Donation or Coercion?: Deductibility of Compulsory Tithes Under Section 170

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Introduction

The relationship between Church and State is fraught and precarious, as the government may neither inhibit nor sponsor the practice of religion.[1] One area in which this tension is particularly apparent is taxation. Religion and taxation are two issues central to the foundation of our country. The Constitution safeguards against religious discrimination and certain punitive tax practices, as necessitated by the civil rights violations which inspired the Founders to fight for independence.[2]

By regulation, churches are automatically deemed nonprofit organizations and are therefore exempt from paying taxes.[3] Plenty of scholars have explored arguments for and against religious tax exemption[4]—this Comment does not purport to build upon that body of scholarship. For years, the Internal Revenue Code has allowed individuals to take income tax deductions for charitable contributions to qualified nonprofits, including churches.[5] The Internal Revenue Service (I.R.S.) has stated that charitable contributions to qualified nonprofits are fully deductible so long as they are voluntary and given

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1 *See, e.g.*, Everson v. Bd. of Ed. of Ewing Twp., 330 U.S. 1, 18 (1947).

2 *See, e.g.*, Bailey v. Drexel Furniture Co., 259 U.S. 20, 37 (1922) (holding that taxes that are the functional equivalent of penalties exceed the scope of Congress's taxing power); Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 563-68 (2012) (reaffirming *Bailey*'s holding regarding distinction between taxes and regulatory penalties); Justin DuRivage & Claire Priest, *The Stamp Act and the Political Origins of American Legal and Economic Institutions*, 88 S. CAL. L. REV. 875, 875-76 (2015); Patrick N. Leduc, *Christianity and the Framers: The True Intent of the Establishment Clause*, 5 LIBERTY U. L. REV. 201, 222-23, 227 (2011).

3 *See* I.R.C. § 508(c)(1)(A).

4 *See, e.g.*, Christine Roemhildt Moore, Comment, *Religious Tax Exemption and the "Charitable Scrutiny" Test*, 15 REGENT U. L. REV. 295, 296 (2003).

5 *See, e.g.*, Vada Waters Lindsey, *The Charitable Contribution Deduction: A Historical Review and a Look to the Future*, 81 NEB. L. REV. 1056, 1061 (2003) (noting the charitable contribution deduction was first enacted in 1917).

without any expectation of receiving benefits in return.[6] This standard seems straightforward, but the I.R.S. has been inconsistent in its application.[7]

Churches often use the term "tithe" interchangeably with "donation," but the terms are not perfect synonyms. Although donations are voluntary contributions to charity, tithes are historically compulsory.[8] In general, churches in the United States do not strictly adhere to the traditional definition of tithe.[9] Some churches, however—including two of the largest religious organizations in the United States—require members to "donate" as a tenant of membership.[10] These payments are neither voluntary nor given without expectation of return benefits, but they are deductible as charitable contributions for income tax purposes.[11]

First, this Comment will outline the background information necessary to contextualize the issue. In Background Section I, this Comment will first discuss the history of tithing—starting with its biblical roots—and then briefly discuss the religious organizations that practice mandatory tithing or something similar. Background Section II will explain the tax treatment of charities and charitable giving in the United States. Background Section III will present an overview of the Religion Clauses of the First Amendment, including history and caselaw. The Analysis Sections of this Comment will explore the definitional and Constitutional problems that arise from the current tax treatment of mandatory tithes, as well as from the potential solutions. This Comment will conclude by proposing an alternative approach that could resolve these definitional and Constitutional problems without running afoul of the First Amendment.

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6 *See* I.R.S. Pub. 526 (Feb. 24, 2022).

7 *See* discussion *infra* Background Section II.B.

8 *See* Andrew Lewis, *Tithe Personal and Praedial*, 42 J. LEGAL HIST. 123, 124-25 (2021).

9 *See* Russell N. James III & Keely S. Jones, *Tithing and Religious Charitable Giving in America*, 43 APPLIED ECONS. 2441, 2442 (2011) (indicating it is common for churches to regard any contribution to the church as a tithe).

10 *See* discussion *infra* Background Section I.B.

11 *See id.*

BACKGROUND

I. TITHING

A. *Biblical and Historical Roots of Tithing*

Tithing is the religious tradition of giving ten percent of one's income to the church, a practice rooted in the Old Testament.[12] The first Biblical reference to tithing occurs in Genesis 14:20, wherein Abraham gave the priest Melchizedek a tenth of his spoils following a victory on the battlefield.[13] Mosaic Law codified the practice of tithing, making it legal and binding upon Israel.[14] The Christian church adopted obligatory tithing in England as early as the 6th century.[15] By the 8th century, European secular law enforced tithes as a form of taxation.[16] Starting with the French Revolution, tithes were suppressed in most countries because of abuses and distrust of the church.[17]

In colonial America, tithes or religious taxes were sometimes mandated to support the clergy.[18] Most of the colonies had some form of established religion during the colonial period.[19] Compulsory church taxes instituted in the Massachusetts Bay Colony remained a feature of Massachusetts's taxation into the early nineteenth century.[20] Likewise, the Virginia Colony imposed a similar tax in 1629,

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12 *See* J. Edward Ketz, *Tithing and Income Measurement*, 11 ACCT. HISTORIANS J. 129, 129-31 (1984).

13 *See* James & Jones, *supra* note 9, at 2441.

14 R.T. KENDALL, TITHING: A CALL TO SERIOUS BIBLICAL GIVING 51 (Zondervan Publ'g House, 1983) (1982).

15 *Tithe*, ENCYCLOPEDIA BRITANNICA (Apr. 27, 2020), https://www.britannica.com/topic/tithe.

16 *Id.*

17 Gemma Betros, *The French Revolution and the Catholic Church*, HIST. TODAY (Dec. 2010), https://www.historytoday.com/archive/french-revolution-and-catholic-church.

18 D.B. ROBERTSON, SHOULD CHURCHES BE TAXED? 44-45 (1968).

19 *Id.* at 51. "Establishment of a religion can be achieved in several ways. The church and state can be one; the church may control the state or the state may control the church; or the relationship may take one of several possible forms of a working arrangement between the two bodies. Under all of these arrangements the church typically has a place in the state's budget, and church law usually governs such matters as baptism, marriage, divorce and separation, at least for its members and sometimes for the entire body politic." Sch. Dist. of Abington v. Schempp, 374 U.S. 203, 227 (1963).

20 *See* ROBERTSON, *supra* note 18, at 45.

enforceable by penalties.[21] Most colonies disestablished immediately after the conclusion of the Revolutionary War, with state legislatures adopting constitutional provisions that provided for religious freedom.[22] With the end of established religion in the colonies came the end of providing direct tax aid to churches.[23]

Today, tithing is a common practice amongst a wide array of denominations and religions. While "tithe" is often used interchangeably with "donation," the practice is compulsory within certain churches.[24]

B. *Religious Organizations with Mandatory Tithes or Similar "Donation" Structures*

Several religious organizations in the United States use mandatory tithes or similarly fixed donation structures to raise funds.[25] Many Orthodox Jewish communities observe the obligation of *ma'aser kesafim* ("a tenth of the money").[26] In these communities, it is considered ideal for individuals to set aside ten to twenty percent of their income to meet religious-giving obligations.[27] Muslims have a charity obligation similar to a tithe under the Third Pillar of Islam, or *zakat*.[28] All believers are required to donate a percentage of their wealth—usually two-and-a-half percent—"as an act both of worship or thanksgiving to God and of service to the community."[29] The practice of almsgiving under *zakat* is not regarded as voluntary, because it is "owed, by those who have received their wealth as a trust from God's bounty, to the poor."[30]

Members of the Church of Jesus Christ of Latter-Day Saints (LDS Church), Mormons, are expected to contribute ten percent of

21 *Id.* at 47.

22 *See* John K. Wilson, *Religion Under the State Constitutions 1776-1800*, 32 J. CHURCH & STATE 753, 755, 760 (1990).

23 *Id.* at 754.

24 *See Tithe*, *supra* note 15.

25 *Id.*

26 SAMUEL D. BRUNSON, GOD AND THE IRS: ACCOMMODATING RELIGIOUS PRACTICE IN UNITED STATES TAX LAW 133 (2018).

27 *Id.* at 134.

28 *Id.*

29 JOHN L. ESPOSITO, ISLAM: THE STRAIGHT PATH 109 (4th ed. 2011).

30 *Id.* at 110.

their income to the Church each year.[31] Although the LDS Church publicly characterizes these tithes as optional, one's status as a "full tithepayer[ ]" is an important consideration in determining whether he is worthy of temple access.[32] Seventh-Day Adventists are also required to give ten percent of their income.[33] The Seventh-Day Adventist Church differentiates between tithes, which are mandatory, and offerings, which are discretionary.[34] Adherents of Seventh-Day Adventism believe that the Church's tithing plan is "God ordained," and therefore constitutes both a "moral duty as well as [an] . . . obligation."[35]

The Church of Scientology does not characterize its funding structure as one based on tithes, but the functionality is the same.[36] Instead of mandating tithes, the Church charges a "fixed donation" for members to access services called "auditing" and "training."[37] The costs of these services are prescribed in set schedules, depending on session length and "level of sophistication."[38] The payment structure is based on a Scientology-specific principle called "the doctrine of exchange," under which members must pay something if they receive something.[39] Members are expected to donate via auditing or training services to advance within the Church.[40]

For those whose religion requires donations, these donations are "divinely mandated, and thus are not to be taken lightly."[41] Perhaps

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31 Jon Swaine, Douglas MacMillan, & Michelle Boorstein, *Mormon Church Has Misled Members on $100 Billion Tax-Exempt Investment Fund, Whistleblower Alleges*, WASH. POST (Dec. 17, 2019), https://www.washingtonpost.com/investigations/mormon-church-has-misled-members-on-100-billion-tax-exempt-investment-fund-whistleblower-alleges/2019/12/16/e3619bd2-2004-11ea-86f3-3b5019d451db_story.html.

32 *See* Edward L. Kimball, *The History of LDS Temple Admission Standards*, J. MORMON HIST. 135, 162-63 (1998).

33 *What Adventists Believe About Biblical Stewardship*, SEVENTH-DAY ADVENTISTS CHURCH, https://www.adventist.org/stewardship/#tithing (last visited Sept. 3, 2022).

34 *See id.* ("Offering is anything you choose to give beyond your tithe.").

35 Evan Carl Edward Jacobs, *"Giving God His Due?" Understanding Tithing and Its Function Within the Seventh-Day Adventist Church*, 38 ANTHROPOLOGY S. AFR. 235, 239, 241 (2015).

36 *How Are Churches of Scientology Supported Financially?*, SCIENTOLOGY, https://www.scientology.org/faq/church-funding/church-funding.html (last visited Sept. 3, 2022).

37 *See* Hernandez v. Comm'r, 490 U.S. 680, 685 (1989).

38 *See id.*

39 Graham v. Comm'r, 83 T.C. 575, 577-78 (1984).

40 *See Hernandez*, 490 U.S. at 685; *How Much Might a Scientologist Donate Before Achieving the State of Clear?*, SCIENTOLOGY, https://www.scientology.org/faq/church-funding/how-much-for-state-of-clear.html (last visited Sept. 3, 2022).

41 BRUNSON, *supra* note 26, at 133; *see also* KENDALL, *supra* note 14, at 68 ("The law of Moses made tithing 'legal.' This in itself is a fairly strong hint how seriously God takes tithing.").

unsurprisingly then, there is strong indication that these mandated donations "enjoy a relatively high level of compliance."[42]

II. TAX EXEMPTION

A. *Regulation of Charities and Charitable Giving in the United States*

The majority of nonprofit organizations that qualify for exempt status are classified under Section 501(c) of the Internal Revenue Code.[43] Nonprofit organizations are not automatically tax exempt. An organization seeking recognition of its exempt status is required to file an application with the I.R.S.[44] Churches, however, are not required to apply for tax-exempt status to be treated or recognized as Section 501(c)(3) organizations.[45] Although a church must satisfy the requirements delineated in Section 501(c)(3) to be tax exempt, it is exempt from application and information reporting obligations.[46] The United States federal government exempts religious organizations in particular from taxation because they are considered "beneficial and stabilizing influences in community life," and such exemptions are "useful, desirable, and in the public interest."[47]

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42 BRUNSON, *supra* note 26, at 133; *see also* James & Jones, *supra* note 9, at 2442 ("Religious charitable giving is by far the largest and most widespread component of the over 188 billion dollars in annual donations made by individuals, exceeding all other forms of individual charitable giving combined.").

43 I.R.S. Pub. 5331 (2018).

44 I.R.C. § 6104(a)(1)(A).

45 I.R.C. § 508(c)(1)(A).

46 I.R.C. § 6033(3)(a)(ii). Treasury Regulations describe the "organizational and operational tests" to qualify under § 501(c)(3). Treas. Reg. § 1.501(c)(3)-1 (2017). The organizational test is satisfied if the organization's founding documents (1) limit its purposes to exempt purposes and (2) do not empower the organization to engage in activities that are not in furtherance of its charitable purpose. *Id.* The operational test contains three elements, all of which must be present for an organization to qualify under § 501(c)(3). *Id.*

47 Walz v. Tax Comm'n of City of N.Y., 397 U.S. 664, 673 (1970). Former United States Representative Robert Drinan identified three additional justifications: "1. Tax exemption for churches and related institutions has always existed in American law; in fact, it can be traced back to Constantine or even to the Talmud, according to which rabbis were given certain tax exemptions. 2. Churches by means of the educational programs which they sponsor participate in the work of the state and thereby relieve it of some of its burdens. 3. No court decision in American jurisprudence has ever ruled that tax exemption to religious groups is a discrimination against nonbelievers." ROBERT F. DRINAN, RELIGION, THE COURTS, AND PUBLIC POLICY 9 (1963). Some believe that the tax exemption of churches "is probably as ancient as taxation

The United States government encourages charity through application of the Internal Revenue Code.[48] In the United States, certain taxpayers are allowed to take a tax deduction for donations to 501(c)(3) organizations.[49] These deductions reduce the taxpayer's tax liability by a percentage of the donation.[50] Functionally, this means that donors do not bear the full cost of their qualified donations.[51] If a donation of $100, for example, reduces a taxpayer's burden by $25, then the taxpayer has effectively paid only $75 to incur the benefit of a $100 donation.[52] The recipient organization receives the donor's $100 tax-free.

Section 170 governs the deductibility of charitable contributions.[53] A charitable contribution is "a donation or gift to, or for the use of, a qualified organization."[54] Given that churches are automatically considered tax exempt, they are considered "qualified organizations" eligible to receive tax-exempt donations.[55] Donations to churches are deductible up to fifty percent of the taxpayer's adjusted gross income for the year.[56] A taxpayer may carry forward unused "fifty percent deductions" for up to five succeeding tax years.[57]

Not every payment to a charity constitutes a charitable contribution under the provisions of the Internal Revenue Code.[58] Modern tax cases have assessed the deductibility of charitable donations using the *quid pro quo* test.[59] The I.R.S. has adopted this framework, and has issued regulations stating that a donation must be (1) voluntary and (2) made without getting or expecting to get anything of equal value in return.[60] A payment to a charity cannot be deducted if the

itself." *See* John W. Whitehead, *Tax Exemption and Churches: A Historical and Constitutional Analysis*, 22 CUMBERLAND L. REV. 521, 524 (1992).

48 BRUNSON, *supra* note 26, at 118.

49 I.R.C. § 170(a)(1).

50 BRUNSON, *supra* note 26, at 119.

51 *Id.*

52 *Id.*

53 I.R.C. § 170(a).

54 I.R.S. Pub. 526 (Feb. 24, 2022).

55 I.R.S. Pub. 1828 (2015).

56 I.R.C. § 170(b)(1)(A).

57 I.R.C. § 170(c).

58 *Id.*

59 *See* Neher v. Comm'r, 852 F.2d 848, 852 (6th Cir. 1988); *see also* discussion *infra* Background Section II.B.

60 I.R.S. Pub. 526 (Mar. 3, 2021).

taxpayer expects to receive a substantial benefit in return.[61] Not all return benefits negate charitable contributions, but the benefits must be substantial enough to warrant adverse tax treatment.[62]

Where a taxpayer receives a nominal benefit in return and the size of the payment is out of proportion to the benefit received, the taxpayer may claim a deduction for the difference between the payment and the market value of the benefit received, given the payment's "dual character" of a purchase and contribution.[63] The I.R.S. created a two-part test for determining when part of a "dual payment" is deductible.[64] First, the payment is deductible "only if and to the extent it exceeds the market value of the benefit received."[65] Second, the excess payment must be "made with the intention of making a gift."[66]

Tithes and other similar donations to churches, synagogues, and mosques are fully deductible.[67] Although churchgoing individuals likely experience intangible religious benefits from these donations, the procured benefits are considered to be too indirect to warrant treatment as return benefits in a *quid pro quo* analysis.[68] Admission to a religious service or ceremony, for example, is considered to be an intangible religious benefit.[69] However, certain tangible return benefits are also fully deductible.[70] Pew rents, for example, allow the donor the right to sit in a specific pew during church services.[71] This seating privilege is a tangible benefit, yet pew rents are deductible under Section 170.[72]

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61 *See* Singer Co. v. United States, 449 F.2d 413, 424 (Ct. Cl. 1971).

62 Ottawa Silica Co. v. United States, 699 F.2d 1124, 1131-32 (Fed. Cir. 1983).

63 *See, e.g.*, Rev. Rul. 67-246, 1967-2 C.B. 104 (stating the price of ticket to charity ball deductible to extent it exceeds market value); Rev. Rul. 68-432, 1968-2 C.B. 104 (noting possibility that payment to charitable organization may have "dual character").

64 *See* United States v. Am. Bar Endowment, 477 U.S. 105, 117 (1986) (citing Rev. Rul. 67-246, 1967-2 C.B. 104).

65 Rev. Rul. 67-246 1967-2 C.B. 104.

66 *Id.*

67 BRUNSON, *supra* note 26, at 122.

68 *Id.* An intangible religious benefit is defined as "any intangible religious benefit which is provided by an organization organized exclusively for religious purposes and which generally is not sold in a commercial transaction outside the donative context." I.R.C. § 170(f)(8)(B)(iii).

69 John R. Valentine, *Religious Organizations,* Quid Pro Quo *Contributions, and Intangible Religious Benefits*, 16 TAX'N EXEMPTS 275, 279 (2005).

70 Rev. Rul. 70-47, 1970-1 C.B. 49.

71 *See* Carl Zollman, *Pew Rights in the American Law*, 25 YALE L.J. 467, 467-68 (1916); BRUNSON, *supra* note 26, at 123.

72 Rev. Rul. 70-47, 1970-1 C.B. 49.

B. *A Brief Exploration of the Relevant Caselaw*

The case of *Commissioner of Internal Revenue v. Duberstein* was a critical starting point in developing tests to determine whether a payment qualifies as a charitable contribution for purposes of deductibility.[73] Although *Duberstein* did not address the interpretation of Section 170, it did address the question of when the receipt of property qualifies as a gift excludable from taxable income.[74] In *Duberstein*, the Court concluded that a gift "proceeds from a detached and disinterested generosity, . . . out of affection, respect, admiration, charity or like impulses."[75] The Court further determined that "the most critical consideration" in determining whether a payment is a gift "is the 'intention with which payment, however voluntary, has been made.'"[76]

In *DeJong v. Commissioner of Internal Revenue,* the Ninth Circuit applied the holding in *Duberstein* to charitable gifts under Section 170.[77] In *DeJong*, a couple deducted $1,075 in payments to their children's school, even though $400 of that was attributable to tuition.[78] The Commissioner reduced the couple's deduction by $400 for that reason.[79] The Tax Court sustained the Commissioner's determination regarding the petitioners' claimed deduction, stating that the payments at issue "were not voluntary and gratuitous contributions."[80] The Ninth Circuit Court of Appeals agreed there was sufficient evidence that donative intent was lacking, given that the $400 tuition payment was not made with a "detached and disinterested generosity."[81]

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73 *See* Comm'r v. Duberstein, 363 U.S. 278, 279-80, 284 (1960); Douglas A. Kahn & Jeffrey H. Kahn, *"Gifts, Gafts, and Gefts"—The Income Tax Definition and Treatment of Private and Charitable "Gifts" and a Principled Policy Justification for the Exclusion of Gifts from Income,* 78 NOTRE DAME L. REV. 441, 445 (2003) (describing *Duberstein* as a "landmark case").

74 *Duberstein*, 363 U.S. at 279-80.

75 *Id.* at 285 (cleaned up).

76 *Id.* at 285-86 (Brandeis, J., dissenting) (quoting Bogardus v. Comm'r, 302 U.S. 34, 45 (1937)).

77 DeJong v. Comm'r, 309 F.2d 373, 376-79 (9th Cir. 1962). In *DeJong*, the Ninth Circuit applied the principles of *Duberstein* to a case regarding Section 170 without explaining that Section 102 was at issue in *Duberstein*. Section 102 of the Internal Revenue Code pertains to gifts, while Section 170 pertains to charitable giving. *Compare* I.R.C. § 170 *with* I.R.C. § 102.

78 *DeJong*, 309 F.2d at 374-75.

79 *Id.*

80 DeJong v. Comm'r, 36 T.C. 896, 899-900 (1961).

81 *See DeJong*, 309 F.2d at 379 (internal quotation marks omitted).

Courts eventually moved away from the subjective principles of *Duberstein* in favor of an objective *quid pro quo* test.[82] Under this test, courts "look to see whether the payment was a voluntary transfer made without consideration, or a payment made with the expectation of receiving a commensurate benefit in return."[83] Where contributions are made with the expectation of receiving a benefit and such benefit is received, the payment is not deductible as a charitable contribution—it is a *quid pro quo*.[84]

Although the I.R.S. tended to be generous in its treatment of religious *quid pro quos*,[85] it was suspicious of return benefits in the context of certain Scientology donations.[86] In 1978, the I.R.S. passed a ruling that stated that fixed donations to the Church of Scientology were not charitable deductions under Section 170.[87] In 1989, a consolidated group of members of the Church of Scientology brought a case challenging the Commissioner's decisions regarding the deductibility of these fixed donations.[88] In *Hernandez v. Commissioner of Internal Revenue*, the petitioners sought to deduct "donations" for auditing and training on their income tax returns, but Respondent Commissioner found that the payments were non-deductible transactions.[89] The Supreme Court agreed with the Commissioner and the courts below, focusing on the *quid pro quo* nature of the payments in question.[90] The Court emphasized that "[t]he *sine qua non* of a charitable contribution is a transfer of money or property without adequate consideration."[91] In other words, the petitioners' payments were not charitable contributions because the petitioners received an identifiable benefit in exchange for money.[92] Justice O'Connor dissented, noting the inconsistency in the I.R.S.'s treatment of fixed payments as deductible contributions.[93] The I.R.S. later reversed the *Hernandez*

82 *See* Neher v. Comm'r, 852 F.2d 848, 852 (6th Cir. 1988).

83 *See id.*

84 *See id.*

85 *See* discussion *supra* Background Section II.A.

86 BRUNSON, *supra* note 26, at 123.

87 Rev. Rul. 78-189, 1978-1 C.B. 68.

88 *See* Hernandez v. Comm'r, 490 U.S. 680, 686 (1989).

89 *Id.* at 686-87.

90 *Id.* at 690-93.

91 *Id.* at 691 (quoting United States v. Am. Bar Endowment, 477 U.S. 105, 118 (1986)) (internal quotation marks omitted).

92 *Id.* at 691.

93 *Id.* at 704-10 (O'Connor, J., dissenting).

decision in 1993, granting Scientology tax-exempt status and reversing its 1978 ruling on fixed donations.[94]

Today, the main constraint on such contributions is determination of the deductible amount in light of a payment's "dual character."[95] Payments that are part purchase and part contribution are deductible to the extent that the amount contributed exceeds the value of the benefit received so long as the taxpayer made the payment with the "intention of making a gift."[96]

III. CONSTITUTIONAL BACKGROUND

The Constitution was intended to avert "the dangers of a union of Church and State," but it was not enough of a safeguard, at least in its original form. The First Amendment was thus enacted to "stand as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support or influence" religious practice.[97] The First Amendment, as applied to the states by the Fourteenth Amendment,[98] provides in part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[99] The first clause is known as the Establishment Clause, and the second is known as the Free Exercise Clause.[100] These two clauses—sometimes referred to as "the Religion Clauses"—represent the notion that "religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State."[101] The two Religion Clauses protect against two very different types of government encroachment upon religion.[102] The Establishment Clause is meant to protect against the evils of "sponsorship, financial support, and active involvement of the sovereign in religious activity."[103] The Free Exercise Clause, according to the Supreme Court,

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94 Rev. Rul. 93-73, 1993-2 C.B. 75.

95 *See Am. Bar Endowment*, 477 U.S. at 117-18; *see also* discussion *supra* Background Section II.A.

96 *See Am. Bar Endowment*, 477 U.S. at 117-18.

97 Engel v. Vitale, 370 U.S. 421, 429-30 (1962).

98 Murdock v. Pennsylvania, 319 U.S. 105, 108 (1943).

99 U.S. CONST. amend. I.

100 Cutter v. Wilkinson, 544 U.S. 709, 719 (2005).

101 Lee v. Weisman, 505 U.S. 577, 589 (1992).

102 *Engel*, 370 U.S. at 430.

103 Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 772 (1973) (quoting Walz v. Tax Comm'n of City of N.Y., 397 U.S. 664, 668-69 (1970)) (internal quotation marks omitted).

was intended to prevent the government from "suppress[ing] religious belief or practice."[104]

Although there is a substantial amount of overlap between the Religion Clauses, they are in fact "frequently in tension."[105] Neither of the Religion Clauses is "amenable to an absolutist reading"[106]—each of the clauses, "if expanded to a logical extreme, would tend to clash with the other."[107] The Supreme Court has noted that there is "room for play in the joints" between the two clauses.[108] In other words, there is room for legislation that is neither compelled by the Free Exercise Clause, nor prohibited by the Establishment Clause.[109] True neutrality occupies the precarious space between sponsorship and interference.[110]

A. *Free Exercise Clause*

The Free Exercise Clause of the First Amendment protects against government action that discriminates against religious belief.[111] The Founders believed that free exercise constituted "the right freely and peaceably to exercise one's religion"—essentially, the "freedom to engage in a variety of public religious actions . . . including religious worship, religious speech, religious assembly, religious publication, religious education, and more."[112] The Free Exercise Clause is implicated when government action, through coercion or compulsion, burdens religious expression.[113]

In modern times, the Supreme Court has essentially "reduced the Free Exercise Clause to a single principle of neutrality."[114] To satisfy

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104 *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 523 (1993).

105 Locke v. Davey, 540 U.S. 712, 718 (2004). One scholar summarized the source of this tension succinctly: "The prohibition against establishment seems to forbid government support for religion, but the guarantee of free exercise seems to compel the very same support." Dallin H. Oaks, *Separation, Accommodation and the Future of Church and State*, 35 DEPAUL L. REV. 1, 2 (1985).

106 BRUNSON, *supra* note 26, at 8.

107 *Walz*, 397 U.S. at 668-69.

108 *Id.* at 669.

109 Cutter v. Wilkinson, 544 U.S. 709, 719 (2005).

110 *Walz*, 397 U.S. at 669.

111 *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532 (1993).

112 JOHN WITTE, JR. & JOEL A. NICHOLS, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 46 (4th ed. 2016).

113 *See* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 450 (1988).

114 WITTE & NICHOLS, *supra* note 112, at 143.

the Free Exercise Clause, a regulation must be (1) neutral, and (2) generally applicable.[115] Under First Amendment jurisprudence, the free exercise of religion can be subservient to the government's interest, but only where there is a compelling reason for the infringement.[116] Otherwise, the government must accommodate religious freedom.[117]

The Free Exercise Clause does not compel the government to exempt churches or religious organizations from taxation.[118] But a tax provision which employs religious classifications or preferences and burdens religious affiliation would violate the Free Exercise Clause.[119] In *Hernandez*, the Supreme Court held denying a tax deduction for religious donations did not violate the Free Exercise Clause.[120] The Court further stated that even if the denial constituted a substantial burden on the ability to practice religion, such a burden could be justified by the "broad public interest in maintaining a sound tax system."[121]

B. *Establishment Clause*

The government may, to an extent, accommodate the free exercise of religion, but that "does not supersede the fundamental limitations imposed by the Establishment Clause."[122] In the landmark case *Everson v. Board of Education,* the Supreme Court aptly described the Establishment Clause:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs,

115 *Church of the Lukumi Babalu Aye*, 508 U.S. at 531.

116 BRUNSON, *supra* note 26, at 11.

117 *Id.* at 11-12.

118 *See* Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 18-19 (1989); *see also* Tony & Susan Alamo Found. v. Sec'y of Lab., 471 U.S. 290, 303 (1985).

119 *See Bullock*, 489 U.S. at 19-20.

120 Hernandez v. Comm'r, 490 U.S. 680, 699 (1989).

121 *Id.* (quoting U.S. v. Lee, 455 U.S. 252, 260 (1982)) (internal quotation marks omitted).

122 Lee v. Weisman, 505 U.S. 577, 587 (1992).

> for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State."[123]

The Establishment Clause, in simple terms, "guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which establishes a [state] religion or religious faith, or tends to do so."[124]

Many scholars believe that Establishment Clause jurisprudence is "famously chaotic."[125] The Supreme Court further contributed to this chaos with its recent decision in *Kennedy v. Bremerton School District,* which made waves in Establishment Clause jurisprudence by overturning the infamous *Lemon* test.[126] Prior to *Bremerton,* the first step in analyzing an Establishment Clause claim was to ask whether the challenged statute "facially differentiates" between religions.[127] If the statute did not facially differentiate between religions, the Court would apply the three-pronged test established in *Lemon v. Kurtzman*.[128] Under the *Lemon* test, a statute needed to (1) have a secular purpose; (2) neither advance nor inhibit religion in its primary effect; and (3) not foster "an excessive government entanglement with religion."[129] If a statute failed any prong of the *Lemon* test, it violated the

123 Everson v. Bd. of Ewing Twp., 330 U.S. 1, 15-16 (1947) (quoting Reynolds v. United States, 98 U.S. 145, 164 (1878)).

124 *Weisman*, 505 U.S. at 587 (cleaned up).

125 BRUNSON, *supra* note 26, at 15.

126 *See* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2427-28 (2022).

127 *See* Hernandez v. Comm'r, 490 U.S. 680, 695 (1989).

128 *See id.* While *Lemon* was not overruled until *Bremerton*, the Court insists that it "long ago abandoned *Lemon*." *See Bremerton*, 142 S. Ct at 2428. Even while supposedly abandoned by the Supreme Court, *Lemon* lived on in the lower courts. *See* Amanda Harmon Cooley, *The Persistence of Lemon,* 47 U. DAYTON L. REV. 411, 435-38 (2022); Danville Christian Acad., Inc. v. Beshear, 503 F. Supp. 3d 516, 528-29 (E.D. Ky. 2020) (noting that, in the Sixth Circuit, "[*Lemon*] is still the proper test for analyzing claims involving the Establishment Clause"); Irish 4 Reprod. Health v. U.S. Dep't of Health & Hum. Servs., 434 F. Supp. 3d 683, 709 (N.D. Ind. 2020) (noting that the Seventh Circuit continues to "faithfully apply" the *Lemon* test).

129 *Hernandez*, 142 U.S. at 696.

Establishment Clause.[130] For years, the Court was willing to ignore the suggested outcome of the *Lemon* test to reach its desired outcome;[131] the Court even referred to *Lemon* as "no more than [a] helpful signpost[ ]."[132] It therefore came as no surprise when the Court announced its new rule in *Bremerton*.[133]

In lieu of *Lemon*, courts will now apply the rule articulated by Justice Gorsuch in *Bremerton*.[134] The Establishment Clause must now be interpreted by "reference to historical practices and understandings."[135] The line drawn between "the permissible and the impermissible" must "accord with history and faithfully reflect the understanding of the Founding Fathers."[136] The analysis must center on "original meaning and history," which the Court urges, "has long represented the rule rather than some exception within the Court's Establishment Clause jurisprudence."[137] While it is still too soon to tell how the Court will apply *Bremerton*, it is useful to note Justice Kavanaugh's "overarching set of principles" in Establishment Clause cases,[138] which are based on "history, tradition, and precedent:"

> If the challenged government practice is not coercive *and* if it (i) is rooted in history and tradition; or (ii) treats religious people, organizations, speech, or activity equally to comparable secular people, organizations, speech, or activity; or (iii) represents a permissible legislative

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130 *See id.* at 613.

131 BRUNSON, *supra* note 26, at 15.

132 Hunt v. McNair, 413 U.S. 734, 741 (1973).

133 *See Bremerton*, 142 S. Ct. at 2427 ("[T]his Court long ago abandoned *Lemon* and its endorsement test offshoot.").

134 *Id.* at 2428.

135 *Id.* (cleaned up).

136 *Id.* (cleaned up).

137 *Id.* (cleaned up).

138 *Id.* at 2093 (Kavanaugh, J., concurring). Justice Kavanaugh predicted *Lemon*'s demise in his *American Legion v. American Humanist Association* concurrence. *See Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2093 (2019) (Kavanaugh, J., concurring). He further predicted the Court's eventual adoption of a history and tradition-based approach. *Id.* This article will proceed under the assumption that the Court's Establishment Clause analysis going forward will mirror the *American Legion* framework, as it is consistent with the Court's holding in *Kennedy*. *See* Charles J. Russo & William E. Thro, *Respect for Religious Expression is Indispensable in a Free and Diverse Republic: The Supreme Court Upholds Prayer by Public School Employees*, 400 EDUC. L. REP. 885, 898 (2022) (noting that *Bremerton* is consistent with Kavanaugh's approach in *American Legion*).

accommodation or exemption from a generally applicable law, then there ordinarily is no Establishment Clause violation.[139]

The Supreme Court has long accepted that exempting churches from tax obligations does not violate the Establishment Clause.[140] The Supreme Court has also held that denying a tax deduction for certain types of church donations does not violate the Establishment Clause.[141]

ANALYSIS

I. DEFINITIONAL PROBLEM WITH MANDATORY TITHES AS CHARITABLE CONTRIBUTIONS

As set forth above, charitable contributions must be (1) voluntary and (2) made without receiving or expecting to receive anything in return.[142] There has been much scholarly discussion of whether certain religious benefits constitute valid consideration in a bargained for exchange, but little to no discussion regarding the involuntary or even coercive nature of certain deductible religious donations. This Section will first address issues with the intangible spiritual benefits analysis, then consider the viability of arguments regarding donative intent.

A. *"Intangible Spiritual Benefits" and Quid Pro Quo*

A deduction for the full amount of a donation is allowed only where the donor receives no substantial benefit from the contribution.[143] If the donor receives a substantial benefit as a result of his contribution, he may deduct only the amount of the contribution less the value of the benefit received.[144] A common definition of "substantial benefit" is a benefit that is "greater than those [benefits] that inure to the general public."[145] In *Ottawa Silica Co. v. United States*,

139 *Am. Legion*, 139 S. Ct. at 2093 (Kavanaugh, J., concurring).

140 *See, e.g.*, Gibbons v. Dist. of Columbia, 116 U.S. 404, 408 (1886); Walz v. Tax Comm'n of City of N.Y., 397 U.S. 664, 680 (1970).

141 *See* Hernandez v. Comm'r, 490 U.S. 680, 700 (1989).

142 I.R.S. Pub. 526 (Feb. 24, 2022).

143 *See* Ottawa Silica Co. v. United States, 699 F.2d 1124, 1131-32 (Fed. Cir. 1983).

144 United States v. Am. Bar Endowment, 477 U.S. 105, 117 (1986).

145 *Ottawa Silica Co.*, 699 F.2d at 1132 (quoting Singer Co. v. United States, 449 F.2d 413, 423 (Ct. Cl. 1971)).

an increase in value of the taxpayer's non-contributed land was sufficiently substantial to constitute a *quid pro quo* for the taxpayer, thereby precluding a charitable deduction under Section 170.[146]

The I.R.S has ruled that fixed payments to churches, synagogues, or other similar religious organizations for pew rent, dues, or to attend certain services are all valid methods of making contributions to the church.[147] Therefore, such payments are deductible as charitable contributions under section 170 of the Internal Revenue Code.[148] This is the case even though these contributions appear to confer clear benefits on the donor.[149] Indeed, as Justice O'Connor observed in her *Hernandez* dissent, these types of fixed payments are "inherently reciprocal."[150]

In the context of a *quid pro quo* analysis, religious return benefits are "generally . . . not regarded as yielding private benefits to the donor," as these benefits are viewed as merely "incidental."[151] This has served as the justification for allowing fixed donations to be fully deductible, as the "primary beneficiaries are . . . the general public and members of the faith."[152]

If the *quid pro quo* analysis is the appropriate test when the return benefit is "religious benefits or access to religious services"—and *Hernandez* confirms this is the correct framework—then it is difficult to discern why such payments remain deductible.[153] The Tax Court previously noted that religious benefits do not have monetary value under Section 170,[154] but simple principles of economics suggest that, in the context of a bargain, the payment rendered in exchange is a fair indication of value.

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146 *Id.* at 1135.

147 Rev. Rul. 70-47, 1970-1 C.B. 49

148 Rev. Rul. 70-47, 1970-1 C.B. 49.

149 *See* Hernandez v. Comm'r, 490 U.S. 680, 709 (1989) (O'Connor, J., dissenting) (noting that "[i]n exchange for their payment of pew rents, Christian churchgoers receive particular seats during worship services . . . . Similarly, in some synagogues attendance at the worship services for Jewish High Holy Days is often predicated upon the purchase of a general admission ticket or a reserved seat ticket").

150 *Id.*

151 *IRS Official Explains New Examination-Education Program on Charitable Contributions to Tax-Exempt Organizations*, BNA DAILY REPORT FOR EXECUTIVES, Sept. 26, 1988, at J-3.

152 *Hernandez*, 490 U.S. at 708 (O'Connor, J., dissenting).

153 *See id.* at 701-02.

154 *See* Murphy v. Comm'r, 54 T.C. 249, 252 (1970).

B. *Coercion and Donative Intent*

If the receipt of intangible religious benefits cannot be used to dispute the validity of mandatory tithes, another option in the realm of definitional challenges is the "voluntariness" of the donation.[155] Cases challenging the deductibility of certain contributions rarely turn on the "voluntariness" of a given donation.[156]

Until the 1980s, the primary consideration in determining whether a payment was a contribution or gift was the payor's intention, or "donative intent."[157] The standard for donative intent, following the decisions in *Duberstein* and *DeJong,* was whether a payment arose out of a "detached and disinterested generosity."[158] This meant that a payment made without the correct mindset could never qualify for a charitable deduction.[159] When the Court moved to the *quid pro quo* standard, it lost sight of the importance of donative intent. The voluntary nature remains part of the definitional inquiry into whether a payment qualifies as a charitable contribution, but often, the decision hinges upon the benefits to be received.[160] By focusing on the voluntariness of a payment, the I.R.S. and the Court can avoid difficult and precarious case-by-case assessments of whether religious benefits are substantial enough to warrant charitable treatment—so long as a taxpayer makes a contribution voluntarily, it is deductible under Section 170.[161] Coerced payments such as mandatory tithes are made without the requisite donative intent and are therefore nondeductible personal expenditures.

C. *The Spirit of Section 170*

As mentioned above, the federal government encourages charitable giving through Section 170.[162] When the charitable deduction was

155 *See* I.R.S. Pub. 526 (Mar. 3, 2021).

156 *See, e.g.*, Bogardus v. Comm'r, 302 U.S. 34, 45 (1937). Note that the dissent discusses the voluntary nature of the action, despite no mention in the majority opinion.

157 *See* Comm'r v. Duberstein, 363 U.S. 278, 285-87 (1960); *see also* Neher v. Comm'r, 852 F.2d 848, 852 (6th Cir. 1988); *Bogardus*, 302 U.S. at 45 (Brandeis, J., dissenting) ("What controls is the intention with which payment, however voluntary, has been made.").

158 *See Duberstein*, 363 U.S. at 285-87 (internal citations omitted); DeJong v. Comm'r, 309 F.2d 373, 376-79 (9th Cir. 1962).

159 Connell v. Comm'r, 51 T.C.M. (CCH) 1657, 1660 (1986).

160 *See* I.R.S. Pub. 526 (Mar. 3, 2021).

161 *See Connell*, 51 T.C.M. (CCH) at 1660.

162 *See supra* Section II(A); BRUNSON, *supra* note 26, at 118.

first introduced on the Senate floor for review in 1917, Senator Henry Hollis of New Hampshire pronounced:

> After [the taxpayers] have done everything else they want to do, . . . if they have something left over, they will contribute it to a college or to the Red Cross or for some scientific purposes. Now, when . . . we impose these very heavy taxes on incomes, that will be the first place where the wealthy . . . will be tempted to economize, namely, in donations to charity.[163]

The Joint Committee on Taxation has since noted that "Congress believe[s] allowing a charitable deduction . . . stimulates charitable giving, thereby providing more funds for worthwhile nonprofit organizations."[164]

Although allowing a deduction for compulsory tithes may stimulate charitable giving in one sense, it may decrease charitable giving in another sense.[165] "The more financially secure [an individual] feels, the more is given to charity; . . . conversely, an increase in financial insecurity leads to additional declines in charitable giving."[166] The average U.S. donor gives roughly two percent of his *disposable* income to charity.[167] If an individual's church requires him to donate ten percent of his *gross* income, he may feel obligated to give beyond his means to satisfy his church obligations.[168] U.S. donors already prioritize religious giving over donations to other charitable causes.[169] An individual with little or no discretionary income may feel compelled to prioritize his tithing obligations to the church over other financial obligations, including food, debts, and other charitable giving.[170] Accordingly, allowing deductions for mandatory tithes is

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163 55 Cong. Rec. 6728 (1917) (statement of Sen. Henry Hollis).

164 STAFF OF J. COMM. ON TAX'N, 97TH CONG., GEN. EXPLANATION OF THE ECON. RECOVERY TAX ACT OF 1981 49 (Comm. Print 1981).

165 *See* Grace Soyon Lee, *Mitigating the Effects of an Economic Downturn on Charitable Contributions: Facing the Problem and Contemplating Solutions*, 22 CORNELL J.L. PUB. POL'Y 589, 594 (2013).

166 *Id.* (internal quotation marks omitted).

167 *How Much Is Given? By Whom? For What?*, CHARITY CHOICES, https://www.charitychoices.com/page/how-much-given-whom-what (last visited Sept. 8, 2022).

168 *See* BRUNSON, *supra* note 26, at 134.

169 *Generosity Reports*, IND. UNIV.'S LILLY FAM. SCH. OF PHILANTHROPY, https://generosityforlife.org/generosity-data/data-tools/generosity-reports/ (last visited Sept. 8, 2022).

170 *See* BRUNSON, *supra* note 26, at 134. *See also* Daniel L. Johnson, *The Law of Tithing*, ENSIGN, November 2006, at 35-36 (Mormon leader advocating for prioritizing tithing over other

unlikely to increase charitable giving to many of the "worthwhile non-profit organizations" Congress seeks to benefit in allowing the charitable deduction. This becomes especially problematic in light of recent controversies regarding how certain churches spend tithing money.[171]

The impact of allowing deductions for coerced donations may be limited, however, by certain provisions within the Tax Cuts and Jobs Act of 2017 (TCJA).[172] The charitable deduction is available only to taxpayers who choose to itemize their deductions rather than take the standard deduction.[173] The TCJA nearly doubled the standard deduction for taxpayers: it increased the standard deduction for individual filers from $6,500 to $12,000 and from $13,000 to $24,000 for married couples.[174] This means that unless the taxpayer has itemized deductions in excess of the increased standard deduction amount, he will not itemize and therefore will not receive the tax benefit of his donation.[175] Accordingly, only the wealthiest taxpayers are able to take deductions for their charitable contributions.[176] This change reduced the number of itemizers from 46.5 million in 2017 to approximately 18 million in 2018.[177]

Many scholars projected that the TCJA would have a negative impact on the rate of charitable giving.[178] Regardless of whether the

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financial obligations, including those arising from medical emergencies); Mette Hanson Law, *Tithing Comes First*, ENSIGN, July 1985, at 20-21 (explaining importance of prioritizing tithing over "rent, car payment, taxes, and utility payments"); Lynn G. Robbins, *Tithing—a Commandment Even for the Destitute*, ENSIGN, July 2010, at 70 (explaining why even "destitute" hurricane victims in Honduras and Nicaragua should tithe). "Ensign" was an official magazine published by the Church of Jesus Christ of Latter-Day Saints. *See Changes Are Coming to Church Magazines in 2021*, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS: NEWSROOM (Aug. 14, 2020), https://newsroom.churchofjesuschrist.org/article/church-magazines-2021.

171 *See, e.g.*, Swaine, MacMillan, & Boorstein, *supra* note 31.

172 *See* Tax Cuts and Jobs Act of 2017, Pub. L. 115-97, 131 Stat. 2054, 2069 (2017).

173 *See id.* at 2070, 2088.

174 Erica York & Alex Muresianu, *The Tax Cuts and Jobs Act Simplified the Tax Filing Process for Millions of Households*, TAX. FOUND. (Aug. 7, 2018), https://taxfoundation.org/the-tax-cuts-and-jobs-act-simplified-the-tax-filing-process-for-millions-of-americans/.

175 BRUNSON, *supra* note 26, at 119-20.

176 *See Policy Basics: Tax Exemptions, Deductions, and Credits*, CTR. ON BUDGET & POL'Y POL. (Nov. 24, 2020), https://www.cbpp.org/research/federal-tax/tax-exemptions-deductions-and-credits.

177 York & Muresianu, *supra* note 174.

178 *See, e.g.*, Joey Bloodworth, *Charity for All: A Modern Call for a Renewed Commitment to Charitable Giving*, 93 S. CAL. L. REV. 273, 292 (2020); Stephen J. Pieklik, Nathan S. Catanese, & Cory C. Omasta, *Deducting Success: Congressional Policy Goals and the Tax Cuts and Jobs Act of 2017*, 16 PITT. TAX REV. 1, 18-19 (2018); Ellen P. Aprill, *Examining the Landscape of § 501(c)(4) Social Welfare Organizations*, N.Y.U. J. LEGIS. & PUB. POL'Y 345, 406 (2018).

TCJA negatively impacted charitable giving rates, allowing deductions for mandatory tithes has a very small impact on charitable giving compared to the impact of the "largest overhaul of the Internal Revenue Code in nearly half a century."[179] In this context, why should one be concerned about allowing a deduction for coerced donations? First, studies have shown that the TCJA did not actually decrease charitable giving to the extent expected.[180] Further, even if the TCJA *had* decreased charitable giving, the relevant provisions expire at the end of 2025 unless Congress votes to extend the TCJA.[181] There is little reason, therefore, to dismiss the impact of allowing charitable deductions for mandatory tithes.

II. CONSTITUTIONAL PROBLEM WITH CURRENT TREATMENT OF MANDATORY TITHES

In addition to the definitional problems outlined in the previous section, the current treatment of mandatory tithes under Section 170 poses a constitutional problem under the Establishment Clause. The problem is best illustrated by comparing the tax treatment of mandatory tithes to that of payments to secular nonprofits. Consider for comparison a hypothetical nonprofit that provides access to membership benefits upon donation, such as an annual donation to a museum or zoo that confers passes to events. The median household income in the United States in 2020 was $67,521.[182] A family belonging to one of the religions described in Background Section I making that amount annually would be expected to tithe ten percent, or $6,750.[183] In exchange for that payment, the family would receive certain benefits: maybe access to certain temple events or seating.[184] Under current regulations, that entire amount would be deductible—

179 Delia Scoville, *Taking Credit: How Congress is Reshaping Renewable Energy Investment Incentives*, 47 ECOLOGY L.Q. 743, 750 (2020).

180 *See* Scott A. Hodge, *Latest Data Shows That the Tax Cuts and Jobs Act Did Not Dampen Charitable Giving*, TAX FOUND. (June 22, 2020), https://taxfoundation.org/tax-cuts-jobs-act-affect-charitable-giving/.

181 I.R.C. § 63(c)(7).

182 Emily A. Shrider et al., *Income and Poverty in the United States: 2020*, U.S. CENSUS BUREAU (Sept. 14, 2021), https://www.census.gov/library/publications/2021/demo/p60-273.html.

183 *See* discussion *supra* Background Section I.B.

184 *See* discussion *supra* Background Section II.A.

regardless of benefits conferred.[185] By contrast, consider a similar donation to the hypothetical secular nonprofit described above: a deduction would be allowable only to the extent that the donation amount exceeds the fair market value of the goods or services received in return.[186]

Ten percent of gross income is already a large amount to donate—especially considering the average charitable donation for this income level is roughly $3,300.[187] The effect of the current charitable deduction regulations is such that the average household, when faced with a tithing obligation, will not have the resources to make additional charitable contributions. Even the least savvy taxpayer is going to prioritize the donation that is fully deductible to him on his income tax return.

Under the Establishment Clause, the federal government is prohibited from favoring religion over non-religion.[188] As discussed above in Background Section III, the test developed by the Supreme Court in *Lemon v. Kurtzman* is no longer used to evaluate the constitutional viability of a given law under the Establishment Clause.[189] Previously, under the *Lemon* test, a law could only be sustained under the Establishment Clause if (1) it had a secular legislative purpose; (2) its principal or primary effect did not advance religion; and (3) it did not foster "excessive government entanglement with religion."[190] Now, post-*Bremerton*, the courts must conduct "[a]n analysis focused on original meaning and history," to achieve a result that "faithfully reflect[s] the understanding of the Founding Fathers."[191] Per Justice Kavanaugh's *American Legion* framework, a practice does not violate the Establishment Clause if (1) it is "rooted in history and tradition;" (2) "treats religious people, organizations, speech, or activity equally

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185 Assuming other requirements for deductibility are met. *See* discussion *supra* Background Section II regarding deductibility requirements.

186 Treas. Reg. § 1.170A-1(h)(1) (2020).

187 *See* Taylor Schulte, *Charitable Giving Statistics for 2022*, DEFINE FIN. (Jan. 3, 2022), https://www.definefinancial.com/blog/charitable-giving-statistics/. This assumption is based on an adjusted gross income (AGI) calculation made using the maximum student loan interest deduction ($2,500) and average retirement contribution percentage in 2020. *See also* I.R.C. § 221(b)(1); Emily Brandon, *How Much Should You Contribute to a 401(k)?*, U.S. NEWS (Dec. 7, 2021, 11:09 AM), https://money.usnews.com/money/retirement/401ks/articles/how-much-should-you-contribute-to-a-401-k.

188 *See* U.S. CONST. amend. I; Wallace v. Jaffree, 472 U.S. 38, 60 (1981).

189 *See* discussion *supra* Background Section III.

190 Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

191 Kennedy v. Bremerton, 142 S. Ct. 2407, 2428 (2022).

to comparable secular people, organizations, speech, or activity;" or (3) "represents a permissible legislative accommodation or exemption from a generally applicable law."[192]

Regardless of which formulation of the Establishment Clause test courts apply, the constitutional problem with the treatment of compulsory tithes remains apparent. Under the old *Lemon* test, the treatment is improper given that the Establishment Clause "forbids not only laws that have the purpose or primary effect of advancing . . . religion, but also laws that would appear to a reasonable observer to be endorsing . . . religion."[193] Under *Bremerton* and *American Legion*, the current treatment of compulsory tithes is very clearly at odds with the tax treatment of similar fees paid to secular non-profits.[194] Given the lengthy relationship between tax and religion in this country, it is highly unlikely that a statutory provision like Section 170 would be invalidated on Establishment Clause grounds—especially considering the Court's current trend towards blurring the lines between Church and state.[195] Accordingly, the treatment of mandatory tithes under Section 170 would need to be addressed using a different theory—ideally, the definitional deficiencies addressed above.[196]

III. CONSTITUTIONAL CONSIDERATIONS IN ADDRESSING TAX TREATMENT OF MANDATORY TITHES

In addressing the definitional and constitutional problems outlined above, the government may encounter further significant constitutional obstacles.[197] When religion and federal income tax overlap, one is inevitably forced to navigate the tricky intersection of the Free Exercise Clause and the Establishment Clause.[198]

> Extensive contact between modern tax systems and religious institutions is unavoidable. Whether religious entities and actors are taxed or

192 Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2093 (2019) (Kavanaugh, J., concurring).

193 Scott C. Idleman, *Religious Premises, Legislative Judgments, and the Establishment Clause*, 12 CORNELL J.L. & PUB. POL'Y 1, 24 (2002) (emphasis omitted).

194 *See* discussion *supra* Analysis Section II.

195 *See Bremerton*, 142 S. Ct. at 2428; Carson v. Makin, 142 S. Ct. 1987, 1996 (2022).

196 *See* discussion *supra* Analysis Section I.

197 *See* BRUNSON, *supra* note 26, at 34.

198 *See id.* (internal quotation marks omitted).

> exempted, there are no disentangling alternatives, just imperfect trade-offs between different forms of entanglement . . . . In the contemporary tax context, there is no way to prevent significant entanglement between mega-churches and mega-governments.[199]

Whenever a religious organization or practice is taxed, the "religious practice sometimes becomes subject to the intrusive oversight of the I.R.S."[200] Exemption can be equally problematic, as the I.R.S. is likewise charged with monitoring exempt entities.[201] Regardless of whether the religious organization or practice taxed or exempted from taxation, "religion becomes entangled with the state."[202] In Section III.A., this Analysis will address the Free Exercise Clause concerns of a proposed statutory solution to the mandatory tithing problem. In Section III.B., this Analysis will proceed to analyze the potential Establishment Clause problems arising from the same hypothetical statutory solution.

A. *Free Exercise Clause*

The most obvious solution to the compulsory tithing deduction problem is to modify the statutory language to exclude such donations from the scope of the charitable deduction.[203] The current iteration of Section 170 states that "[a] charitable contribution shall be allowable as a deduction only if verified under regulations prescribed by the Secretary."[204] The relevant Treasury regulations specify a number of exceptions to the charitable deduction, including donations to disqualified organizations or donations for lobbying expenditures.[205] A sample amendment might involve adding a provision stating something to the effect of "[n]o deduction shall be allowed under Section 170 for

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199 *Id.* at 37 (quoting Edward A. Zelinsky, *Do Religious Tax Exemptions Entangle in Violation of the Establishment Clause? The Constitutionality of the Parsonage Allowance Exclusion and the Religious Exemptions of the Individual Health Care Mandate and the FICA and Self-Employment Taxes*, 33 CARDOZO L. REV. 1633, 1635 (2012)) (internal quotation marks omitted).

200 BRUNSON, *supra* note 26, at 34.

201 *Id.*

202 *Id.*

203 Section 170 is regularly amended to add new provisions. For a more in-depth legislative history of the provision, *see* MARGOT L. CRANDALL-HOLLICK, CONG. RSCH. SERV., R46178, THE CHARITABLE DEDUCTION FOR INDIVIDUALS: A BRIEF LEGISLATIVE HISTORY (2020).

204 I.R.C. § 170(a)(1).

205 Treas. Reg. § 1.170A-1(j).

amounts paid to churches or other religious organizations in fulfillment of compulsory tithing obligations." Such an amendment clearly targets the problem to be solved, with little room for confusion as to its purpose. The problem with such a solution is that it would plainly violate the First Amendment's Free Exercise Clause.[206]

Under the Free Exercise Clause, the government is prohibited from interfering with the Free Exercise of Religion.[207] To satisfy the Free Exercise Clause, a regulation must be (1) neutral and (2) generally applicable.[208] The prongs of neutrality and general applicability are interrelated—"failure to satisfy one requirement is a likely indication that the other has not been satisfied."[209] A tax regulation, such as the potential solution suggested above, that makes any sort of religion-based designation in denying a deduction would be neither neutral nor generally applicable.

A tax regulation such as the one suggested above would not be facially neutral because it singles out compulsory tithing obligations paid to churches or other religious organizations. A law is not facially neutral if "it refers to a religious practice without a secular meaning discernable from the language or context."[210] In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, the Supreme Court found that use of the words "sacrifice" and "ritual" in a series of local ordinances supported a conclusion that the laws were not facially neutral.[211] Although the words had both religious and secular meanings, use of words with such strong religious connotations indicated that the purpose of the legislation was to oppress central elements of Santeria practice.[212] Here, there would be much less of an argument for secular meaning,[213] especially when considering that the effect of the statute would not be secular.

Even if the regulation simply excluded "involuntary payments" to religious organizations from the charitable deduction, it may still fail the neutrality prong of the test. Facial neutrality is not enough to satisfy the neutrality prong of the test—the Free Exercise Clause also

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206 *See* U.S. CONST. amend. I.

207 *Id.*

208 *See* Emp. Div. Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 879-81 (1990).

209 Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993).

210 *Id.* at 533.

211 *Id.* at 533-34.

212 *Id.* at 534.

213 *Tithe*, *supra* note 15.

"forbids subtle departures from neutrality,"[214] and "covert suppression of particular religious beliefs."[215] When inquiring into "religious gerrymanders,"[216] or looking beyond the facial neutrality of a statute's text, the Court considers the operational effect of a statute.[217] The effect of the proposed statute in this case would be the same, even removing the express language targeting tithing obligations. In *Lukumi*, it was apparent to the Court that "almost the only conduct subject to [the] Ordinances . . . [was] the religious exercise of Santeria church members."[218] Likewise, here, it is apparent that the only conduct that would subject to the proposed regulation is the mandatory tithes paid by Mormons, Scientologists, and the like. Such a statute could not be neutral, either facially or as applied.

Although failing the neutrality prong is determinative, it is still useful to briefly consider the general applicability prong of the Free Exercise test. A law that selectively burdens "conduct motivated by religious belief" is not considered generally applicable under the Free Exercise Test.[219] The proposed regulatory solution would not be considered generally applicable for reasons similar to those iterated in the preceding paragraph. By selectively targeting only the religious practice of mandatory tithing, the proposed solution "falls well below the minimum standard necessary to protect First Amendment rights."[220]

Given that the obvious solution would be neither neutral nor generally applicable per the analysis above, the proposed regulation would need to "undergo the most rigorous of scrutiny" to prevail against a First Amendment challenge.[221] As the Court stated in *Lukumi*, "[a] law restrictive of religious practice must advance 'interests of the highest order' and must be narrowly tailored in pursuit of those interests."[222] A regulation "that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict

214 Gillette v. United States, 401 U.S. 437, 452 (1971).

215 Bowen v. Roy, 476 U.S. 693, 703 (1986).

216 *See* Walz v. Tax Comm'n of City of N.Y., 397 U.S. 664, 696 (1970) (Harlan, J., concurring).

217 *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 534-35 (1993).

218 *Id.* at 535.

219 *Id.* at 543.

220 *See id.*

221 *See id.* at 546.

222 *See id.* (quoting McDaniel v. Paty, 435 U.S. 618, 628 (1978)).

scrutiny only in rare cases."[223] Given that a regulation such as the one proposed here is unlikely to survive strict scrutiny,[224] it is not an ideal solution in light of the First Amendment's protections. Accordingly, another solution is necessary.

B. *Establishment Clause*

The Establishment Clause is intended to protect against government actions that have "the purpose or effect of advancing religion."[225] As discussed above, the current treatment of mandatory tithes under Section 170 raises Establishment Clause concerns.[226] The proposed solution may raise similar Establishment Clause concerns, however. Recall the suggested statutory amendment given in the previous section: "No deduction shall be allowed under Section 170 for amounts paid to churches or other religious organizations in fulfillment of compulsory tithing obligations."[227] This most obvious regulatory solution is not a viable solution, as it would likely fail the repudiated *Lemon* test under each of the three prongs.[228] Further, while the Supreme Court has yet to apply the framework articulated

223 Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 546 (1993).

224 *See id.*

225 *See* U.S. CONST. amend. I; Idleman, *supra* note 193, at 23.

226 *See* discussion *supra* Analysis Section II.

227 *See* discussion *supra* Analysis Section III.A.

228 *See* Idleman, *supra* note 193, at 20. Under *Lemon*'s first prong, a statute's secular purpose could not be presumed where "the specific wording or design of the statute suggests that the actual, preeminent objective is religious or religiously related." *Id.* Further, the Tenth Circuit concluded that "explicit statutory incorporation of a particular religion's belief may violate the Establishment Clause." *Id.* (quoting Jane L. v. Bangerter, 61 F.3d 1505, 1516 (10th Cir. 1995)). This article's proposed solution likely falls within that exception, as compulsory tithing is a foundational belief for Mormons, Scientologists, and Seventh Day Adventists. *See* discussion *supra* Background Section I.B. The proposed solution would fail under *Lemon*'s second prong, as the government's explicit exclusion of mandatory tithes from the charitable deduction could appear to a reasonable observer as "disfavoritism, if not hostility" towards the religions that practice compulsory tithing. *See* Idleman, *supra* note 193, at 31. This solution likely fails *Lemon*'s third prong, as value judgments about the validity of certain religious practices go beyond mere "routine compliance" activity and extend into the realm of intrusive inquiry into religious affairs. *See Hernandez*, 490 U.S. at 696-97 (holding that routine compliance activity is not considered excessive entanglement under *Lemon*). *But see* Vision Church v. Vill. of Long Grove, 468 F.3d 975, 995 (7th Cir. 2006) (quoting United States v. Indianapolis Baptist Temple, 224 F.3d 627, 631 (7th Cir. 2000)) (finding excessive entanglement where there is "intrusive government participation in, supervision of, or inquiry into religious affairs").

in *Bremerton,* the suggested statutory amendment is unlikely to fare well against the principles identified in *American Legion*.[229]

First, it would be difficult to argue that the suggested statute "treats religious people, organizations, speech, or activity equally to comparable secular people, organizations, speech, or activity."[230] While the effect of the statute would be to "level the playing ground" between the tax treatment of tithes and similar donations to secular non-profits, the language of the proposed statute would likely raise flags. Under prior Establishment Clause precedent, a statute's secular purpose could not be presumed where the statute's language suggested it was meant to regulate within the realm of religion.[231] Here, the suggested statute rather plainly targets a uniquely religious practice. Further, as established above, the suggested statute could scarcely be deemed a "generally applicable law."[232] A law that selectively burdens "conduct motivated by religious belief" is not generally applicable.[233] Here, the only conduct that would be subjected to the proposed regulation are the mandatory tithes paid by Mormons, Scientologists, and the like. Accordingly, a fair argument could be made that this statute would violate the Establishment Clause under at least one of the *American Legion* principles.

Given that the proposed statutory solution does not pass constitutional muster under either the old *Lemon* test or the new test under *Bremerton* and *American Legion*, it is not a viable solution to the mandatory tithing deduction problem. The best solution to the mandatory tithing deduction problem is one that allows for sufficient regulation without veering into Establishment Clause concerns.

IV. A CONSTITUTIONALLY PERMISSIBLE SOLUTION TO THE MANDATORY TITHING DEDUCTION PROBLEM

The most obvious solution to the mandatory tithing deduction problem would violate the First Amendment,[234] so how might the government address the issue without running afoul of the Free Exercise

229 *See* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2093 (2019) (Kavanaugh, J., concurring).

230 *See id.*

231 *See* Idleman, *supra* note 193, at 20.

232 *See Am. Legion*, 139 S. Ct. at 2093 (Kavanaugh, J., concurring).

233 *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 521 (1993).

234 *See* discussion *supra* Analysis Sections III.A, III.B.

or Establishment Clauses? By focusing on the voluntariness aspect, rather than on compulsory tithes in particular, the government can solve the mandatory tithing deduction problem and avoid implicating First Amendment concerns.

In the preceding section, this Comment assessed a proposed regulation stating: "No deduction shall be allowed under Section 170 for amounts paid to churches or other religious organizations in fulfillment of compulsory tithing obligations."[235] Consider instead a regulation stating: "No deduction shall be allowed under Section 170 for amounts paid to otherwise qualified organizations absent the requisite donative intent." This solution eliminates the problematic deduction for the mandatory tithes while simultaneously codifying existing jurisprudence regarding involuntary secular donations.

First, this alternative solution fares better under the Free Exercise test than the obvious solution. By avoiding an overt reference to tithing, the proposed regulation retains facial neutrality.[236] Further, prohibiting both involuntary secular donations as well as tithes addresses the religious gerrymandering and general applicability concerns.[237] The alternative regulation targets both secular and religious activity, and is therefore both neutral and generally applicable, thus satisfying the Free Exercise Clause.[238]

Next, the alternative solution also fares better under the Establishment Clause than the obvious solution. By removing the explicit reference to the religious practice of tithing, the statute's specific phrasing no longer "suggests that the actual, preeminent objective is religious or religiously related."[239] Further, basing the exclusion on involuntariness eliminates the appearance of "disfavoritism, if not hostility"[240] towards religions that practice compulsory tithing. Lastly, requiring taxpayers to substantiate the voluntariness of their charitable donations is standard compliance protocol.[241] Routine compliance

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235 *See* discussion *supra* Analysis Sections III.A, III.B.

236 *See Church of the Lukumi Babalu Aye*, 508 U.S. at 533 (stating that a law is not facially neutral if it "refers to a religious practice without a secular meaning discernible from the language or context").

237 *See* discussion *supra* Analysis Section III.A.

238 *See* Emp. Div. Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 879-81 (1990).

239 *See* Idleman, *supra* note 193, at 20.

240 *Id.* at 31.

241 *See* I.R.C. § 170(f)(8) (requiring substantiation for certain contributions).

activity does not violate the Establishment Clause.[242] Accordingly, a statutory solution focusing on voluntariness rather than certain tithes passes muster under the Establishment Clause.

Lastly, this alternative solution codifies existing jurisprudence and guidelines regarding involuntary secular donations. The I.R.S. has already issued guidelines and rulings stating that charitable contributions to qualified nonprofits are fully deductible so long as they are voluntary.[243] This voluntariness requirement has been addressed and affirmed by the courts.[244] Indeed, the Supreme Court has suggested that the element of choice is essential in informing whether a payment constitutes a charitable donation.[245] For example, the Supreme Court has held that payments to nonprofits compelled as a condition of membership are not deductible as voluntary donations.[246] Adding the voluntariness element to the Section 170 deduction requirements not only makes sense from a constitutional perspective, but also necessarily codifies scattered guidance otherwise set forth by the I.R.S. and the courts.

V. OUTCOMES

Roughly two percent of the United States population is Mormon.[247] According to current population estimates, this would mean that there are roughly 6.7 million Mormons in the United States.[248] Scientologists are more guarded about revealing their membership

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242 *See* Hernandez v. Comm'r, 490 U.S. 680, 696-97 (1989) (holding that § 170's primary effect does not violate the Establishment Clause because it is not a direct government act endorsing or impeding religion).

243 I.R.S. Pub. 526 (Mar. 3, 2021); Rev. Rul. 86-63, 1986-1 CB 88 ("A contribution for purposes of section 170 of the Code is a voluntary transfer of money or property that is made with no expectation of procuring financial benefit commensurate with the amount of the transfer.").

244 *See, e.g.*, Marshall v. Welch, 197 F. Supp. 874, 875-76 (S.D. Ohio 1961) (highlighting the voluntariness of a payment in determining its deductibility); DeJong v. Comm'r, 309 F.2d 373, 376-79 (9th Cir. 1962); Ruddel v. Comm'r, 71 T.C.M. (CCH) 2419 (1996) (holding that a donation pursuant to a plea agreement is not voluntary and therefore not deductible).

245 *See* United States v. Am. Bar Endowment, 477 U.S. 105, 113-14 (1986).

246 *See id.* (finding that members could not claim a charitable deduction for dividends assigned to the nonprofit as a condition of membership).

247 Daniel Cox, *Most Churches Are Losing Members Fast — But Not the Mormons. Here's Why.*, VOX (Mar. 6, 2019, 10:20 AM), https://www.vox.com/identities/2019/3/6/18252231/mormons-mormonism-church-of-latter-day-saints.

248 *U.S. and World Population Clock*, U.S. CENSUS BUREAU (Oct. 10, 2021, 9:54 PM), https://www.census.gov/popclock/.

numbers, but at one point claimed 3.5 million members in the United States.[249] There are about 1.1 million Seventh-Day Adventists in the United States.[250] According to these estimates, there are potentially 11.3 million Americans who are required to donate a portion of their income to their respective churches. Although the Court in *Hernandez* was concerned about potentially expanding the charitable deduction provisions far beyond what Congress envisioned, they were only considering the impact of allowing deductions for Scientologists—the actual number impacted is far larger than the Court imagined. Given the sheer number of Americans subjected to mandatory donations, it is possible that the revenue lost in allowing these deductions is substantial. A full-fledged economic study could help determine the scope of this problem and the revenue at stake.

CONCLUSION

The I.R.S. took an initial step in addressing Section 170 inconsistencies when it overturned *Hernandez*, but further work remains. Although the I.R.S. no longer overtly discriminates against Scientologists, it created another substantial problem in broadly permitting charitable deductions for mandatory donations to churches. These mandatory tithes violate the definitional standard of charitable contributions. Even if one accepts the Court's dubious stance regarding valuation of religious benefits, the fact remains that compulsory tithes are not voluntary. The I.R.S. could amend its charitable deduction guidance to allow for a sweeping inclusion of all donations to tax-exempt churches, but this would constitute a vast expansion of the charitable contribution provisions. From a revenue standpoint, the more sensible approach is to prioritize disallowing deductions for involuntary donations. Such a revised approach would provide tax-

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249 *See Kansas City Scientology Center Heads Downtown,* RELIGION NEWS BLOG (Nov. 8, 2013, 10:06 AM), https://www.religionnewsblog.com/17738/kansas-city-scientology. It is worth noting that this estimate his highly contested. *See also* Tony Ortega, *5 Biggest Lies in Scientology's 2-Minute TV Ad*, THE VILLAGE VOICE (Feb. 7, 2012), https://www.villagevoice.com/2012/02/07/5-biggest-lies-in-scientologys-2-minute-tv-ad/ (alleging worldwide membership was likely closer to 40,000); *Introduction to the RTC Electronic Report Form*, RELIGIOUS TECH. CTR., https://www.rtc.org/matters/intro.html (last updated Aug. 9, 2000) (official Scientology website noting that "tens of thousands of Scientologists [ ] have access to the internet").

250 *North American*, SEVENTH-DAY ADVENTIST CHURCH, https://www.adventist.org/world-church/north-american/ (last visited Sept. 8, 2022).

payers with clear instructions as to the deductibility of their donations and would further ensure that the I.R.S. steers clear of sticky Religion Clause considerations.