eyewitness Report: Stacked Deck at “Gay Rights” Hearing*, CULTURE FACTS (Family Research Council, Washington, D.C.), Mar. 8, 2002, <http://web.archive.org/web/20020430143810/http://www.frc.org/get/cu02c1.cfm?CFID=592043&CFTOKEN=4159852>.

For a vulnerable teenager struggling for acceptance, this pitch can sound quite therapeutic.”<sup>197</sup>

- “Rather than marriage changing the behavior of homosexuals to match the relative sexual fidelity of heterosexuals, it seems likely that the opposite would occur. If homosexual relationships, promiscuity and all, are held up to society as being a fully equal part of the social ideal that is called ‘marriage,’ then the value of sexual fidelity as an expected standard of behavior for married people will further erode—even among heterosexuals.”<sup>198</sup>
- “As more teens engage in homosexual conduct, we will see a rise in the number of teens infected with HIV. As more are drawn into the homosexual lifestyle, we will also see more teens die painful and unnecessary deaths.”<sup>199</sup>

Thus, even a limited review of FRC’s publications provides numerous examples<sup>200</sup> of viewpoints or positions unsupported by facts, such that these publications may be said to fail the first factor of the methodology test.

2. *FRC’s Presentations Make Substantial Use of Inflammatory and Disparaging Terms and Express Conclusions Based More on Strong Emotional Feelings than Objective Evaluations*

FRC’s publications have made substantial use of inflammatory and disparaging terms to advocate against homosexuality. Although the group has moderated the intensity of its rhetoric in recent years, analysis of FRC’s web archives reveals the following historical violations:

- “Why burden the Red Cross with testing blood that has a high probability of being contaminated [by virtue of the fact that it was donated by a gay man]? Why put the victims of terrorism (who have suffered enough), and all Americans in

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197. Frank York & Robert H. Knight, *Homosexual Teens at Risk, Victims of “Homophobia” or Self-Destructive Behavior?*, FAM. POL’Y, Mar.-Apr. 1998, available at <http://web.archive.org/web/20000815100556/http://www.frc.org/fampol/fp98fcu.html>.

198. Sprigg, *supra* note 192, at 4.

199. York & Knight, *supra* note 1, at 19.

200. The Author chose to withhold additional examples on the grounds they were superfluous.

need of blood, at risk in the name of ‘political correctness?’ These are good questions and the answers are simple: we shouldn’t and we mustn’t.”<sup>201</sup>

- “But bringing this child into the unnatural ‘family’ formed by a lesbian partnership—thus depriving him of a married mother and father—simply compounds the error. And the case is symbolic of one of the key problems with homosexual adoption—the selfishness inherent in placing the desires of adults ahead of the best interests of innocent children.”<sup>202</sup>
- “Supporters of [the Employment Non-Discrimination Act] claim the only message it sends is that workers should be judged on their work alone. They are wrong. It also sends a message that the federal government knows how private employers should conduct their business better than the employers themselves. And it sends a message that homosexual behavior is just as good as heterosexual behavior, just as earlier civil rights laws sent the message that blacks are not inferior to whites. But given that homosexual behavior conflicts with nature, morality, and religion; and given that it leads to higher rates of physical disease, mental illness, substance abuse, and domestic violence; this is not a message Congress should send.”<sup>203</sup>
- “The decision by the show’s producers to cast a woman for the part, perhaps out of uncertainty about how the audience would respond to an actual [male-to-female] transsexual, is an attempt to portray in a positive light the voluntary choice of mutilating sex-change operations.”<sup>204</sup>

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201. *Homosexuals ‘Roll Up Their Sleeves’ to Change Blood Bank Policies*, CULTURE FACTS (Family Research Council, Washington, D.C.), Oct. 5, 2001, <http://web.archive.org/web/20020515011818/http://www.frc.org/get/cu01j1.cfm?CFID=592043&CFTOKEN=4159852>.

202. *Deaf Lesbians Engineer ‘Designer Baby’ to Be Deaf*, CULTURE FACTS (Family Research Council, Washington, D.C.), Apr. 18, 2002, <http://web.archive.org/web/20020627050735/http://www.frc.org/get/cu02d2.cfm?CFID=845495&CFTOKEN=4414956>.

203. *Eyewitness Report: Stacked Deck at “Gay Rights” Hearing*, *supra* note 196.

204. *Homosexual Groups Guide ‘Education of Max Bickford’*, CULTURE FACTS (Family Research Council, Washington, D.C.), Oct. 5, 2001, <http://web.archive.org/web/20020515011818/http://www.frc.org/get/cu01j1.cfm?CFID=592043&CFTOKEN=4159852>.



- “But the record of their [law]suit against Florida’s ban on homosexual adoptions is at least symbolic of the fact that the push for legalizing such adoptions is not really ‘for the sake of the children.’ Instead, it is but one more step in the campaign to force Americans to celebrate, subsidize, and solemnize homosexual relationships, with the end goal being full rights to civil marriage for homosexual couples. It is unfortunate that innocent children are being used as pawns in this game.”<sup>205</sup>
- “Gay advocates are not only risking the infection of our nation’s blood supply with HIV, but many of them also carry a ‘mini-epidemic’ of other sexually transmitted diseases including gonorrhea, syphilis, shigellosis, hepatitis A and C, human papilloma virus and other diseases. Thankfully, the Red Cross conducts a series of tests on all donated blood to ensure the supply is safe, despite the donor’s assurances.”<sup>206</sup>

One of the most egregious examples of FRC’s failure to employ an educational methodology can be found in a booklet titled *Homosexual Activists Work to Normalize Sex with Boys*.<sup>207</sup> After asserting, “homosexual activists around the world are working aggressively to lower the age of sexual consent for children and to normalize sex with children,” the booklet concludes with the following warning:

This is the future we face, unless there is determined opposition to the homosexual/pedophile movement. A homosexual activist, writing under the pen name of Michael Swift, looked to the day when homosexuals would control our culture. He challenged heterosexual society with these words:

We shall sodomize your sons, emblems of your feeble masculinity, of your shallow dreams and vulgar lies. . . .  
Your sons shall become our minions to do our bidding.

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205. *Is it Really “for the Sake of the Children?”*, CULTURE FACTS (Family Research Council, Washington, D.C.), Mar. 22, 2002, <http://web.archive.org/web/20020730082254/http://www.frc.org/get/cu02c2.cfm?CFID=877003&CFTOKEN=7717583>.

206. *Homosexuals ‘Roll Up Their Sleeves’ to Change Blood Bank Policies*, *supra* note 201.

207. *See generally*, York & Knight, *supra* note 1.

They will be recast in our image. They will come to crave and adore us.

All churches who condemn us will be closed. Our holy gods are handsome young men. We adhere to a cult of beauty, moral and esthetic. All that is ugly and vulgar and banal will be annihilated. Since we are alienated from middle-class heterosexual conventions, we are free to live our lives according to the dictates of the pure imagination. For us, too much is not enough.

*Too much is not enough.* Those words should remind us that one of the primary goals of the homosexual rights movement is to abolish all age of consent laws and to eventually recognize pedophiles as the “prophets” of a new sexual order.<sup>208</sup>

As demonstrated by the foregoing examples, FRC’s publications have consistently violated the methodology test’s third factor by utilizing inflammatory and disparaging terms and making appeals geared more toward emotion than intellect.<sup>209</sup>

FRC’s publications fail the methodology test due to the presence of two of the four factors set forth in Revenue Procedure 86-43 and the lack of “exceptional circumstances” by which the organization’s advocacy might otherwise be rendered educational.<sup>210</sup> Thus, FRC is not

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208. York & Knight, *supra* note 1, at 19. Significantly, the booklet omits the first sentence of Michael Swift’s editorial wherein the author acknowledges that “this essay is outré, madness, a tragic, cruel fantasy, an eruption of inner rage, on how the oppressed desperately dream of being the oppressor.” Michael Swift, *America: Is This the Gay Declaration of War?*, GAY COMMUNITY NEWS, Feb. 21, 1987, *reprinted in* 133 CONG. REC. E3081-02 (1987).

209. The Author chose to withhold additional examples on the grounds they were superfluous.

210. Moreover, FRC has engaged in factual distortions in contravention of the methodology test’s second factor. For example, in 2001, FRC argued that homosexuals should not be allowed to adopt children because “gay households are not ‘normal,’ and are not a healthy environment for the upbringing of children.” *Should Homosexuals Be Allowed to Adopt Children?*, CULTURE FACTS (Family Research Council, Washington, D.C.), Sept. 7, 2001, <http://web.archive.org/web/20020515011853/http://www.frc.org/get/cu01i1.cfm?CFID=592043&CFTOKEN=4159852>. As support for this position, FRC cited the following ostensible facts: “Homosexuals typically have hundreds of sex partners over the course of their lifetime. While many homosexuals claim to be in ‘committed’ relationships, all-too-often the term ‘commitment’ is redefined to include casual sex partners outside the primary relationship. The *Journal of Sex Research*, for example, found that only 2.7 percent of older homosexuals were involved in monogamous relationships.” *Id.*

an educational organization within the meaning of section 501(c)(3) of the Code such that Service can and must revoke the organization's status as a public charity.

#### IV. REFORMING THE METHODOLOGY TEST

The methodology test must be reformed to ensure that hate groups masquerading as educational organizations do not receive federal subsidies. First, Service's application of the test must be more rigorous at all stages of a tax-exempt educational organization's life cycle. Second, an organization's use of discredited factual data in its presentations should be held to implicate the test's second factor. Together, these reforms would make it far more difficult for groups such as New Century and FRC to receive and retain charitable status.

##### A. ENHANCED ENFORCEMENT BY SERVICE

Generally, organizations wishing to attain charitable status under the federal income tax laws must file an Application for Recognition of Exemption Under Section 501(c)(3) of the Internal Revenue Code, commonly referred to as a Form 1023, with Service.<sup>211</sup> As part of the initial application process, self-identified educational organizations should be required to provide Service with copies of any advocacy-oriented presentations they have made available to the public. Currently, applicants may be asked to provide additional information beyond the minimum mandated by Form 1023 if Service decides that it is necessary

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In reality, however, the cited study found that "2.7% [of older gay men] had had sex with 1 partner only" in the course of their lifetime. Paul Van de Ven et al., *A Comparative Demographic and Sexual Profile of Older Homosexually Active Men*, 34 J. SEX RES. 349, 354 (1997), available at <http://www.jstor.org/stable/3813477?seq=6&Search=yes&searchText=2.7&list=hide&searchUri=%2Faction%2FdoBasicSearch%3Ffilter%3Diid%253A10.2307%252Fi291219%26Query%3D2.7%26Search.x%3D5%26Search.y%3D5%26wc%3Don&prevSearch=&item=2&ttl=3&returnArticleService=showFullText&resultsServiceName=null>. Thus, contrary to FRC's representation, the cited statistic measured the percentage of older gay men who had had only one same-sex sexual partner in their lifetime, not the percentage of older gay men currently involved in monogamous relationships. *See id.*

211. Treas. Reg. § 1.501(a)-1(a)(3) (as amended in 1982); Donald B. Tobin, *Political Campaigning by Churches: Hazardous for 501(c)(3)s, Dangerous for Democracy*, 95 GEO. L.J. 1313, 1354 (2007). A copy of Form 1023, as revised in 2006, is available at <http://www.irs.gov/pub/irs-pdf/f1023.pdf>.

to make a proper determination regarding an organization's tax-exempt status.<sup>212</sup> The burden of proof, however, properly belongs with the organization seeking exemption. Moreover, applicants have significant discretion as to how they characterize their organization's activities, such that Service may not realize that an applicant is an advocacy organization based solely on a review of the applicant's Form 1023.<sup>213</sup> Thus, under the current system, Service may not have an opportunity to apply the methodology test to an organization's presentations until after the organization has received a final determination letter conferring charitable status. To eliminate this possibility, Service should require educational organizations engaged in advocacy to self-identify at the outset of the application process.

Educational advocacy organizations ("EAOs") that survive a preliminary application of the methodology test should thereafter be subject to enhanced monitoring by Service. After receiving a favorable determination letter, an EAO may be tempted to resort to propaganda bereft of any educational methodology to communicate its views to the public. Although Service may conduct compliance checks of 501(c)(3) organizations to ensure that their activities are consistent with their stated tax-exempt purpose, Service's resources are necessarily limited. Consequently, an EAO may conclude that the rewards of unencumbered advocacy outweigh the risks of investigation by Service. To deter such gamesmanship, Service should devote a disproportionate amount of its resources to monitoring the continued qualification of EAOs relative to other tax-exempt organizations.

If a compliance check indicates that an EAO may not be employing an educational methodology in its presentations, Service should err in favor of revoking the organization's exemption. Whereas an EAO has the right to appeal a proposed revocation, the taxpayers who indirectly subsidize these organizations have no such recourse if Service declines to take action. If Service denies the organization's appeal, the EAO may then bring a declaratory judgment action in a federal court wherein the judge will undertake a *de novo* review of the administrative record. Thus, when application of the methodology test is inconclusive, Service

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212. Treas. Reg. § 1.501(a)-1(b)(2).

213. See James J. Fishman, *Wrong Way Corrigan and Recent Developments in the Nonprofit Landscape: A Need for New Legal Approaches*, 76 *FORDHAM L. REV.* 567, 580 (2007) ("[O]rganizations that fill out [Form 1023] in boilerplate fashion will almost automatically obtain recognition of exemption."); see also Tobin, *supra* note 211, at 1355 ("Form 1023 . . . provides the IRS with little information regarding the ongoing activities of 501(c)(3) organizations.").

can strike the proper balance between promoting legitimate educational organizations and ensuring that the educational exemption is not abused by adopting a policy that favors revocation of tax-exempt status.<sup>214</sup>

Service's reluctance to enforce the methodology test, as exemplified by the fact that Service continues to accord charitable status to organizations such as New Century and FRC, is likely attributable to concerns regarding the test's constitutionality. In rejecting what was then Service's *proposed* methodology test, the D.C. District Court concluded:

[Service]'s proposed "methodology" approach is flawed in inception and execution. [Service] concedes that the 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*. It is therefore not surprising that the proposed methodology approach merely rewords the regulation it is intended to circumvent, without creating criteria any less vague or more capable of neutral application. "Relevant factual basis," "inflammatory and disparaging terms," and "aimed at developing an understanding," for example, allow IRS officials at least as much latitude in passing judgment "on the content and quality of an applicant's views and goals" as the terms singled out for attention in *Big Mama Rag*.<sup>215</sup>

The constitutionality of the test has also been called into question by a number of scholars.<sup>216</sup> As of June 2012, however, Revenue Procedure

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214. See *Alliance II*, 710 F.2d at 876 (noting with approval Service's characterization of the methodology test as "command[ing] the Internal Revenue Service . . . to steer between Scylla and Charybdis: exemption to all or exemption, in effect, only to degree-granting academic institutions. . . ." such that the test represented "a carefully-charted middle course").

215. *Alliance I*, 1981 WL 1799, at \*5. The court indicated that Service's proposed methodology test was "even more susceptible to subjective interpretation and selective application than the [full and fair exposition standard]" because, at that time, the test was "not embodied in a written regulation." *Id.*

216. See Laura B. Chisolm, *Exempt Organization Advocacy: Matching the Rules to the Rationales*, 63 IND. L.J. 201, 219 (1988) (questioning whether the methodology test can be applied in a content-neutral manner); Brian A. Hill, *First Amendment Vagueness and the Methodology Test for Determining Exempt Status: Nationalist Movement v. Commissioner*, 48 TAX LAW. 569, 579-82 (1995) (suggesting that the test's first and third factors employ the same criteria that were rejected by the D.C. Circuit in *Big Mama Rag*, whereas the second and fourth factors pose their own unique vagueness concerns); Lu, *supra* note 19, at 382 (arguing that Service's "criteria for determining

86-43 had not been repealed, and the methodology test continues to be Service's official procedure for "determin[ing] the circumstances under which advocacy of a particular viewpoint or position by an organization is considered educational within the meaning of section 501(c)(3)."<sup>217</sup>

Consequently, Service should rigorously enforce the methodology test to ensure that hate groups do not receive the tax benefits associated with charitable status. In the event more robust enforcement ultimately leads to the test's being struck down as unconstitutional, Service will then have an opportunity to formulate a new procedure that better comports with the First Amendment. One thing is clear: the status quo is untenable.

#### B. RESTRICTING THE USE OF "JUNK SCIENCE"

Service should interpret the methodology test's second factor as prohibiting the use of discredited factual data. The Tax Court has held that latent factual distortions in an organization's presentations provide stronger evidence of its failure to employ an educational methodology than if the organization had utilized distortions that were readily apparent on their face.<sup>218</sup> Discredited factual data represents a particularly invidious form of latent distortion because it has all the appearances of credibility. Hate groups, thus, may be tempted to rely on outdated or misleading data to create an illusion of factual support for their otherwise unfounded positions. For that reason, an organization's use of data that has been conclusively discredited should be viewed as a type of factual distortion implicating the methodology test's second factor.

Consider, for example, an FRC publication titled *The Top Ten Myths About Homosexuality*.<sup>219</sup> The pamphlet's introduction makes a point of stressing that:

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which educational organizations 'advocate' are hopelessly unclear, if not constitutionally vague, because they fail to articulate a principled and objective basis for the distinction between advocacy and non-advocacy"); Thompson, *supra* note 28, at 491 (asserting that the methodology test is subjective, "unadministrable," and facilitates censorship).

217. Rev. Proc. 86-43(1), 1986-2 C.B. 729.

218. *Nationalist Movement*, 102 T.C. at 592. The implication is that most individuals will recognize and discount the latter type of distortion, whereas latent distortions are more likely to go undetected and, thus, be accepted as accurate by the reader. *See id.*

219. Sprigg, *supra* note 192.

The homosexual movement is built, not on facts or research, but on mythology. Unfortunately, these myths have come to be widely accepted in society—particularly in schools, universities and the media. It is our hope that by understanding what these key myths are—and then reading a brief summary of the evidence against them—the reader will be empowered to challenge these myths when he or she encounters them.<sup>220</sup>

In reality, however, it is FRC's positions that are more aptly characterized as myths, as much of the data cited in the pamphlet has been decisively and conclusively discredited.<sup>221</sup>

In attempting to refute the ostensible myth that “children raised by homosexuals are no different from children raised by heterosexuals, nor do they suffer harm,” FRC asserts, “an overwhelming body of social science research shows that children do best when raised by their own biological mother and father who are committed to one another in lifelong marriage.”<sup>222</sup> According to the American Academy of Pediatrics (the “AAP”),<sup>223</sup> however, “a growing body of scientific literature demonstrates that children who grow up with 1 or 2 gay and/or lesbian parents fare as well in emotional, cognitive, social, and sexual functioning as do children whose parents are heterosexual.”<sup>224</sup> AAP has likewise acknowledged that “[n]o data have pointed to any risk to children as a result of growing up in a family with 1 or more gay parents.”<sup>225</sup> Moreover, the American Psychological Association (the

220. *Id.* at 3.

221. *See infra* pp. 43-46.

222. Sprigg, *supra* note 192, at 30. The referenced social science research appears in footnotes throughout the passage. *See id.* at 30-33 nn.53-58.

223. The AAP is an organization of 60,000 pediatricians from around the world and is not to be confused with the American College of Pediatricians, a 200-member group that broke away from the AAP in 2002 after the AAP announced its support for gay and lesbian parents. *See About Us*, AMERICAN COLLEGE OF PEDIATRICIANS, <http://www.acpeds.org/About-Us/> (last visited Feb.13, 2012).

224. Ellen C. Perrin & The Committee on Psychosocial Aspects of Child & Family Health, *Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 PEDIATRICS 341, 341 (2002), available at <http://aappolicy.aappublications.org/cgi/content/full/pediatrics;109/2/341>.

225. *Id.* at 343. The AAP reaffirmed the aforementioned policy statement in 2010. *See American Academy of Pediatrics, Policy Statement—AAP Publications Retired and Reaffirmed*, 125 PEDIATRICS e444, e444 (2010), available at <http://aappolicy.aappublications.org/cgi/reprint/pediatrics;125/2/e444.pdf>.

“APA”<sup>226</sup> has recognized “that same-sex couples are remarkably similar to heterosexual couples, and that parenting effectiveness and the adjustment, development and psychological well-being of children is unrelated to parental sexual orientation.”<sup>227</sup> Thus, the social science data cited in FRC’s pamphlet has been conclusively discredited to the extent it contradicts official policy statements of AAP and APA. This portion of the pamphlet arguably constitutes a latent factual distortion in violation of the methodology test.<sup>228</sup>

Similarly, in response to the supposed myth that “homosexuals are no more likely to molest children than heterosexuals,” FRC contends that “[t]he percentage of child sexual abuse cases in which men molest boys is many times higher than the percentage of adult males who are homosexual, and most men who molest boys self-identify as homosexual or bisexual.”<sup>229</sup> APA, however, explicitly recognized that “despite a common myth, homosexual men are not more likely to sexually abuse children than heterosexual men are.”<sup>230</sup>

A third and final example of the pamphlet’s reliance on discredited factual data appears in FRC’s attempt to refute the myth that “sexual orientation can never change.”<sup>231</sup> According to FRC, “research confirms that [changes in sexual orientation from homosexual to heterosexual do] occur—sometimes spontaneously, and sometimes as a result of therapeutic interventions.”<sup>232</sup> As of 2009, however, APA had determined

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226. With more than 150,000 members, the APA is the largest association of psychologists in the world. *See About APA*, AMERICAN PSYCHOLOGICAL ASSOCIATION, <http://www.apa.org/about/index.aspx> (last visited Feb. 13, 2012).

227. Press Release, American Psychological Association, *APA Supports Legalization of Same-Sex Civil Marriages and Opposes Discrimination Against Lesbian and Gay Parents* (July 28, 2004), *available at* <http://www.apa.org/news/press/releases/2004/07/gay-marriage.aspx>.

228. The author of a study cited in this portion of the pamphlet has accused FRC of willfully distorting her research: “‘These groups just cherry-pick the data to suit their needs,’ she said of the [FRC], which, she noted, performs no research that has been peer-reviewed by a credible, mainstream professional institution.” Mackenzie Carpenter, *What Happens to Kids Raised by Gay Parents?*, PITTSBURGH POST-GAZETTE, June 10, 2007, <http://www.post-gazette.com/pg/07161/793042-51.stm>.

229. Sprigg, *supra* note 192, at 34.

230. *Understanding Child Sex Abuse: Education, Prevention, and Recovery*, AMERICAN PSYCHOLOGICAL ASSOCIATION, <http://www.apa.org/pubs/info/brochures/sex-abuse.aspx> (click on the link titled “Who are the Perpetrators of Child Sexual Abuse?”) (last visited Feb. 13, 2012).

231. Sprigg, *supra* note 192, at 8.

232. *Id.*



that there was “insufficient evidence to support the use of psychological interventions to change sexual orientation.”<sup>233</sup> Moreover, a report issued by APA found that “[c]ompelling evidence of decreased same-sex sexual behavior and of engagement in sexual behavior with the other sex [following sexual orientation change efforts] was rare” such that “the results of scientifically valid research indicate[d] that it [was] unlikely that individuals [would] be able to reduce same-sex attractions or increase other-sex sexual attractions through [sexual orientation change efforts].”<sup>234</sup> Because the social science data cited by FRC has been conclusively discredited to the extent it contradicts the official policy statements and reports of APA, this portion of the pamphlet arguably utilizes latent factual distortions in violation of the methodology test.

Accordingly, if Service was to interpret the methodology test’s second factor as prohibiting the use of discredited factual data, FRC’s pamphlet would likely be found to employ a non-educational methodology. Unlike the first and third factors of the methodology test, the second factor is stated in terms of an absolute prohibition, such that the presence of a single factual distortion in an organization’s presentations is arguably sufficient to confer non-educational status. Service would likely conclude that FRC’s pamphlet fails the second factor of the methodology test, because the publication contains at least three distortions based on its use of discredited factual data.

Whereas it might be intuitively appealing to deny tax-exempt status to EAOs using discredited factual data to support their positions, construing the methodology test in the manner advocated would pose certain challenges. First, how would Service determine whether a given piece of data had been conclusively discredited so as to preclude educational status? Further, and perhaps more importantly, how would Service differentiate the former class of data from data that has not been conclusively discredited, but for whatever reason has failed to gain widespread acceptance? Second, would the costs associated with such an analysis outweigh the corresponding benefits? Policing the line

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233. *Resolution on Appropriate Affirmative Responses to Sexual Orientation Distress and Change Efforts*, AMERICAN PSYCHOLOGICAL ASSOCIATION, <http://www.apa.org/about/governance/council/policy/sexual-orientation.aspx> (last visited Feb. 13, 2012).

234. TASK FORCE ON APPROPRIATE THERAPEUTIC RESPONSES TO SEXUAL ORIENTATION, AM. PSYCHOLOGICAL ASS’N, REPORT OF THE TASK FORCE ON APPROPRIATE THERAPEUTIC RESPONSES TO SEXUAL ORIENTATION 2-3 (2009), available at <http://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf>.

between data that is merely unpopular and data that has been conclusively discredited would likely cost an extraordinary amount of time and resources, whereas the associated benefits would be largely intangible and, thus, insusceptible to measurement. Third, would the proposed analysis withstand constitutional scrutiny? Almost any conceivable articulation would be subject to challenge under the void-for-vagueness and overbreadth doctrines, as it would necessarily vest Service with additional administrative discretion.

Although consideration of these questions is beyond the scope of this Article, they suggest that interpreting the methodology test in the manner advocated may not be feasible outside the context of hate groups. Unlike other EAOs, the positions advocated by hate groups often rely extensively, or even exclusively, on data that has been conclusively discredited. Whether the position advocated is that homosexuals pose a danger to children, that Caucasians are genetically superior to African-Americans or that the Holocaust is a myth, any factual data offered in support of these contentions would be readily identifiable as discredited junk science sufficient to implicate the methodology test's second factor.

### CONCLUSION

Although the Internal Revenue Service once championed the methodology test as a means of curing the constitutional ails that plagued the full and fair exposition standard, Service's initial enthusiasm has waned over the intervening decades. As of 2011, the test has been relegated to an administrative anachronism—an object of historical curiosity lacking much, if any, practical application in today's world. Sensing an opportunity, a small but significant number of hate groups have sought to exploit the ensuing vacuum by applying for tax-exempt status as 501(c)(3) educational organizations. The fact that so many of these groups have been accorded charitable status is an affront to legitimate educational institutions throughout the United States.

To stymie this trend, the methodology test must be made relevant again. Specifically, Service should begin rigorously enforcing the test at all stages of a tax-exempt educational organization's life cycle, constitutional concerns notwithstanding. Should more robust enforcement ultimately lead to the test's being struck down as unconstitutional, Service will then have an opportunity to fashion a new procedure that better comports with the First Amendment. Additionally, the methodology test's second factor should be interpreted as

prohibiting the use of discredited factual data in an organization's presentations. Hate groups have become increasingly sophisticated in recent years, with many abandoning outright slurs for seemingly more refined, quasi-academic discourse. Despite this apparent rebranding effort, these organizations are, at their core, no different than more traditional hate groups such as the Ku Klux Klan.

If implemented, the proposed reforms would make it far more difficult for hate groups to receive and retain charitable status as educational organizations, to the fiscal and psychological benefit of all U.S. taxpayers. The time has come for the federal government to get out of the hate business.