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*Darryll K. Jones**

In a companion work, I argue that the government may constitutionally deny tax exemption to stochastic terrorists.¹ Stochastic terrorists are groups that espouse hatred of other people based on immutable characteristics. Stochastic terrorists demonize and dehumanize people, implicitly hoping and indeed expecting² that a random listener—the proverbial but wrongly labeled “lone wolf”³—will feel threatened enough to attack a member of the hated

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¹ Darryll K. Jones, *Stochastic Terrorism, Speech Incantations and Federal Tax Exemption*, 54 N.M. L. REV. ____ (forthcoming 2024).

² The Church of Ben Klassen, for example, instructs congregants to wage racial holy war (“RAHOWA”) against Jewish people. *Basic Beliefs*, CHURCH OF BEN KLASSEN, <https://creativityreligion.com/beliefs.html>.

WE BELIEVE that, due to the Jew-instigated demographic explosion of the mud races, we must (as a matter of life or death!) not only start, but also win the worldwide White Racial Holy War within this generation.
WE BELIEVE that RAHOWA (RAcial HOLy WAR), under the victorious flag of the one and only, true and revolutionary White Racial Religion—CREATIVITY—is the only road to the resurrection and redemption of the White Race.

Id. The U.S. Department of Justice eventually filed criminal charges against its leader, Hardy Carroll Bowers, for threatening jurors in a racially motivated mass murder trial that concluded in 2023. Press Release, United States Attorney’s Office, West Virginia Man Arrested for Threatening Pittsburgh Federal Jury (Aug. 10, 2023), <https://www.justice.gov/usao-ndwv/pr/west-virginia-man-arrested-threatening-pittsburgh-federal-jury#:~:text=Hardy%20Carroll%20Lloyd%2C%20age%2045,of%20Life%20Synagogue%20mass%20shooter>. In his social media posts, Bowers makes explicit calls for violence against Jews. Megan Guza, *Feds Arrest White Supremacist Hardy Lloyd, Who Called for Violence Against Jews During Pittsburgh Synagogue Trial*, PITT. POST-GAZETTE (Aug. 11, 2023), <https://www.post-gazette.com/news/crime-courts/2023/08/10/pittsburgh-synagogue-shooting-hardy-lloyd-federal-charges/stories/202308100080> (“‘Walk into a synagogue and gun down 11 Jews and one rabbi,’ he wrote in late May. ‘That’s how you make a difference, people.’”).

³ Juliette Kayyem, *There Are No Lone Wolves*, WASH. POST (Apr. 4, 2019, 1:48 PM), <https://www.washingtonpost.com/opinions/2019/08/04/there-are-no-lone-wolves/> (pointing out that the murderer is acting in concert with stochastic terrorists).

people. Stochastic terrorists are held harmless precisely because the resulting violence is random,⁴ even if predictable, and their hateful advocacy is protected speech.

Just because stochastic terrorists speak doesn't mean the government must subsidize them via tax exemption. Tax exemption is a matter of legislative grace, not a constitutional mandate.⁵ But when the government authorizes tax exemptions, it may not allocate them in violation of the Constitution. It may not grant exemption solely to Christian churches, men, brown-eyed people, heterosexual people, or people who promise never to criticize the government. That would indirectly accomplish a directly prohibited outcome. The government may not punish speech by decree, nor may it deny a discretionary benefit because of speech. The indirection is prohibited by the "unconstitutional conditions" doctrine.⁶

Those who assert that the unconstitutional conditions doctrine prevents the government from denying exemption to hate groups ignore the doctrine's logic. The right of free speech is not the only limitation on the government. If the government is prohibited from denying tax exemption to stochastic terrorists because to do so indirectly prohibits speech, it is also prohibited from granting tax exemption to stochastic terrorists if to do so indirectly accomplishes unequal protection.⁷

It is worth mentioning that the parallelism between denying exemption for hatred as a potential free speech violation and denying exemption as an equal protection matter is more apparent than real. The consequence in the former instance is not necessarily an unconstitutional one. Denying tax exemption for hatred does not silence anybody because people can still express hatred without government subsidy. The consequence when exempting hate groups is invariably unconstitutional. Granting tax

⁴ For an interesting discussion of how random outcomes nevertheless satisfy a stochastic actor's desires, see Pedram Heydari, *Regret, Responsibility, and Randomization: A Theory of Stochastic Choice* (2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4343566.

⁵ *Nelson v. Comm'r*, 30 T.C. 1151, 1154 (1958) ("Exemptions as well as deductions are matters of legislative grace, and a taxpayer seeking either must show that he comes squarely within the terms of the law conferring the benefit sought.").

⁶ Jones, *supra* note 1, at 10–11.

⁷ *Id.*

exemption to hate groups necessarily conscripts all taxpayers into unequal protection.⁸ There is an “out” regarding the former that does not exist regarding the latter.

If the government must deny tax exemption to stochastic terrorists, and denial vindicates the right of equal protection without infringing speech, why might the government simply leave well enough alone and just avoid challenging exemption for hate groups? Constitutional scholars point to second-order problems, such as the difficulty of distinguishing hate speech from non-hate speech concerning or necessarily involving race, heritage, or other immutable characteristics such as orientation or gender.⁹ Will a group advocating closed borders be considered stochastic terrorists and be disqualified? What about a group opposing affirmative action or a transgender athlete’s asserted right to compete against cisgendered athletes? These are worrisome questions, but they hardly disprove the government’s right and duty to avoid constitutional harm when the predicate is proven. They mean only that the government must bear a difficult evidentiary burden based on a sufficiently articulated concept of charity or education before it denies tax exemption.¹⁰ The difficulty does not make the effort unworthy, nor does it make revocation illegitimate when the predicate is proven.

The logic underlying the government’s right to deny tax exemption is linear. The government speaks and acts for itself in pursuit of the public good. It may buy ads condemning cigarettes or advocate voluntary public health measures, even if some disagree. It defines and advocates its ideals, and it

⁸ Nat’l Endowment for the Arts v. Finley, 524 U.S. 569, 596 (1998) (Scalia, J., concurring) (“It is preposterous to equate the denial of taxpayer subsidy with measures ‘aimed at the *suppression* of dangerous ideas.’ The reason that denial of participation in a tax exemption or other subsidy scheme does not necessarily ‘infringe’ a fundamental right is that—unlike direct restriction or prohibition—such a denial does not, as a general rule, have any significant coercive effect.” (citations omitted)).

⁹ See Nat’l All. v. United States, 710 F.2d 868, 873–74 (D.C. Cir. 1983) (after carefully analyzing taxpayer’s educational materials, noting first that government must “shun being the arbiter of truth,” the court determined that the hate group’s materials and methodology evinced a purpose that could not be described as educational for tax exemption purposes).

¹⁰ The taxpayer asserting the right of tax exemption has the initial burden. See *Nelson*, 30 T.C. at 1154. But as a practical matter, once taxpayer makes a prima facie case that it meets the definition of *educational*, the burden shifts to the government to prove that denying exemption does not violate the First Amendment. See, e.g., *Big Mama Rag, Inc. v. United States*, 631 F.2d 1030, 1040 (D.C. Cir. 1980) (reversing government’s revocation of a feminist group’s tax exemption because the rule allowing revocation was vague and unconstitutionally chilled speech).

discriminates against contrary ideals through the purchase of goods or services. So long as the government adequately defines what it means by “charity,” and “education”—two outcomes government legitimately purchases via tax exemption and the charitable contribution deduction—it may deny exemption to groups whose outcomes are outside of the definition. When we conceptualize tax exemption as an expenditure whereby the government purchases inputs to public good, we can understand that the government necessarily defines the public good and may decline to purchase things that do not fit the definition.¹¹

Proponents of another second-order concern misunderstand an important goal of educational tax exemption. They assert that it will be easy for hate groups to disguise indoctrination as teaching by simply including a few objective lessons or sources in their “curriculum,” apparently amongst a stack of hateful propaganda.¹² Yes, but isn’t that precisely the point? Denying tax exemption will not alter people’s biases; but if it requires even a modicum of what fairly passes for objectivity, all that can be accomplished will have been accomplished. If a group of Holocaust deniers, for example, is required to include a modicum of objective content, the desired purpose of educational tax exemption will be achieved.¹³ The perfect ought not be the enemy of the good.

The final second-order problem creates more difficulty, though not as regards the government’s authority. Who, other than government will have legal standing to enforce denial or revocation of hate groups’ tax exemption? The question is legitimate because it is conceivable that, for political reasons, the executive might decline to exercise its right and duty to deny or revoke a

¹¹ Jones, *supra* note 1, at 73 (“[G]overnment cannot purchase speech prohibited to it, but it can limit the purchased program to exclude hate speech as not being according to government’s purchase order.”).

¹² It is also not clear that much would be gained from requiring hate groups to support their views using factual arguments (which could easily be based on pseudoscience) or pressuring them to add the patina of “reasoned development” to their claims. Advocates of any position, however wrong-headed, can always cherry-pick some facts that they could use to buttress their arguments. See Eugene Volokh, *The First Amendment and Tax Exemptions for “Hate” Groups*, VOLOKH CONSPIRACY (Sept. 19, 2019, 12:56 PM), <https://reason.com/volokh/2019/09/19/the-first-amendment-and-tax-exemptions-for-hate-groups/>.

¹³ I am here expressing a faith that once sparked or questioned, the human mind will explore and follow logic wherever it leads even against efforts to indoctrination.

hate group's exempt status.¹⁴ In such a case, the inaction theoretically offends every citizen's constitutional right to equal protection, even people who are not members of the targeted population. Even so, nobody can rationally argue that the unconstitutional burden is felt equally.¹⁵ Instead, it necessarily falls hardest on the hated population. This would be true even if the only differential impact was that members of the targeted people had a higher chance of suffering random violence because of stochastic terrorism. A court might still find that the harm is felt by all, with variations only as regards individual impact. Harm felt by all is sometimes conceived as a "generalized grievance," for which no citizen can prove the "particularized" injury necessary for standing.¹⁶ Thus, we cannot assume that the executive, accustomed to politics and compromise, will necessarily vindicate equal protection or that courts will concede taxpayer standing under the muddled caselaw.¹⁷

If nobody has standing, citizens have unenforceable constitutional rights. Linda Sugin calls those citizens "invisible taxpayers," a term meant to explain that taxpayers have constitutional but procedurally unenforceable rights, even against Congress's taxing power.¹⁸ Often those rights are unenforceable because of the Court's standing jurisprudence. The Court has never admitted that its standing rules leave citizens with mere constitutional hopes rather than enforceable rights in any instances. It rather typically

¹⁴ In *Allen v. Wright*, 468 U.S. 737, 739–40 (1984), African American taxpayers complained that the Internal Revenue Service insufficiently enforced its rules denying tax exemption to private schools practicing racial discrimination.

¹⁵ The direct impetus for this essay are judicial holdings that government's maintenance of confederate monuments and statues offend all taxpayers equally and therefore no single taxpayer has sufficient "particularized grievance" for standing. See *NAACP v. Hunt*, 891 F.2d 1555, 1562 (11th Cir. 1990) (Alabama's display of confederate flag offended citizens of all races equally); *Coleman v. Miller*, 117 F.3d 527, 529–30 (11th Cir. 1997) (Georgia's display of confederate flag offended citizens of all races equally).

¹⁶ *Allen*, 468 U.S. at 751.

¹⁷ For a fascinating account of the political back and forth influencing government's litigation posture in *Bob Jones University*, see Olatunde C. Johnson, *The Story of Bob Jones University v. United States: Race, Religion, and Congress' Extraordinary Acquiescence*, in *STATUTORY INTERPRETATION STORIES* 127 (William Eskridge et al. eds., 2011).

¹⁸ See generally Linda Sugin, *Invisible Taxpayers*, 69 *TAX L. REV.* 617 (2016).

asserts instead that a constitutional rule is enforceable, just not by the particular plaintiff before the court.

The loophole regarding denying exemption for hate groups is that the government may not assert the right to deny exemption, and yet nobody else will have standing to challenge the inaction. This Essay, therefore, sets out three bases for standing. The first, *Flast* standing, is derived from *Flast v. Cohen*, a 1968 U.S. Supreme Court ruling that taxpayers may challenge the government's exercise of taxing and spending power in violation of the First Amendment.¹⁹ *Flast* standing meant that taxpayers could challenge an exercise of taxing and spending power in violation of an explicit limitation on that power. The Court confirmed as much in *Arizona Christian School v. Winn*, where it stated that a tax expenditure—in that case a tax credit available to donors to religious institutions—was not an exercise of taxing or spending power subject to explicit constitutional limitation.²⁰ The Court simply concluded that a tax credit is not a subsidy but a mere decision not to tax. This justification is false to mathematical certainty, of course, and contradicts forty years of unquestioned tax and constitutional law.²¹ The Court's reliance on that absurdity at least confirms that the Constitution limits the government's taxing and spending power. Otherwise, it would not have redefined tax expenditures as something other than spending or subsidy.

Still, scholars reacted with legitimate shock that Congress could immunize itself via standing against a challenge to the indirect subsidy of religion or other constitutional violations. But *Winn* need not be interpreted that broadly. *Winn* is, instead, a substantive decision disguised as a decision on whether the right taxpayer complained. Ultimately it can only be explained as a determination that the tax credit at issue did not “establish” religion because it applied broadly to all charitable donors.

Winn is more an extension of *Walz v. Tax Commission of New York*²² than a repudiation of *Flast* standing. In *Walz*, the Court upheld the government's constitutional authority to extend generally applicable

¹⁹ *Flast v. Cohen*, 392 U.S. 83, 101 (1968).

²⁰ *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 138–46 (2011).

²¹ *Id.* at 147–69 (Kagan, J., dissenting).

²² *Walz v. Tax Comm'n of N.Y.C.*, 397 U.S. 664 (1970).

charitable tax exemptions to churches.²³ The Court justified its holding by a “lesser of two evils” logic. By taxing churches, the government could prohibit the free exercise of religion because it would mean government regulation of churches via the tax code.²⁴ By exempting churches, the government subsidizes and therefore establishes religion via the tax code.²⁵ Faced with an irreconcilable conflict, the Court allowed the government to determine which approach—taxation or exemption—caused the least constitutional harm.²⁶ *Winn* extended *Walz* without acknowledging that no such irreconcilable conflict existed when government grants an individual credit for contributions to organized worship. Individual tax credits for donations to churches cannot be justified by the lesser of two evils logic because there is no irreconcilable conflict. By denying an individual credit, the state would not have invariably prohibited or regulated churches. Thus, the Court’s approval of individual tax credits in support of churches could not have been made as a substantive matter without admitting that it was allowing the government to subsidize churches because doing so is the lesser of two evils. By relying on standing, the Court achieved that result without addressing the underlying substance.²⁷ This is the only possible explanation for the Court’s insistence that *Flast* is still good law while adopting the wholly discredited notion that tax credits for donations to churches are economically distinguishable from direct appropriations.

The second basis, *Flast-Bob Jones* standing, is simply *Flast* applied to tax exemption for racially discriminatory educational organizations. This standing doctrine has its roots in *Brown v. Board of Education*.²⁸ After *Brown*, white citizens established tax-exempt “segregation academies” further assisted by state subsidies that paid for books and the like. *Bob Jones*

²³ *Id.* at 679–80.

²⁴ *Id.* at 667–72.

²⁵ *Id.*

²⁶ *Id.* at 679–80.

²⁷ Although *Winn* was decided long before laws condemning the government for denying generally available benefits to religion, the Court might have simply decided that granting tax benefits to all donors except those who donate to religion was unconstitutional religious discrimination. See *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819 (1995).

²⁸ *Brown v. Board of Educ. of Topeka*, 347 U.S. 483 (1954).

University v. United States, decided nearly forty years after *Brown*, represented the triumph of standing for African American taxpayers complaining that the government subsidized unequal protection by granting federal tax exemption and state-funded books to segregation academies.²⁹ The Supreme Court and other courts before *Bob Jones* agreed, often without even mentioning standing.

The unexplained certainty with which courts ceded *Flast-Bob Jones* standing is both a strength and a weakness. Without an articulated analytical foundation, *Flast-Bob Jones* standing is vulnerable to the argument that it was merely expedient, as courts aggressively responded to southern states' efforts at interposition and nullification. The rather blatant efforts to subsidize "segregation academies" challenged *Brown* and the judiciary's constitutional authority. It is easily conceivable that courts aggressively ignored or assumed standing to vindicate judicial authority. On the other hand, the number of courts that assumed standing without mention or explanation makes it just as likely that courts thought standing so obvious as to belie any need for analysis.

Just as *Winn* apparently erodes *Flast* standing, *Allen v. Wright* erodes *Flast-Bob Jones* standing.³⁰ *Allen* denied standing to a group of African American taxpayers alleging that the government's enforcement of *Bob Jones* was constitutionally insufficient.³¹ But that case, too, might be explained as a substantive ruling disguised as one about standing. *Allen* involved efforts to invoke judicial supervision of very detailed and ongoing legislative and executive branch enforcement deliberations undertaken in response to *Bob Jones*'s demand that exemption be denied to discriminatory educational institutions.³² Neither side challenged *Brown*. The plaintiffs simply disagreed with the manner and speed with which the executive and legislative branches enforced *Bob Jones*'s denial of tax exemption to

²⁹ In *Norwood v. Harrison*, 413 U.S. 455 (1973), the U.S. Supreme Court enjoined Mississippi's "textbook lending program" through which the state allowed racially discriminatory private schools free use of books.

³⁰ See *Allen v. Wright*, 468 U.S. 737 (1984).

³¹ *Id.* at 739–40.

³² *Id.* at 744–50.

segregation academies.³³ That enforcement was delayed, admittedly, by Congress's stated intention to legislate on the matter and its instructions to the U.S. Department of Treasury to await legislation.³⁴ Thus, *Allen* better stands for the proposition that courts will not easily be conscripted into serving as nationwide, long-term supervisors of ongoing executive and legislative efforts to comprehend and implement a constitutional requirement.

Standing is *sui generis*—focusing on a particular plaintiff's claim of constitutional harm and a particular defendant's responsibility for or contribution to that harm. A plaintiff that is not directly harmed by acts traceable to the defendant normally does not have standing. In *Allen*, taxpayers and defendant agreed that *Brown* and *Bob Jones* prohibit tax exemption to segregation academies but disagreed only about whether defendant contributed to that harm through its enforcement policies. The taxpayers sought to substitute a judicially supervised enforcement process, even before Congress or the executive had finally spoken on the issue. As such, the case could have been easily dismissed under a ripeness or political question analysis. It cannot possibly mean, though, that nobody could ever challenge the government's subsidization of groups advocating invidious discrimination or engaging in stochastic terrorism.

That both *Flast* and *Flast-Bob Jones* standing require us to discount flawed but unrepudiated Supreme Court rulings nevertheless proves the vulnerability of the two theories. There is enough *obiter dictum* in *Winn* and *Allen* to preclude a present-day court's unexplained assumption of standing in the routine manner before *Winn* and *Allen*.

Ultimately, these are just academic questions because there is consensus about two things: (1) the government may not tax and spend in violation of constitutional limitations and (2) the judiciary should vindicate taxpayers' rights when government does exactly that. The mechanism by which these truisms can be implemented is a matter of political will more than analytical difficulty. Congress could easily legislate, and courts could just as easily

³³ *Id.*

³⁴ *Id.*

administer citizen standing,³⁵ as has been done in more than twenty environmental statutes.³⁶ Congress could implement rules and procedures designed to address pragmatic concerns regarding a tidal wave of litigation by taxpayers in Hawaii, for example, to enjoin a West Virginia hate group's tax exemption. It might limit taxpayer standing to residents of the state where the organization maintains its headquarters or operates. It could also grant the IRS a right of intervention and, in appropriate cases, award attorney fees to curb harassing litigation. The most interested parties could present the issue, courts would not be inundated by unmanageable litigation, and the agency with the most expertise could protect against collusive, frivolous, or harassing litigation. Most importantly, the constitutional rights of otherwise "invisible taxpayers" would be vindicated.

³⁵ Professor Sugin, using *qui tam* actions as a model, suggested this approach eight years ago. Sugin, *supra* note 18, at 668–69.

³⁶ See Zygmunt J.B. Plater, *Facing a Time of Counter-Revolution—The Kepone Incident and a Review of First Principles*, 29 U. RICH. L. REV. 657, 701 & n.105 (1995).