THE IRS Path of Life

To Keep Your Faith… THEIRS

Which Means:

CAN THE IRS OVERRULE THE SUPREME COURT?

I. INTRODUCTION

The Church of Scientology (the Church) was founded in California by L. Ron Hubbard in the 1950s.[1] Since its inception, the Church has been embroiled in an endless stream of litigation with the Internal Revenue Service (the IRS).[2] The IRS is responsible for administering and enforcing the federal tax laws, including the income tax laws. The Internal Revenue Code (the Code or I.R.C.) contains two provisions which are very important to the continued existence of the Church of Scientology: §§ 170 and 501.[3] These two provisions have been the cause of much of the continuing battle between the Church and the IRS.

Section 501 of the Code exempts certain organizations from taxation.[4] To qualify for this exemption, the Church must show that it is "organized, and operated exclusively for

religious or charitable purposes."[5] Tax-exempt status is critical to the Church of Scientology, and the IRS has attacked several branch churches under § 501. In Church of Scientology v. Commissioner,[6] the IRS was sustained by the courts in its denial of tax-exempt status to the Church of Scientology on the grounds that it permitted personal inurement to the benefit of its founder, L. Ron Hubbard, that it was operated for a substantial commercial purpose, and that it contravened fundamental public policy by violating the law.[7]

Section 170 of the Internal Revenue Code [8] has also been a source of conflict between the IRS and the Church of Scientology. Section 170 allows deductions for charitable contributions.[9] Scientologists have sought to deduct amounts paid to the Church for auditing and training sessions as charitable contributions.[10] The IRS has consistently denied such deductions. In 1978 the IRS issued Revenue Ruling 78-189, which provides that "[a] `fixed donation' paid to the Church of Scientology for general education courses, religious education courses, and `auditing' and processing courses that does not exceed the fair market value of these courses is not a charitable contribution within the meaning of section 170 of the Code."[11] Scientologists challenged the validity of the ruling and litigated the issue up to the United States Supreme Court. The Court affirmed Revenue Ruling 78-189 in Hernandez v. Commissioner [12] and held that such payments are not deductible as charitable contributions. The Court, however, declined to consider the administrative inconsistency claim raised on appeal by the Church of Scientology.[13] The Court explained that the record was insufficient to permit a determination of the issue on its merits.[14]

Thus, I.R.C. §§ 170 and 501 have been the source of innumerable lawsuits between the IRS and the Church of Scientology. However, in late 1993 a truce was called. On October 1, 1993, the IRS and the Scientologists announced a settlement under which the Church of Scientology would once again be recognized as a tax-exempt entity within the meaning of § 501 of the Code.[15] Then, in November of 1993, the IRS made another startling retreat. It issued Revenue Ruling 93-73, which simply stated "Revenue Ruling 78-189 is obsoleted."[16] In other words, fixed donations paid to the Church of Scientology for auditing and training courses were determined to be fully deductible under § 170 of the Code.[17]

In 1989, the Supreme Court held in Hernandez that payments made to branch churches of the Church of Scientology for auditing and training sessions are not deductible as charitable contributions under § 170 of the Code.[18] Yet the IRS, in Revenue Ruling 93-73, held that these payments are deductible as charitable contributions under § 170 of the Code.[19] The IRS, in effect, overruled Hernandez.

The ultimate issue raised by Hernandez and Revenue Ruling 93-73 is whether the IRS's regulatory powers are beyond judicial review. The legal system of the United States is based upon a Constitution which, according to the Supreme Court in Marbury v. Madison,[20] envisions judicial review. In Marbury, Chief Justice John Marshall determined that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[21] In Hernandez, the Supreme Court said what the law is—

payments made to the Church of Scientology for auditing and training sessions are not deductible as charitable contributions under § 170 of the Code.[22] In Revenue Ruling 93-73, the IRS overruled the Supreme Court and allowed the deductions disallowed in Hernandez.[23]

The interpretation of regulatory statutes has been a source of conflict between agencies and courts for many years.[24] In 1984, the appropriate judicial and administrative roles were clearly defined by the Supreme Court in Chevron, U.S.A., Inc. v. Natural Resources Defense Council.[25] The Court in Chevron put to rest a complex debate regarding statutory interpretation that had spanned many years and numerous judicial opinions.[26] The Court adopted a deferential model of judicial review of regulatory statutes that placed the principal interpretive power with the agency.[27] However, as this Comment will argue, even under a deferential model of judicial review, the IRS exceeded its authority, and therefore, Revenue Ruling 93-73 is invalid.

Part II of this Comment examines the Hernandez decision and a subsequent case, Powell v. United States, [28] which addressed the Scientologists' administrative inconsistency claim left undecided by the Supreme Court in Hernandez. Part III discusses the IRS-Scientology settlement, and, specifically, Revenue Ruling 93-73. [29] This Part will hypothesize that the IRS's abrupt about-face was compelled by fear of defeat on the Church of Scientology's administrative inconsistency claim. The IRS, therefore, retreated from its previous position in an attempt to avoid further litigation on the issue. A Scientology victory in Powell would have forced the IRS either to allow the controversial deductions or to deny deductibility to similar quid pro quo transactions traditionally allowed in connection with other religious organizations.

Part IV argues that Revenue Ruling 93-73, which allowed the controversial deductions, exceeded the IRS's interpretive authority. Section A will assert that the Supreme Court in Hernandez conclusively determined the deductibility of fixed payments made to the Church of Scientology for auditing and training sessions under § 170 of the Code. The Court thus eliminated the possibility of a new IRS interpretation of § 170. Revenue Ruling 93-73 is therefore invalid. Section A also addresses the possibility of a post-Hernandez regulation permitting the deductions allowed in Revenue Ruling 93-73. This section argues that Hernandez also eliminated the possibility of a new Treasury Department interpretation of § 170. A post-Hernandez regulation allowing the deductions disallowed in Hernandez would, therefore, also be held invalid.

Section B addresses the possibility of a reviewing court's failure to adopt the proposition that Hernandez precludes all further interpretation of § 170. The underlying assumption of the analysis in section B is that the Supreme Court in Hernandez was upholding an agency interpretation of § 170, which disallowed deductions for fixed payments made to the Church of Scientology for auditing and training sessions. The section argues that an examination of Revenue Ruling 93-73, based on this assumption, would produce the same conclusion of invalidity identified in section A. However, a post-Hernandez regulation allowing the disallowed deductions would likely be upheld. The differing

results are explained by the different formats chosen for the same substantive interpretation.

Section C argues that if a regulation allowing the deductions disallowed in Hernandez had been adopted before Hernandez was decided, such a regulation would likely have been upheld under the Chevron test. When compared with the conclusion reached in section A, the deferential model of judicial review adopted in Chevron appears to tie the validity of the regulation to the timing of its promulgation. Section C suggests the peculiarity of such a result, but an analysis of the issue is beyond the scope of this Comment.

Part V addresses the potential unreviewability of Revenue Ruling 93-73 under both the Article III case or controversy limitation imposed on the Court's jurisdiction by the Constitution and the Court's own jurisdictional doctrines grounded in prudential considerations. This Part also examines the limitations imposed on taxpayer standing under the Supreme Court's standing doctrine. Part V concludes by suggesting that a claimant can challenge Revenue Ruling 93-73 under the Establishment Clause exception to taxpayer standing identified by the Court in 1968.[30]

II. THE HERNANDEZ DECISION

A. Background

As mentioned above, Scientology teaches that the individual is a spiritual being having both a mind and a body.[31] The auditing and training sessions described earlier are the stepping stones to achieving spiritual awareness.[32] However, the benefits from auditing and training can only be attained by degrees.[33] Thus, the Church offers different levels of courses, depending on the member's degree of spiritual accomplishment.[34] The sessions are provided in fixed blocks of time known as intensives.[35]

One of the basic tenets of Scientology is the doctrine of exchange.[36] The doctrine provides that any time members receive something they must pay something back.[37] By following this doctrine Scientologists maintain inflow and outflow and avoid spiritual decline.[38] The Church of Scientology adheres to the doctrine with vigor and applies it by charging a fixed donation for auditing and training sessions.[39] The courses are rarely given for free.[40] The charges are set forth in schedules, and prices vary with a session's length and level of sophistication.[41]

The Church's primary source of income is proceeds collected from its members for the training and auditing sessions.[42] The sessions are strongly encouraged by the Church and are promoted through newspaper, magazine, and radio advertisements.[43] The Church also sponsors free lectures, free personality tests, and leaflets in an effort to increase the number of members participating in the sessions.[44] Advance payments for the sessions are rewarded with a 5% discount.[45] Unused portions of prepaid auditing or training fees, less an administrative charge, are often refunded to the participants.[46]

One of the articulated goals of the Church of Scientology is to make money.[47] In fact, the governing policy of the Church's financial offices, as set out in the Church of Scientology's encyclopedia of Church policy,[48] is to "MAKE MONEY. * * * MAKE MONEY. * * * MAKE MORE MONEY. * * * MAKE OTHER PEOPLE PRODUCE SO AS TO MAKE MONEY."[49] This goal explains the method of charging and collecting for auditing and training sessions, as well as the advertising involved.

Hernandez was a consolidated case. Katherine Graham, Richard Hermann, David Maynard, and Robert Hernandez were all members of various branch churches of the Church of Scientology. Each made payments to the Church for auditing and training sessions and then deducted the amount on their federal income tax returns as charitable contributions.[50] The Commissioner of Internal Revenue (the Commissioner) disallowed the claimed charitable contribution deductions and determined that there were deficiencies in each member's federal income tax return.[51] The Commissioner asserted that the payments were not "contribution[s] or gift[s]" within the meaning of § 170(c) but were in fact payments made to purchase services, in other words, a quid pro quo, and therefore, nondeductible.[52] Graham, Hermann, Maynard, and Hernandez appealed the decisions to the Tax Court.

The Tax Court consolidated the cases for trial. The named petitioners in the 1984 Tax Court case were Graham, Hermann, and Maynard.[53] Although Hernandez agreed to be bound by the relevant legal and factual findings of the Tax Court in Graham v. Commissioner,[54] he reserved his right to a separate appeal.[55]

B. The Tax Court's Reasoning

The IRS stipulated before trial that the branch churches of the Church of Scientology involved in the case qualified as religious organizations entitled to receive tax-deductible charitable contributions under the applicable Code sections.[56] Thus, the issues to be determined at trial were: "(1) whether payments made by petitioners to the various Churches of Scientology were deductible as charitable contributions, and (2) whether denial of the claimed deductions would violate petitioners' constitutional rights."[57]

The Tax Court began its analysis by determining that deductions allowed by § 170(a)(1) were for "charitable contribution" payments as defined by § 170(c), as "a contribution or gift."[58] The court considered the definition, "a contribution or gift," to be lacking in clarity and turned to the case law.[59] The court cited DeJong v. Commissioner,[60] a 1961 Tax Court case, which addressed the issue in detail. DeJong held that the term "charitable contribution" was synonymous with the word "gift."[61] The DeJong court stated that "[a] gift is generally defined as a voluntary transfer of property by the owner to another without consideration therefor. If a payment proceeds primarily from the incentive of anticipated benefit to the payor beyond the satisfaction which flows from the performance of a generous act, it is not a gift."[62]

The Tax Court applied this definition of "gift" and found that petitioners' payments were made with the expectation of consideration, in the form of the religious services provided

by the Church of Scientology.[63] The payments were made in exchange for services. The court thus identified the payments as quid pro quo, not charitable contributions within the meaning of § 170.[64]

Petitioners' first constitutional argument was grounded in the Free Exercise Clause of the First Amendment.[65] The First Amendment provides that Congress shall make no law prohibiting the free exercise of religion.[66] However, "[i]t is well established that there is no constitutional right to a tax deduction. Benefits granted to taxpayers, such as deductions for charitable contributions, are matters of legislative grace."[67] It is equally well established that the denial of a charitable contribution deduction is constitutional.[68] The court concluded that petitioners were not being precluded from exercising their chosen religion, a choice and activity which are constitutionally protected.[69] They were simply prevented from receiving a subsidy to engage in the protected activity.[70]

Petitioners next argued that the denial of the deductions violated the Establishment Clause of the First Amendment.[71] The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion . . . ."[72] Petitioners asserted that not only would disallowance result in "disparate treatment" of petitioners in violation of the neutrality re-

quirement of the Clause, but would also result in excessive government entanglement with religion.[73]

In deciding this issue, the Tax Court looked at Larson v. Valente,[74] a case cited by petitioners in support of their argument. At issue in Larson was a Minnesota statute that imposed registration and reporting requirements on religious groups which solicited more than 50% of their contributions from nonmembers.[75] The Supreme Court found that the statute made "explicit and deliberate distinctions between different religious organizations,"[76] and therefore violated the Establishment Clause.[77]

The Tax Court distinguished Larson from the case at bar by pointing out that § 170 makes no distinctions among religions.[78] The Minnesota charitable solicitation law in Larson clearly did. Second, the court recognized that even if § 170 advances one religion over another, "that fact alone does not make the statute unconstitutional."[79] A statute may result in disparate impact among religions, provided that the disparate impact stems from the application of secular criteria.[80] The Tax Court concluded that the tests for determining whether a payment constitutes a charitable contribution within the meaning of § 170 are based on secular criteria and held that the Establishment Clause was not violated by denial of the deductions.[81]

Finally, the Tax Court rejected petitioners' claim of selective discriminatory action under both the First Amendment[82] and the Equal Protection Clause of the Fifth Amendment.[83] The court found no evidence of discriminatory action against petitioners.[84] The Tax Court entered judgment for the Commissioner on all claims, and petitioners appealed.

C. The Split in the Circuits

Graham, Hermann, and Maynard appealed the decision to the Ninth Circuit. Hernandez, who had reserved his right to a separate appeal in the Tax Court proceedings, appealed the decision to the First Circuit. Both circuits affirmed the Tax Court's decision and disallowed the deductions under § 170 of the Code.[85] The judgments were handed down in 1987.

One month after the First Circuit's decision in 1987, the Eighth Circuit faced the same issue in Staples v. Commissioner.[86] The Eighth Circuit held that payments made to the Church of Scientology for auditing and training sessions are deductible as charitable contributions within the meaning of § 170.[87] The Sixth and Second Circuits joined the Eighth Circuit in 1988,[88] while the Fourth and the Tenth Circuits lined up behind the First and the Ninth Circuits in 1987 and 1988, respectively.[89] The rulings for the taxpayer in the Eighth, Second, and Sixth Circuits rested on statutory, not constitutional grounds. The ultimate issue in dispute was whether § 170 of the Code encompassed fixed payments made to the Church of Scientology for auditing and training sessions.

The following section will discuss both the First Circuit's decision in Hernandez and the Eighth Circuit's decision in Staples, to lay the groundwork for the Supreme Court's 1989 decision in Hernandez,[90] which resolved the circuit split.

1. The First Circuit's Reasoning

The First Circuit noted the Supreme Court's recent interpretation of the scope of the charitable contribution deduction in United States v. American Bar Endowment.[91] The Supreme Court there stated:

[t]he sine qua non of a charitable contribution is a transfer of money or property without adequate consideration. The Taxpayer, therefore, must at a minimum demonstrate that he purposely contributed money or property in excess of any benefit he received in return.[92]

The First Circuit then addressed Hernandez's claims.

Hernandez first argued that the quid pro quo test applied by the IRS under § 170 to determine whether payments are charitable contributions should not apply to the return of a religious benefit.[93] The question of consideration should instead be limited to economic or financial benefit. However, the First Circuit found "no indication that Congress intended to distinguish the religious benefits sought by Hernandez from the medical, educational, scientific, literary, or other benefits that could likewise provide the quid for the quo of a nondeductible payment to a charitable organization."[94] The court, therefore, rejected the argument.[95]

Hernandez next argued that the scope of the charitable contribution deduction, as laid out by the Supreme Court in American Bar Endowment,[96] could not be applied to the

payments in question because of the difficulty of determining the economic value of religious benefits gained from the auditing and training sessions.[97] The First Circuit found no such impossibility. The Church of Scientology provided its members with a pricing schedule. The established prices for the various courses listed in this schedule implied that the classes, could, and indeed had been, valued economically by the Church.[98] The IRS could utilize these values in examining individual tax returns.[99] The First Circuit concluded that Hernandez's payments to the Church of Scientology for auditing and training services were not deductible as "charitable contributions" under § 170 of the Code.[100]

The court then examined Hernandez's constitutional claims. Hernandez argued that § 170, both on its face and as applied to him, violated the Establishment Clause of the First Amendment.[101] The First Circuit determined that § 170 is neutral on its face because it does not differentiate among "organizations `operated exclusively for religious, charitable, scientific, literary or educational purposes.'"[102] It agreed with the Tax Court's analysis of Larson and rejected the claim of facial invalidity.[103]

Hernandez's claim of discriminatory application asserted that the Tax Court discriminated against churches that conducted "individual rather than congregational services and against churches that require fixed payments for services rather than relying on voluntary contributions of varying amounts."[104] The First Circuit found that the Tax Court's interpretation of § 170 was based upon the quid pro quo status of the exchange, and not upon the individual nature, as opposed to the traditional congregational nature, of the services.[105] However, the Tax Court did consider "the fixed and mandatory nature of the auditing and training prices."[106] The First Circuit concluded that the distinction between fixed mandatory payments and other types of payments was neutral and expressed no disfavor toward religion in general or any particular religious organization.[107] The First Circuit thus concluded that § 170 complied with the commands of the Establishment Clause.[108]

Hernandez's second constitutional claim was grounded in the Free Exercise Clause of the First Amendment.[109] The First Circuit explained that the Free Exercise Clause does not require the government to provide a tax deduction for gifts to religious and other charitable institutions.[110] However, the court quoted the Supreme Court in Thomas v. Review Board[111] and stated:

[w]here the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.[112]

Hernandez asserted that the Tax Court had conditioned his receipt of a charitable deduction for auditing and training payments on his abandonment of the doctrine of exchange, one of the basic tenets of Scientology.[113] However, the First Circuit was unable to find sufficient evidence in the record to support such an assertion. It was

unclear whether the doctrine required fixed monetary payments or simply some form of "outflow."[114] The evidence was also insufficient as to whether the fixed donation system constituted religious conduct entitled to protection under the Free Exercise Clause.[115] The First Circuit concluded that the disallowance did not prevent Hernandez from paying for the auditing and training sessions administered by the Church.[116]

Lastly, the First Circuit rejected Hernandez's claim that the IRS had selectively enforced § 170 against him and thus evinced discriminatory intent.[117] The First Circuit compared the payments made for auditing and training sessions to contributions made to other organizations, such as basket collections and mass bequeaths, and declined to treat them as similar transactions.[118] The latter are deductible by the donor under § 170. The First Circuit held that the denial was not based upon religious discrimination but upon the quid pro quo nature of the payments in question.[119]

2. The Eighth Circuit's Reasoning

Maureen and Michael Staples made payments to the Church of Scientology for auditing sessions and doctrinal courses.[120] The payments were made according to a schedule of fees established by the Church.[121] The Staples then sought to deduct the payments on their federal income tax return as charitable contributions under § 170 of the Code. The Commissioner disallowed the deductions and the Staples appealed the decision to the Tax Court. On the authority of Graham, the Tax Court held that "because the Staples' participation in their church's individualized religious practices was conditioned on the payment of set fees, those payments were not charitable contributions within the meaning of [§ 170]."[122] The Staples appealed.

The Eighth Circuit began its analysis by addressing the voluntary stipulations made by the government for purposes of litigation. Prior to trial, the government stipulated that "Scientology is a religion and that the specific Scientology organization to which the payments were made was a qualified church and religious corporation under subsections 170(b)(1)(A)(i) and (c)(2) and exempt from taxation under [§ 501(a)]."[123] The government also stipulated that "the collection of fixed donations as a prerequisite to participation in the essential religious practices of Scientology is the Church's only method of actively soliciting contributions from members."[124] In addition, the Eighth Circuit noted that at oral argument the government agreed that under the stipulations "auditing sessions and doctrinal courses are bona fide religious practices."[125]

The Eighth Circuit recognized the importance of these stipulations and the lack of effect given to similar government stipulations by the Tax Court in Graham.[126] The court pointed out that the Tax Court had characterized the Church as a "commercial operation" and likened the auditing sessions and doctrinal courses to "general education or vocational training."[127] These findings were contrary to the government's stipulations. They did, however, allow the Tax Court easily to conclude that the payments were not charitable contributions within the meaning of § 170 of the Code, that is, "not voluntary transfers without consideration."[128] The Tax Court instead characterized the payments

as amounts transferred "with the expectation of receiving a commensurate benefit in return."[129]

The Eighth Circuit disapproved of the holding in Graham, which it saw as linking the deductibility of payments for participation in bona fide religious activities to the type of "mechanism adopted by the church to solicit support from its members."[130] Under the government's stipulations, the courses were bona fide religious practices. The deductions in Graham were disallowed because of the fixed nature of the payments and the established schedule of fees adopted by the Church. The Eighth Circuit noted that neither the government nor the Tax Court had cited a case denying deductions for payments made for purely religious practices.[131]

The Eighth Circuit then turned to § 170 of the Code and the "contribution or gift" limitation encompassed therein.[132] The court recognized that, generally, the statute did not include payments made in expectation of some type of substantial benefit in return.[133] However, the Staples argued that spiritual gain is not a recognizable return benefit and cited Revenue Ruling 70-47 to support their argument.[134] Revenue Ruling 70-47 allows deductions for pew rents, periodic church dues, and building fund assessments.[135] Under the Staples' interpretation of § 170, payments made to qualified churches would be deductible regardless of the method of collection; pledges, collection plates, and payments as a condition of participation in essential religious activities would all be deductible as charitable contributions.[136]

The Eighth Circuit looked to the case law of § 170 in examining the interpretation advanced by the Staples and determined that "a construction of § 170 sensitive to religious practices would be consistent with the policies underlying the statutory provision."[137] The Eighth Circuit recognized the theory that religious observances of any faith benefit the general public as a whole as well as the individual participant.[138] Under this theory, the public benefit remains regardless of the method of worship or whether the donations are voluntary or fixed.[139]

The Eighth Circuit then discussed the congressional purpose behind the § 170 "contribution" limitation. Congress had two concerns. First, it feared that charitable organizations would market goods and services offered by businesses while enjoying an unfair competitive advantage.[140] Second, Congress recognized that the return benefit received by a contributor in a quid pro quo transaction would necessarily reduce the amount contributed, to the detriment of the charitable organization.[141] However, the Eighth Circuit concluded that neither of these concerns was implicated when the benefit received was purely religious in nature.[142]

Lastly, the Eighth Circuit agreed with the Staples that religious services are not treated as commodities within the tax system to be bought and sold in commercial transactions.[143] No monetary value can be attached to the right to participate in religious practices.[144] The Eighth Circuit found that "[t]he establishment by a church of a set `price' for religious participation does not change the nature of the benefit of religion to the individual or to society."[145] The Eighth Circuit concluded that the

timing of the payments and the details of the Church's method of collecting the funds were irrelevant to the issue of deductibility in the case at bar.[146] The Eighth Circuit held that "an amount remitted to a qualified church with no return other than participation in strictly spiritual and doctrinal religious practices is a contribution within the meaning of section 170."[147]

It is important to note that the Eighth Circuit was fully aware of the First Circuit's holding in Hernandez when it handed down its judgment. In fact, the court addressed the Hernandez decision in its opinion. The Eighth Circuit opined that the different conclusions rested upon the First Circuit's determination that participation in strictly religious practices is adequate consideration to remove a payment from the § 170 contribution category.[148] The Eighth Circuit found that society had yet to develop a system through which to value spiritual gain monetarily. The Eighth Circuit also noted that no case had attempted to do so.[149] With this in mind, the Eighth Circuit could not accept the First Circuit's position, and the two courts' resulting conclusions differed.[150]

By the end of 1988 seven circuits had decided whether payments made to the Church of Scientology for auditing and training sessions were charitable contributions within the meaning of § 170 of the Code.[151] The circuits were split four to three in favor of disallowance when the Supreme Court granted certiorari to the original Tax Court petitioners, Graham, Hermann, Maynard, and Hernandez.[152]

D. The Supreme Court's Holding

The Supreme Court in Hernandez first looked at the legislative history of the "contribution or gift" limitation embodied in § 170.[153] After noting the lack of relevant documentation, the Court determined that "Congress intended to differentiate between unrequited payments to qualified recipients and payments made to such recipients in return for goods or services. Only the former were deemed deductible."[154] The House and Senate reports examined by the Court define "gifts" as payments "made with no expectation of a financial return commensurate with the amount of the gift."[155] Based on this definition, the Court determined that Hernandez had received a concrete benefit—the auditing sessions—in return for his money. Thus, the payments were made in expectation of a quid pro quo benefit and were therefore not deductible under § 170.[156] The Court listed the various factors which it concluded revealed the inherently reciprocal nature of the exchange: the fixed price schedules for auditing and training sessions in each branch church, the different prices associated with the different levels of sophistication of the various classes, the authorized refunds if the member failed to receive the auditing and training instruction, and the unambiguous Church policy barring the provision of auditing and training sessions for free.[157]

The Court then rejected petitioners' argument that the quid pro quo analysis is inappropriate under § 170 when the benefit received by the taxpayer is purely religious in nature.[158] The Court also rejected the claim that payments made for the right to participate in a religious service should be automatically deductible under § 170.[159] The Court once again looked to the legislative history of the section and concluded that

Congress had intended to make payments to religious organizations deductible only if such payments were "contribution[s] or gift[s]."[160] The fact that the benefit received was religious in nature or granted access to a religious service is irrelevant to the appropriate § 170 analysis.[161]

The Court also feared that petitioners' deductibility proposal would widen the reach of the charitable contribution deduction far beyond Congress's original intention, as evidenced in the language of the statute.[162] The Court identified several types of payments to qualified organizations that could plausibly be characterized as providing a religious benefit or granting access to a religious service: tuition payments to parochial schools, church-sponsored counseling sessions, or medical care at a church-affiliated hospital that otherwise might not be deductible.[163]

Finally, the Court rejected petitioners' deductibility proposal because of the possible problems of entanglement between church and state.[164] The notion that the IRS and the courts would analyze payments in an effort to differentiate between "religious" and "secular" benefits unsettled the Court.[165] It recognized the very real danger of "pervasive monitoring" by the State of religious activities.[166] Thus, the Court concluded that fixed payments to the Church of Scientology made by petitioners for auditing and training sessions were not "contribution[s] or gift[s]" within the meaning of that statutory expression embodied in § 170 of the Code.[167]

After reaching this conclusion, the Court then moved on to address petitioners' constitutional claims under the Establishment and Free Exercise Clauses of the First Amendment.[168] Petitioners claimed that the Establishment Clause was violated on two separate levels. First, they argued that § 170 "create[s] an unconstitutional denominational preference by according disproportionately harsh tax status to those religions which raise funds by imposing fixed costs for participation in certain religious practices."[169] The Court examined this claim under the analytic framework it had developed in Larson v. Valente.[170]

The initial inquiry when a claim of denominational preference arises is "whether the law facially differentiates among religions."[171] If no facial preference is found, the analysis moves to the Establishment Clause test developed in Lemon v. Kurtzman.[172] The Lemon test contains three parts, each of which must be addressed separately: (1) the statute must have a secular legislative purpose; (2) its principal or primary effect must be one that neither advances nor inhibits religion; and (3) the statute must not foster excessive government entanglement with religion.[173]

Thus, following this analysis, the Court first determined that § 170 embodies no facial preference because it makes no "explicit and deliberate distinctions between different religious organizations."[174] The Court then went on to the three-part Lemon test and determined that § 170 again passed constitutional muster. First, the Court found no religious purpose behind the statute and determined that § 170 is neutral in both design and purpose.[175] Second, the Court found that the primary effect of § 170 was to encourage gifts to charitable organizations and was in no way intended either to advance

or to inhibit religion.[176] Finally, in reaching the third prong of the test, the Court determined that § 170 threatened no excessive entanglement between church and state.[177] In fact, the Court noted that petitioners' interpretation of § 170 was far more likely to lead to excessive entanglement between church and state by requiring the IRS to ascertain whether a taxpayer had received a religious benefit.[178]

Following the Establishment Clause discussion, the Court analyzed petitioners' Free Exercise Clause challenge, which alleged that the denial of a deduction for the payments at issue placed a burden on their practice of Scientology and therefore violated their constitutionally protected right to the free exercise of religion.[179] The burden, as described by petitioners, is that disallowance of deductions deters members from engaging in auditing and training sessions and interferes with the "doctrine of exchange."[180]

The Free Exercise test developed and utilized by the Supreme Court asks "whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden."[181] The Court first noted that it does not have the authority to evaluate the validity of certain religious beliefs or practices.[182] It then deliberated over whether the burden as defined by petitioners was substantial.[183] The Court concluded, however, that it did not have to decide this question, because it had previously established that even a substantial burden would be justified by the "broad public interest in maintaining a sound tax system," free of "myriad exceptions flowing from a wide variety of religious beliefs."[184] The Court held that petitioners' Free Exercise claim failed.

The final argument addressed by the Court in Hernandez involved a claim of administrative inconsistency.[185] Petitioners claimed that the IRS had accorded harsher treatment to payments made for auditing and training sessions than to payments made to other churches and synagogues for their religious services.[186] They concluded that Congress had impliedly acquiesced in the deductions allowed for such payments to other faiths by its failure to amend § 170 in such a way as to deny these deductions.[187] Petitioners noted that Congress had had ample opportunity to amend the statute if it so desired.

Petitioners then asserted that the payments made for auditing and training sessions were indistinguishable from payments made to other religious organizations, and therefore should be given the same tax treatment, by being made deductible.[188] Although this argument would have raised several important and complex issues, the Court rejected it without consideration because the record did not contain the proper factual findings necessary to analyze a claim of administrative inconsistency.[189]

In conclusion, the Supreme Court held that fixed payments made for auditing and training sessions conducted by the Church of Scientology were not deductible as charitable contributions within the meaning of § 170, and that § 170 violated neither the Establishment nor the Free Exercise Clauses of the First Amendment.

E. Powell v. United States

In 1990 the Church attacked the issue left undecided by the Supreme Court in Hernandez. In Powell v. United States,[190] George Powell, a member of the Church of Scientology of Florida, made payments to the Church for various religious services.[191] He then claimed the payments as charitable deductions on his federal income tax return.[192] The Commissioner disallowed the deductions and assessed income tax deficiencies for the deductions in question.[193] Powell paid the deficiencies in full and filed administrative claims for a refund.[194] The IRS did not act on the claims and Powell filed suit in district court. The district court dismissed the complaint for failure to state a claim upon which relief could be granted,[195] and Powell appealed the decision to the Eleventh Circuit.[196]

Powell asserted that the IRS was administratively inconsistent in its application of § 170 of the Code.[197] The IRS allows tax deductions to members of other religious organizations who make payments to their churches for participation in religious services.[198] Powell offered several examples of IRS-approved charitable contribution deductions: (1) payments made by members of the Jewish religion for High Holy Day tickets, which allow them to participate in religious services; (2) mandatory tithes paid by members of the Mormon religion, which are required for participation in religious services; (3) stipends paid by members of the Catholic religion in exchange for special masses; and (4) rental fees paid by members of certain Protestant religions for the privilege of sitting in a specific pew at religious services.[199] Powell also pointed out that fixed payments for certain religious services had been deductible since 1919 with the IRS's specific approval.[200]

The Eleventh Circuit recognized that Powell did not contest the Supreme Court's holding in Hernandez that payments made to the Church of Scientology for auditing and training sessions were a quid pro quo exchange.[201] Powell instead argued that IRS practice allowed deductions for such quid pro quo payments made by members of other religious organizations to their churches for participation in religious services.[202] This disparate treatment was the basis of Powell's claim.

The Eleventh Circuit then determined that Powell had met his burden of proof under 12(b)(6) of the Federal Rules of Civil Procedure.[203] For purposes of the rule, the court must accept as true all allegations in the complaint.[204] Powell alleged several situations in which members of other religious organizations are granted deductions for payments made in exchange for religious services.[205] Therefore, the question left to be decided by the court was "whether the inconsistent administration of quid pro quo payments is a claim upon which Powell can be granted relief."[206]

The Supreme Court in Hernandez did not rule out Hernandez's administrative inconsistency argument; it merely determined that the factual record was insufficient to establish such a claim.[207] In Powell, the Eleventh Circuit recognized the claim and held that the IRS was not allowed to treat two similarly situated taxpayers

differently.[208] The court determined that Powell had stated a claim upon which relief could be granted and remanded the case.[209]

III. THE IRS-SCIENTOLOGY SETTLEMENT

The Eleventh Circuit remanded Powell on October 22, 1991. While Powell was in the district court on remand, the IRS and the Church of Scientology announced a cease-fire. On October 1, 1993, the IRS issued approximately thirty exemption letters to Scientology-related organizations.[210] The rulings granted tax-exempt status to more than 150 corporate entities.[211] Scientology's top official, David Miscavige, hailed the event as the end of a war, a forty-year long feud.[212]

Aside from confirming the validity of the exemption letters, the IRS declined to comment on the details of the IRS-Scientology agreement.[213] The Scientologists, although pleased with their victory, also refused to discuss the settlement.[214] However, the two organizations did disclose that the agreement resolved dozens of federal cases involving the Church and its various entities.[215] In November of 1993, the IRS issued Revenue Ruling 93-73, neatly disposing of Powell.

Revenue Ruling 93-73 allowed the deductions disallowed by the Supreme Court in Hernandez.[216] The pending claim in Powell alleged that the IRS had inconsistently administered quid pro quo payments by allowing deductions for quid pro quo transactions involving other religious organizations, while denying the same deductions to members of the Church of Scientology.[217] Revenue Ruling 93-73 allowed the deductions to members of the Church and rendered the unresolved claim moot.

In May of 1993, Jerome Kurtz, chairman of the Committee on Taxation of the New York City Bar Association, sent a letter to IRS Commissioner Margaret Milner Richardson chastising the IRS for its lack of candor with respect to the IRS-Scientology settlement.[218] The letter began: "I write to express serious concern about the failure of the Internal Revenue Service to comment on or explain the meaning of several aspects of its settlement with the Church of Scientology."[219] Kurtz specifically questioned Revenue Ruling 93-73 and its effect on the Hernandez holding.[220]

Kurtz, a former IRS Commissioner, was joined by other former Commissioners in his concern over the effect of Revenue Ruling 93-73.[221] Two of them, Don Alexander and Larry Gibbs, argued that the IRS, by issuing Revenue Ruling 93-73, which makes Revenue Ruling 78-189 obsolete, is, in effect, disregarding the Supreme Court's opinion in Hernandez.[222] Another former Commissioner, Sheldon Cohen, joined Kurtz in opining that "the facts involving the Scientology auditing payments must have changed before the IRS could justifiably ignore Hernandez."[223] Both assert that, at a minimum, the IRS cannot ignore Hernandez without further explanation.[224]

The IRS must have recognized the inevitability of such disapproval when it was negotiating the details of the settlement agreement. What is unclear is why it chose to follow such a controversial path. To fully understand the settlement, it is helpful to

examine the motivation behind the IRS's retreat from its victory in Hernandez. Such an examination must begin with a determination of what the IRS was trying to achieve when it issued Revenue Ruling 93-73.

The IRS apparently wanted to avoid further litigation by allowing deductions under § 170 of the Code for fixed payments made to the Church of Scientology for auditing and training sessions—payments which the Supreme Court had determined to be quid pro quo transactions, and therefore nondeductible.[225] Short of petitioning Congress to amend § 170 to encompass quid pro quo transactions with tax-exempt organizations, the IRS had two possible courses of action. The Treasury Department could have promulgated a regulation allowing the deductions pursuant to its authority under § 7805(a) of the Code.[226] The second alternative, which is simpler and more expedient, would be to allow the deductions through a Revenue Ruling. As is evident, the IRS chose the second course of action.

It is a well-accepted proposition that a taxpayer may not challenge another taxpayer's return.[227] Revenue Ruling 93-73 applies only to Scientologists. Scientologists, therefore, appear to be the only taxpayers capable of challenging it. Given that the ruling benefits Scientologists, a challenge by Church members appears unlikely and Revenue Ruling 93-73, in effect, operates as law. It is possible that the IRS was relying on the potential unreviewability of Revenue Ruling 93-73 to overcome any challenges to the ruling based on the Hernandez decision.

By issuing Revenue Ruling 93-73, the IRS attempted to allow the deductions disallowed in Hernandez and avoid future litigation on the issue. Despite its victory in Hernandez, the debate surrounding the deductibility of fixed payments made for auditing and training sessions was not over. Scientologists continued to challenge the Hernandez decision.[228] Revenue Ruling 93-73 was issued to put the matter to rest.

Part V of this Comment addresses whether the IRS achieved its goal. It argues that the ruling can be challenged under the Establishment Clause exception to taxpayer standing articulated by the Supreme Court in 1968.[229] It is possible that the IRS's issuance of Revenue Ruling 93-73 merely replaced one form of litigation with another. A related issue, worthy of discussion, is the motivation behind the IRS action.

Recall that the administrative inconsistency claim was never decided by the Supreme Court in Hernandez.[231] This Part will address the questions presented by the debate with respect to Revenue Ruling 93-73 and to hypothetical regulations allowing the deductions disallowed in Hernandez.[232]

The Supreme Court in Hernandez was interpreting § 170—the statute itself—and not an agency regulation promulgated thereunder. Several elements of the opinion support this assertion. Justice Marshall began the opinion by laying out a considerable portion of the text of § 170.[233] In addition, the Court's analysis referred to the statute continuously. Finally, nowhere in the decision is a regulation promulgated under § 170 ever mentioned. The inescapable conclusion to be drawn from the Court's decision is that the Court was

interpreting § 170, not an agency interpretation. The Court was exercising its quintessential judicial function of determining what the law is.[234] As such, the decision constitutes the final determination on the issue and eliminates all other possible statutory interpretations.

Under the foregoing analysis, the IRS, by issuing Revenue Ruling 93-73, clearly exceeded its interpretive authority. The Supreme Court in Hernandez determined that § 170 of the Code does not encompass fixed payments made to the Church of Scientology for auditing and training sessions. The Court was interpreting § 170 of the Code and establishing the law. The determination precludes the IRS from issuing an additional interpretation on the issue. Revenue Ruling 93-73 is therefore invalid.

The above analysis would apply with equal force to a post-Hernandez regulation, promulgated under § 170, allowing the deductions disallowed in Hernandez. Section 7805(a) of the Code provides:

[e]xcept where such authority is expressly given by this title to any person other than an officer or employee of the Treasury Department, the Secretary shall prescribe all needful rules and regulations for the enforcement of this title including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue.[235]

Courts have long held that agency regulations "are given controlling weight unless they are arbitrary, capricious or manifestly contrary to the statute."[236] The Supreme Court in Hernandez determined that § 170 did not encompass fixed payments made to the Church of Scientology for auditing and training sessions. Therefore, a regulation allowing the disallowed deductions would be "manifestly contrary to the statute" as interpreted by the Supreme Court. The Hernandez decision thus precludes the Treasury Department from promulgating a regulation on the issue in question. The hypothetical post-Hernandez regulation would therefore be invalid.

If a reviewing court failed to adopt the initial proposition that the Supreme Court in Hernandez was interpreting § 170, and not a regulation promulgated thereunder, further analysis would be required.

B. Judicial Review of Agency Interpretations

This section addresses the situation which would exist if a reviewing court were to conclude that Hernandez did not conclusively determine the deductibility of fixed payments made to the Church of Scientology for auditing and training sessions. The underlying assumption of the following analysis is, therefore, that the Supreme Court in Hernandez reviewed and upheld an agency interpretation which disallowed the disputed deductions under § 170 of the Code. However, even under this assumption, Revenue Ruling 93-73 would be invalid.

The law governing the judicial review of agency interpretations was established by the Supreme Court in Chevron.[237] The Court articulated a two-part test to be applied by

courts when reviewing an agency's construction of a statute it administers.[238] A reviewing court must first determine "whether Congress has directly spoken to the precise question at issue."[239] If congressional intent is unambiguous, the inquiry terminates, for the reviewing court must give effect to the clearly expressed intent of Congress. If, however, the statute is silent or ambiguous as to the issue in question, the court must determine "whether the agency's answer is based on a permissible construction of the statute."[240] The question presented by Hernandez and Revenue Ruling 93-73 is whether such deference should be accorded to informal IRS Revenue Rulings.

Robert A. Anthony argues that the Chevron test encompasses a delegation inquiry, which courts should apply when reviewing agency interpretations given in nonregulation formats.[241] The relevant inquiry is "whether Congress intended to delegate to the agency the power to interpret with the force of law in the particular format that was used."[242] Anthony asserts that a reviewing court must first determine whether Congress has delegated to the agency the authority to make interpretations entitled to deferential judicial review with respect to the subject matter of the interpretation being reviewed.[243] If the court answers the first inquiry affirmatively, it must then determine whether Congress intended for the agency to make such interpretations in the chosen format.[244]

A reviewing court, faced with Revenue Ruling 93-73, would apply the Chevron model of judicial review and first determine "whether Congress has directly spoken to the precise question at issue."[245] The precise question at issue in Revenue Ruling 93-73 is the deductibility of fixed payments made to the Church of Scientology by its members for auditing and training sessions under § 170 of the Code. The Supreme Court in Hernandez began its analysis of § 170 by investigating the legislative history of the "contribution or gift" limitation embodied in the statute.[246] The Court described the legislative history as "sparse," but went on to conclude that Congress intended to deny deductions for payments made to qualified "recipients in return for goods or services," that is, quid pro quo transactions with tax-exempt organizations.[247] The Court was forced to examine the congressional reports on § 162(b) of the Code[248] to find a definition of the word "gift" used in § 170.[249]

If a reviewing court were applying the Chevron test to Revenue Ruling 93-73, which allows deductions for fixed payments made to the Church of Scientology for auditing and training sessions, the Court would likely be reluctant to identify a specific congressional intention on the precise question at issue. The reviewing court could define the precise question more broadly, in an attempt to determine congressional intent, but that would defeat the deferential nature of the Chevron test as established by the Supreme Court. The Court intended for reviewing courts to investigate the precise question at issue, not a broader definition of it.[250] If, however, the reviewing court did choose to broaden the analysis and examine the legislative history with regard to the "contribution or gift" limitation in § 170, the Supreme Court's Hernandez opinion appears to refute the premise that Congress has spoken directly to the question at issue.[251] Not only did the Court describe the legislative history of § 170 as sparse, but it was forced to examine legislative

reports addressing another section of the Code to reach its ultimate interpretation of § 170.[252]

The next step in the Chevron analysis, according to Anthony, is the delegation inquiry.[253] The first prong is whether the IRS has the authority to make interpretations entitled to deferential judicial review with respect to the subject matter of Revenue Ruling 93-73.[254] Assuming that the Supreme Court in Hernandez had upheld an IRS interpretation disallowing the disputed deductions, it seems clear that the deductibility of fixed payments made to the Church of Scientology for auditing and training sessions would be subject to agency interpretation. The reviewing court would then turn to the second prong of the delegation inquiry.

This prong examines whether an interpretation, in the form of a Revenue Ruling, is entitled to judicial deference.[255] Anthony argues that although an agency may have the authority to interpret the statutory scheme it is entrusted to administer, it is not free to express its interpretation in any format it chooses and expect to command judical deference.[256] If a reviewing court were to conclude that Congress intended for IRS Revenue Rulings to be accorded deferential judicial review, it would then determine whether Revenue Ruling 93-73 is based on a permissible construction of § 170.[257]

A Revenue Ruling is "a policy statement by the Service regarding the tax consequences that will result when the law is applied to specific facts."[258] Taxpayers may rely on published Revenue Rulings in determining the tax treatment of certain transactions. However, the IRS maintains that the conclusions in Revenue Rulings are fact-specific and cautions taxpayers to plan accordingly.[259] The Tax Court has generally concluded that Revenue Rulings merely represent the position of one of the parties in litigation. It seems clear, therefore, that Congress did not intend for Revenue Rulings to be accorded deferential judicial review. Anthony asserts that informal agency interpretations should rarely be accorded judicial deference.[260] If informal interpretations were presumed to enjoy deferential review, an agency would have "little need for regulations, or for the statutory delegations and public procedures that safeguard them."[261]

Once the court determined that Revenue Ruling 93-73 was not entitled to judicial deference, because of inadequate delegation, the court, under Anthony's approach, "should undertake an independent review of the statute, extending to the agency's view such special consideration as it finds helpful."[262] The court reviewing Revenue Ruling 93-73 would logically look directly to Hernandez. In Hernandez, the Supreme Court reviewed an agency interpretation directly on point and upheld the agency's position, disallowing deductions for fixed payments made to the Church of Scientology for auditing and training sessions.[263] Although it is well established that an agency may change its interpretation of a statute, it is likely that the reviewing court would adopt the reasoning of the Supreme Court and disallow the deductions allowed by Revenue Ruling 93-73. The reviewing court would hold that Revenue Ruling 93-73 exceeded the IRS's interpretive authority.

Assuming Hernandez had upheld the agency's interpretation, a post-Hernandez regulation granting the deductions allowed by Revenue Ruling 93-73 might be more successful. The first part of the Chevron model of judicial review would lead to the same conclusion.[264] The reviewing court would be reluctant to hold that Congress had spoken directly to the precise question at issue.[265] However, the delegation inquiry (which Revenue Ruling 93-73 failed) would likely be allowed by a post-Hernandez regulation.

First, assume that Hernandez had upheld an agency interpretation disallowing deductions for fixed payments made to the Church of Scientology for auditing and training sessions. It therefore appears that interpretive authority had been delegated to the agency with respect to the subject matter of the post-Hernandez regulation. The court would then turn to the issue of format: whether Congress intended for Treasury Department regulations to be accorded judicial deference. The answer to this question is yes.

Section 7805(a) of the Code delegates to the Secretary of the Treasury the power to "prescribe all needful rules and regulations for the enforcement" of the tax laws.[266] Regulations promulgated under specific statutory delegation "possess the fullest credentials to command judicial acceptance."[267] As such, these regulations are "given controlling weight unless they are arbitrary, capricious or manifestly contrary to the statute."[268] It therefore seems likely that a post-Hernandez regulation would satisfy the delegation inquiry and move the court into the deferential portion of the Chevron model of judicial review.

The last portion of the Chevron test requires the court to uphold the regulation if it is based on a permissible construction of the statute.[269] The Court invoked the principles of separation of powers and legitimacy to establish the deferential test laid out above.[270] The Court explained that deference was necessary

in order to respect the legislature's decision to entrust regulatory responsibility to the agencies, and to ensure that the policy choices inherent in interpreting regulatory statutes are made by persons answerable to the political branches rather than by unelected judges.[271]

The Chevron Court stressed that courts should give considerable weight to an agency's construction of a statutory scheme it administers.[272] The Court also recognized the need for flexibility with respect to varying agency regulations. Justice Stevens stated that an agency, "to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis."[273] Thus, given the Supreme Court's apparent approval of varying statutory interpretations, it is likely that a reviewing court would uphold a post-Hernandez regulation allowing the deductions disallowed in Hernandez.

This result is disconcerting in light of the Supreme Court's decision in Hernandez. The Court seemed to conclude that § 170 did not encompass fixed payments made to the Church of Scientology for auditing and training sessions. However, the result is justified

in part by the underlying assumption identified at the beginning of this section. If the Supreme Court in Hernandez was merely upholding an agency interpretation disallowing the disputed deductions, the agency would be free to change its position and enjoy continuing deferential judicial review.

C. A Pre-Hernandez Regulation Might Have Been More Successful

If the Treasury Department had promulgated a regulation allowing the deductions disallowed in Hernandez, prior to that decision, it would likely have succeeded in interpreting § 170 in a manner contrary to the legislative intent as articulated by the Hernandez Court.[274] A court reviewing such a regulation would apply the Chevron model of judicial review. The first part of the Chevron test requires the reviewing court to determine whether Congress has directly spoken to the precise question at issue.[275] The precise question at issue in a pre-Hernandez regulation would be the deductibility of payments made to the Church of Scientology by its members for auditing and training sessions under § 170 of the Code. As already noted, a reviewing court would likely be reluctant to hold that Congress had directly spoken to the precise question at issue as described above.[276]

After finding the statute to be ambiguous as to the precise question at issue, the court would turn to the delegation inquiry laid out above. A pre-Hernandez regulation would likely satisfy the delegation inquiry in the same manner as the post-Hernandez regulation described earlier. The court would then turn to the last portion of the Chevron test: whether the agency's interpretation was based on a permissible construction of the statute.[277] The court would apply the same principles to determine that deference must be accorded to the agency interpretation in order to respect the legislature's decision to delegate regulatory authority and to ensure that policy decisions are not being made by unelected judges. Under this model of judicial review, the court would be likely to find a pre-Hernandez regulation to be a reasonable interpretation of § 170.

One question raised by the above analysis is the validity of the deferential Chevron test. Assuming that the Supreme Court in Hernandez was interpreting a statute and not a regulation,[278] the Chevron model of judicial review forces a reviewing court to uphold a regulation contrary to congressional intent simply because the regulation was promulgated prior to an independent judicial interpretation. The Chevron model thus appears to tie the validity of a regulation to the timing of its promulgation. Although this result is peculiar, the issue is beyond the scope of this Comment.

The above discussion should make clear that Revenue Ruling 93-73 appears to be beyond the scope of the IRS's interpretive authority and is, therefore, invalid. Part IV, sections A and B, are based on two different interpretations of the Supreme Court's holding in Hernandez, although both conclude that Revenue Ruling 93-73 is invalid. The disconcerting result reached in the analysis of the hypothetical post-Hernandez regulation in section B is explained by both the underlying assumption of the section and the greater credibility of Treasury regulations over IRS Revenue Rulings. The result, therefore, does not affect the validity of Revenue Ruling 93-73.

Part V addresses the taxpayer standing issue created by Revenue Ruling 93-73. Revenue Ruling 93-73's possible invalidity is irrelevant if it cannot be challenged.

V. TAXPAYER STANDING AND THE ESTABLISHMENT CLAUSE

When the government uses funds from the federal treasury for purposes that appear to be in violation of the statutes and Constitution of this country, would the taxpayer who has directly contributed to those funds be the proper party to challenge those expenditures? The Supreme Court has consistently answered this question with a resounding no.[279]

A. History

"Standing" is determined with reference to the party seeking relief.[280] Standing asks whether the party has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."[281] Standing questions arise principally in challenges to unlawful government conduct.[282] The Supreme Court asserts that separation of powers principles prohibit the judicial branch from hearing such claims.[283]

Standing doctrine is a blend of prudential and constitutional concerns. The Article III case or controversy requirement of the Constitution has been interpreted by the Supreme Court as a restriction on its jurisdiction. Several doctrines have grown out of this requirement.[284] Prudential concerns involve considerations of policy with respect to what constitutes wise policy in administering the judiciary. Standing attempts to identify and attain the proper, and properly limited, role of the courts in a democratic society.[285]

The first and most important requirement of standing is that there be an "injury in fact."[286] The federal courts have determined that jurisdiction is proper only when the plaintiff has suffered "some threatened or actual injury resulting from the putatively illegal action."[287] Thus, grievances of such a generalized nature that the injury was effectively shared by all citizens are consistently denied standing. Parties seeking "to employ a federal court as a forum in which to air their general grievance[s] about the conduct of government" have been denied access to the federal courts and left to search for a remedy in the political process or one of the other branches of government.[288]

The "injury in fact" requirement and the policy against general grievances are most often implicated when a citizen or taxpayer asserts standing to challenge unlawful government actions. It was this consideration which led the Supreme Court to deny federal taxpayer standing in Frothingham v. Melon.[289] A federal taxpayer can, of course, claim that his or her own taxes have been improperly assessed. However, a federal taxpayer cannot claim that federal funds in general are being improperly distributed.

Frothingham, decided in 1923, involved the Maternity Act of 1921, which provided federal grants to states that developed programs to reduce infant mortality. The plaintiff

taxpayer challenged the constitutionality of the Act under the Tenth Amendment, which provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[290] The plaintiff alleged that the issue of infant mortality was a local matter reserved to the States.[291] The plaintiff also alleged that the program would increase her tax liability and thus deprive her of her property without due process.[292]

The Supreme Court, in a unanimous decision, denied standing to the plaintiff. The Court examined the separation of powers issue presented by the case and concluded that to take jurisdiction of the taxpayer's suit "would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department."[293] The Court also considered the "injury in fact" requirement of standing, and held that the plaintiff's interest in the expenditure of federal funds was shared by millions of others. The Court concluded that a statute could be attacked only by one who "has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement, [not one who merely] suffers in some indefinite way in common with people generally."[294] This approach to taxpayer standing has become a well-accepted principle of law.

The Supreme Court has, however, recognized one important exception to the limitations on taxpayer standing. In Flast v. Cohen,[295] the Court granted federal taxpayers standing to challenge government expenditures allegedly in violation of the Establishment Clause of the First Amendment. Flast was a challenge to the spending of federal funds on books to be used in parochial schools.[296] Plaintiffs, as federal taxpayers, sought to enjoin the expenditures under the Establishment Clause. The Establishment Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion . . . ."[297] The plaintiffs in Flast alleged that the Act gave financial aid to religious schools in violation of this prohibition.[298]

The Court in Flast first considered Frothingham in an effort to determine whether the decision established a constitutional bar to federal taxpayer suits or simply expressed a rule of judicial self-restraint. The Court recognized the merits of both sides of the debate but declined to decide the issue. After noting that the prevailing view of scholars and commentators at the time was that Frothingham represented "only a nonconstitutional rule of self-restraint,"[299] the Court determined that the very existence of the debate compelled them to take a fresh look at the issue of federal taxpayer standing.[300]

The Court began its analysis by examining the standing doctrine and its underlying premise. It determined that "[t]he fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated."[301] Thus, the question is whether the plaintiff is the proper party to request adjudication of a particular issue, "not whether the issue itself is justiciable."[302] This determination led the Court to conclude that standing should not be looked at in separation of powers terms because the focus would then be shifted to the substantive value of the claim rather than to the issue of the proper party.[303]

The emphasis of the standing question is whether the party invoking federal jurisdiction has a personal stake in the outcome of the controversy.[304] The Court recognized that a taxpayer may have the requisite personal stake in the outcome, depending upon the facts of the particular case.[305] The Court held, therefore, that Article III posed no absolute bar to suits by federal taxpayers challenging allegedly unconstitutional expenditures of federal funds.[306] The Court then turned to the issue of determining the facts under which a federal taxpayer would be granted standing.

The Court identified the "logical nexus" test, which it had applied in its previous standing decisions. This test requires that there be a logical nexus between the status asserted and the claim sought to be adjudicated.[307] Although the Court noted earlier in its decision that the justiciability of the substantive issues in a plaintiff's claim was irrelevant to the question of standing, thus eliminating the need to examine them, it recognized that the logical nexus test required just such an examination.[308] The Court had to determine, therefore, whether a logical nexus existed between the status of federal taxpayers and the claim alleging an unconstitutional federal spending program.

The nexus test required by the Court has two prongs. The taxpayer must first establish a "logical link" between his or her status as a taxpayer and the type of legislative enactment attacked.[309] Thus, "a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Article I, Section 8 of the Constitution."[310]

Second, the taxpayer must establish a nexus between taxpayer status and the "precise nature of the constitutional infringement alleged."[311] This second prong requires the taxpayer to show that the challenged enactment violates a specific constitutional limitation imposed on the congressional taxing and spending power.[312] An enactment that is generally beyond the scope of the congressional taxing and spending power will not satisfy the test.[313] When both prongs are established, the plaintiff will have shown a sufficient personal stake in the outcome of the controversy to assert standing and invoke a federal court's jurisdiction.[314]

The type of legislative enactment in Flast was a clear exercise of Congress's Article I, section 8 taxing and spending power. The challenged program involved a large expenditure of federal funds to provide books and other instructional materials to parochial schools. Thus, the Court held that the first prong of the nexus requirement was established.[315]

The second prong required the Court to examine the plaintiff's Establishment Clause claim.[316] The Court looked to the history of the First Amendment and determined that its drafters, men like Thomas Jefferson and James Madison, intended for the Amendment to take a firm position against establishment of religion.[317] The most dangerous evil expressed by the authors of the First Amendment was taxation by the government to support churches and religious institutions chosen by the majority.[318] The Court held that the Establishment Clause was intended to be a specific constitutional limitation on Congress's taxing and spending power and that, therefore, the second prong of the nexus

test was satisfied.[319] The Court concluded that the plaintiffs' complaint contained sufficient allegations to give them standing to challenge the enactment in federal court.[320]

The exception to Frothingham's general rule against taxpayer standing created in Flast has not been overruled, but the Court has consistently refused to broaden its scope.[321] The claim that Revenue Ruling 93-73 violates the Establishment Clause of the Constitution fits within the parameters set by the Court in Flast. Therefore, a federal taxpayer should have standing to litigate this issue in federal court.

B. The Cause of Action

The claim is as follows: § 170 of the Internal Revenue Code allows deductions for charitable contributions. The Supreme Court in Hernandez held that payments made to the Church of Scientology for auditing and training sessions were not deductible as charitable contributions under § 170 of the Code.[322] The Court determined that the payments were part of a quid pro quo transaction and thus ineligible for "gift or contribution" status under § 170.[323]

The IRS, in Revenue Ruling 93-73, announced that payments made to the Church of Scientology for auditing and training sessions are deductible under § 170 of the Code. [324] Under Revenue Ruling 93-73, Scientologists are allowed deductions for quid pro quo transactions which are denied to members of other religions, transactions which have been held by the Supreme Court to fall outside the purview of § 170 of the Code. Revenue Ruling 93-73 gives preferential treatment to members of the Church of Scientology in violation of the Establishment Clause of the First Amendment.[325]

As a litigant seeking to invoke the jurisdiction of a federal court, a federal taxpayer would have to show standing to assert the claim. [326] Frothingham establishes a general prohibition against taxpayer suits. However, Flast establishes an exception to the Frothingham prohibition. Therefore, in order to assert standing, a federal taxpayer would have to show that the claim fell within the parameters established in Flast.

The nexus test from Flast requires the taxpayer to show a logical nexus between status as a taxpayer and the claim sought to be adjudicated.[327] The test has two prongs.[328] First, the taxpayer must establish a logical link between his or her status as a taxpayer and the type of legislative enactment being challenged.[329] The Flast Court and subsequent cases[330] have interpreted this requirement to be satisfied by a federal taxpayer only when the enactment is an exercise of Congress's Article I, section 8 taxing and spending power.[331] Second, the taxpayer must establish a nexus between taxpayer status and the precise nature of the constitutional infringement alleged.[332] This second nexus requires the taxpayer to show that the challenged enactment violates a specific constitutional limitation imposed on the congressional taxing and spending power.[333]

The legislative enactment challenged in this claim is a clear exercise of Congress's Article I, section 8 taxing power. Congress delegates its taxing power to the IRS. The IRS

exercises that power to promulgate regulations which are presumptively law unless found to be arbitrary and capricious. The IRS also issues Revenue Rulings stating its opinion in particular fact situations. While these rulings are not considered law, there are circumstances under which they will, in effect, carry legal weight because of the limitations imposed on taxpayer standing. Revenue Ruling 93-73 is therefore an exercise of Congress's Article I, section 8 taxing and spending power. Thus, the first prong of the nexus test is satisfied.

The Establishment Clause, under the Flast holding, is a specific constitutional limitation on Congress's taxing and spending power.[334] The history of the First Amendment shows that the drafters of the clause intended to prevent taxation by the government for the purpose of supporting churches and religious institutions chosen by the majority.[335] Thus, the second prong of the nexus test is satisfied. The taxpayer should therefore have standing to challenge Revenue Ruling 93-73 in federal court.

The merits of the taxpayer's Establishment Clause claim are as follows: The initial inquiry when a claim of denominational preference arises is "whether the law facially differentiates among religions."[336] If no facial preference is found, the analysis moves to the Establishment Clause test developed in Lemon.[337] The Lemon test is a three-pronged test and the challenged enactment must satisfy each part separately.[338]

A court hearing this claim could hold that Revenue Ruling 93-73 facially differentiates among religions. This ruling provided that payments made to the Church of Scientology for auditing, processing, and other religious education courses were not deductible under § 170 of the Code.[339] Revenue Ruling 93-73 declared Revenue Ruling 78-189 obsolete.[340] Revenue Ruling 93-73 thus gives preferential treatment to members of the Church of Scientology by allowing them deductions for quid pro quo transactions that are denied to other religious organizations.

If, however, the court did not find that Revenue Ruling 93-73 facially differentiated among religions, the ruling would be scrutinized under the Lemon test. Under this test, the ruling would probably fail. The first prong of this test requires that the enactment have a secular legislative purpose.[341] Revenue Ruling 93-73 was issued to give preferential tax treatment to members of the Church of Scientology in violation of the law as announced by the Supreme Court in Hernandez. Such a purpose can hardly be considered a "secular legislative purpose."[342] The second prong requires that the enactment's principal or primary effect be one that neither advances nor inhibits religion.[343] Revenue Ruling 93-73 advances Scientology by allowing its members to deduct as charitable contributions payments made to the Church in quid pro quo transactions which are denied to other religions under § 170. The last prong of the Lemon test provides that the enactment must not foster excessive government entanglement with religion.[344] This question is more complex. The court might not reach the last prong, however, because the failure of one prong renders the challenged enactment unconstitutional under the Establishment Clause. The court would probably find that Revenue Ruling 93-73 failed the first two prongs of the Lemon test and hold it unconstitutional.

As noted earlier, however, the Supreme Court has recently expressed some dissatisfaction with the three-pronged Lemon test.[345] In Lee v. Weisman,[346] a 1990 Establishment Clause case, the Court, without expressly abandoning the test, did not discuss it and instead applied a test suggested by Justice Kennedy in an earlier Establishment Clause case, County of Allegheny v. ACLU.[347] The test involves "a single, careful inquiry into whether the practice at issue provides direct benefits to a religion in a manner that threatens the establishment of an official church or compels persons to participate in a religious exercise contrary to their consciences."[348]

Even under this newly proposed test, Revenue Ruling 93-73 would be held unconstitutional. Revenue Ruling 93-73 provides direct benefits to the members of the Church of Scientology, and federal taxpayers are compelled to subsidize Scientology education courses that may be "contrary to their consciences." Therefore, although it is not clear which test—the Lemon test or the test outlined in County of Allegheny v. ACLU—is to be applied in Establishment Clause cases, Revenue Ruling 93-73 should be held unconstitutional in either case.

VI. CONCLUSION

Under Marbury v. Madison, the Supreme Court has the ultimate duty of statutory interpretation. Although Congress may delegate rule-making authority to government agencies entrusted with the responsibility of administering and enforcing specific statutory schemes, agency regulations must remain subject to judicial review. The situation created by Hernandez and Revenue Ruling 93-73, discussed in this Comment, exemplifies the need for independent judicial review.

The Supreme Court in Hernandez interpreted § 170 of the Code and held that it did not encompass fixed payments made to the Church of Scientology for auditing and training sessions. The IRS, in Revenue Ruling 93-73, determined that such payments were fully deductible under § 170 of the Code. **In effect, the IRS overruled the Supreme Court**.

In addressing the validity of Revenue Ruling 93-73, two important issues are raised. First, a court reviewing the controversial ruling must determine whether Hernandez precludes any further interpretation of § 170. Specifically, the issue is whether the Supreme Court was interpreting a statute, § 170, or an agency interpretation of it. Second, a reviewing court must examine the longstanding limitations imposed on taxpayer standing.

As this Comment has argued, the Supreme Court in Hernandez was interpreting a congressional statute. The Court conclusively ruled on the deductibility of fixed payments made to the Church of Scientology for auditing and training sessions. Therefore, the statute was no longer subject to agency interpretation on this issue. As such, Revenue Ruling 93-73 is invalid. Part V of this Comment argued that the Ruling can be challenged under the Establishment Clause exception to taxpayer standing.

The IRS cannot be allowed to overrule Supreme Court decisions. However, as this Comment has shown, situations exist in which an IRS Revenue Ruling could overrule a

Supreme Court decision and avoid judicial review because of the limitations imposed on taxpayer standing.

ALISON H. EATON[*]

1 Church of Scientology v. Comm'r, 823 F.2d 1310, 1312 (9th Cir. 1987).

2 The IRS and the Scientologists have been feuding for over forty years. Jim Newton, Tax-Free Status OKd for Church of Scientology, L.A. TIMES, Oct. 13, 1993, at A1. The IRS has attacked the Church's tax-exempt status, the deductibility of its members' donations, and other tax-related issues involving the Church and its members. See, e.g., Hernandez v. Comm'r, 490 U.S. 680 (1989); Church of Scientology, 823 F.2d at 1310. "From the late 1960s to the mid-1970s, IRS agents classified Scientology as a `tax-resister' and `subversive' . . . ." Newton, supra, at A1. The Church has responded to these attacks. One particularly ominous plan, code-named Snow White, was developed by the Church's founder, L. Ron Hubbard, in 1973. Robert W. Welkos & Joel Sappell, Burglaries and Lies Paved a Path to Prison Series: The Scientology Story, L.A. TIMES, June 24, 1990, at A39. The operation's goal was to "purge government files of what Hubbard thought was false information being circulated worldwide to discredit him and the church." Id. The plan began with Freedom of Information proceedings and ended in a scandal that sent eleven Scientologists to prison. Id. During the operation, Scientologists stole government documents, wired an IRS conference room, planted moles in the IRS and the Justice Department, and framed a New York author for alleged bomb threats to the Church following the author's 1972 book, The Scandal of Scientology. Id.

3 I.R.C. §§ 170 & 501 (West 1994).

4 Section 501 (c)(3) exempts:

"[c]orporations, and any community chest, fund, or foundation, organized and operated exclusively for religious . . . purposes, . . . no part of the net earnings of which inures to the benefit of any private shareholder or individual . . . ."

Id.

5 Hall v. Comm'r, 729 F.2d 632, 634 (9th Cir. 1984) (citing I.R.C. § 1701) (internal quotation marks omitted).

6 83 T.C. 381 (1984), aff'd, 823 F.2d 1310 (9th Cir. 1987).

7 The Ninth Circuit affirmed on the grounds of personal inurement and thus did not reach the commercial purpose and public policy issues. Id. at 1315.

8 I.R.C. § 170 (West 1994).

9 Section 170 provides in relevant part:

(a) Allowance of deduction

(1) General Rule. There shall be allowed as a deduction any charitable contribution (as defined in subsection (c)) payment of which is made within the taxable year. A charitable contribution shall be allowable as a deduction only if verified under regulations prescribed by the Secretary.

* * *

(c) Charitable contribution defined. For purposes of this section, the term "charitable contribution" means a contribution or gift to or for the use of —

* * *

(2) A corporation, trust, or community chest, fund, or foundation —

(A) created or organized in the United States or in any possession thereof, or under the law of the United States, any State, the District of Columbia, or any possession of the United States;

(B) organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals;

(C) no part of the net earnings of which inure to the benefit of any private shareholder or individual; and

(D) which is not disqualified for tax exemption under section 501(c)(3) by reason of attempting to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office. . . .

Id.

10 Scientologists believe that within every person there exists a spiritual being. Graham v. Comm'r, 83 T.C. 575, 577 (1984), aff'd, 822 F.2d 844 (9th Cir. 1987), aff'd sub nom. Hernandez v. Comm'r, 490 U.S. 680 (1989). To gain spiritual awareness, Scientologists engage in a process known as auditing. Auditing involves a one-on-one encounter between a participant (known as a "preclear") and a trained Scientologist (known as an "auditor"). Id. The auditor attempts to determine the preclear's areas of spiritual difficulty through the use of an E-meter, an electronic device which measures skin responses during a question and answer session. Id. The goal is for the preclear to gain spiritual awareness by moving through the sequential levels of auditing. Id. Training sessions are doctrinal courses offered by the Church of Scientology to its members. Id. The courses are

designed to train parishioners to serve as auditors. Id. The Church teaches its parishioners that participation in the courses results in spiritual gains to the individual. Id.

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

12 490 U.S. 680 (1989).

13 Id. at 702-03.

14 Id. at 702.

15 The IRS sent out 30 favorable exemption rulings to Church of Scientology-related groups. The rulings granted tax-exempt status to more than 150 corporate entities. Newton, supra note 2, at A1; see also Paul Streckfus, What We Know About the Scientology Closing Agreement, 62 TAX NOTES 131 (1994).

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

17 By rendering obsolete Revenue Ruling 78-189, which provided that payments for auditing and training sessions were not deductible under § 170, Revenue Ruling 93-73 made these payments legitimate deductions.

18 490 U.S. 680, 684 (1994).

19 Rev. Rul. 93-73, 1993-2 C.B. 75. See supra note 17.

20 5 U.S. (1 Cranch) 137 (1803).

21 Id. at 177.

22 490 U.S. at 684.

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

24 See Cynthia R. Farina, Statutory Interpretation and the Balance of Powers in the Administrative State, 89 COLUM. L. REV. 452 (1989).

25 467 U.S. 837 (1984).

26 See Farina, supra note 24, at 455.

27 Chevron, 467 U.S. at 842-45.

28 945 F.2d 374 (11th Cir. 1991).

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

30 Flast v. Cohen, 392 U.S. 83 (1968).

31 See supra note 10.

32 See supra note 10.

33 See supra note 10.

34 See supra note 10.

35 See supra note 10.

36 Graham v. Comm'r, 83 T.C. 575, 577 (1984), aff'd, 822 F.2d 844 (9th Cir. 1987), aff'd sub nom. Hernandez v. Comm'r, 490 U.S. 680 (1989).

37 Id.

38 Hernandez v. Comm'r, 819 F.2d 1212, 1222 (1st Cir. 1987), aff'd, 490 U.S. 680 (1989).

39 Graham, 83 T.C. at 577.

40 Id. at 577 & n.6. The Encyclopedia of Scientology describes the Church's policy against free services and price-cutting. The policy states:

"Price cuts are forbidden under any guise

1. PROCESSING MAY NEVER BE GIVEN AWAY BY AN ORG. Processing is too expensive to deliver.

. . .

9. ONLY FULLY CONTRACTED STAFF IS AWARDED FREE SERVICE, AND THIS IS DONE BY INVOICE AND LEGAL NOTE WHICH BECOMES DUE AND PAYABLE IF THE CONTRACT IS BROKEN" (emphasis added).

Id. (quoting Hubbard Communications Office Policy Letter (HCO PL) Sept. 27, 1970 (Issue I), 30 EC 89 Series).

41 Graham, 83 T.C. at 578 (1984). See Hernandez, 490 U.S. at 685. The Court quoted the 1972 prices as an example of the Church's fee schedule. "[T]he general rates for auditing ranged from $625 for a 12 1/2 hour auditing intensive, the shortest available, to $4,250 for a 100-hour intensive, the longest available. Specialized types of auditing required higher fixed donations: a 12 1/2 hour `Integrity Processing' auditing intensive cost $750; a 12 1/2 hour `Expanded Dianetics' auditing intensive cost $950." Hernandez, 490 U.S. at 685 (citing Graham, 83 T.C. at 577-78).

42 Graham, 83 T.C. at 578.

43 Id. at 579.

44 Id.

45 Id. at 577.

46 Id.

47 Id.

48 See supra note 40.

49 Graham, 83 T.C. at 578 (quoting HCO PL Mar. 9, 1972, MSOEC 381, 384).

50 Hernandez v. Comm'r, 490 U.S. 680, 686 (1989).

51 Id. & n.3.

52 Graham, 83 T.C. at 580. "Quid pro quo" means "something for something." BLACK'S LAW DICTIONARY 1248 (6th ed. 1990). "It is nothing more than the mutual consideration which passes between the parties to a contract, and which renders it valid and binding." Id.

53 Graham, 83 T.C. at 575.

54 Id.

55 Hernandez, 819 F.2d at 1215.

56 Graham, 83 T.C. at 576. The stipulation allowed the Tax Court to hear the case without venturing into the related debates involving the tax-exempt status of the Church of Scientology under § 501(c)(3) of the Code.

57 Id. (footnote omitted).

58 Id. at 580 (citing I.R.C. § 170(c) (West 1994)).

59 Id.

60 36 T.C. 896 (1961), aff'd, 309 F.2d 373 (9th Cir. 1962).

61 DeJong, 36 T.C. at 899.

62 Id. (citations omitted).

63 Graham, 83 T.C. at 581.

64 Id.

65 U.S. CONST. amend. I. The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." Id.

66 Id.

67 Graham, 83 T.C. at 581 (citing Interstate Transit Lines v. Comm'r, 319 U.S. 590, 593 (1943)).

68 Id. at 581-82 (citing Cammarano v. United States, 358 U.S. 498, 513 (1959)). The Court in Cammarano explained the issue as follows:

Petitioners are not being denied a tax deduction because they engage in constitutionally protected activities, but are simply being required to pay for those activities entirely out of their own pockets, as everyone else engaging in similar activities is required to do under the provisions of the Internal Revenue Code.

Id.

69 Graham, 83 T.C. at 582.

70 Id.

71 U.S. CONST. amend. I. See supra note 65.

72 Id.

73 Graham, 83 T.C. at 582.

74 456 U.S. 228 (1982).

75 Id.

76 Id.

77 Id. at 247 n.23.

78 Graham, 83 T.C. at 583. See supra note 9.

79 Graham, 83 T.C. at 583.

80 Id. (citing Lynch v. Donnelly, 466 U.S. 994 (1984)).

81 Id. at 582.

82 U.S. CONST. amend I. See supra note 65.

83 U.S. CONST. amend. V.

84 Graham, 83 T.C. at 583.

85 Graham, 822 F.2d at 844; Hernandez v. Comm'r, 819 F.2d 1212 (1st Cir. 1987), aff'd, 490 U.S. 680 (1989).

86 821 F.2d 1324 (8th Cir. 1987).

87 Id.

88 Neher v. Comm'r, 852 F.2d 848 (6th Cir. 1988) (holding payments made for auditing and training sessions deductible); Foley v. Comm'r, 844 F.2d 94 (2d Cir. 1988) (same).

89 Christiansen v. Comm'r, 843 F.2d 418 (10th Cir. 1988) (holding payments made for auditing and training sessions not deductible); Miller v. IRS, 829 F.2d 500 (4th Cir. 1987) (same).

90 Hernandez, 490 U.S. 680.

91 477 U.S. 105 (1986).

92 Id. at 118.

93 Hernandez, 819 F.2d at 1216-17.

94 Id. at 1217.

95 Id.

96 477 U.S. 105 (1986).

97 Hernandez, 819 F.2d at 1217.

98 Id.

99 Id.

100 Id. at 1217-18.

101 U.S. CONST. amend. I. See supra note 65.

102 Hernandez, 819 F.2d at 1218 (quoting I.R.C. § 170 (West 1994)).

103 Id. at 1219. See supra notes 74-81 and accompanying text.

104 Hernandez, 819 F.2d at 1219.

105 Id.

106 Id.

107 Id.

108 Id. at 1221.

109 U.S. CONST. amend. I. See supra note 65.

110 Id.

111 450 U.S. 707 (1981).

112 Hernandez, 819 F.2d at 1221 (quoting Thomas, 450 U.S. at 717-18), quoted in Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987).

113 Id. at 1221-22. The doctrine provides that any time a person receives something, he must pay something back. A Scientologist must maintain inflow and outflow in order to avoid spiritual decline. See supra notes 36-38 and accompanying text.

114 Hernandez, 819 F.2d at 1222.

115 Id. at 1223.

116 Id.

117 Id. at 1225-27.

118 Id. at 1226-27.

119 Id.

120 Staples v. Comm'r, 821 F.2d 1324, 1325 (8th Cir. 1987).

121 Id. The relevant facts regarding the religious activities of the Church of Scientology discussed by the court are identical to those laid out in Part II section A of this Comment. See supra notes 31-49 and accompanying text.

122 Staples, 821 F.2d at 1325 (summarizing the Tax Court's holding).

123 Id.

124 Id.

125 Id.

126 Id.

127 Id. at 1325-26 (quoting Graham v. Comm'r, 83 T.C. 575, 581 (1984)).

128 Id. at 1326.

129 Id.

130 Id.

131 Id.

132 I.R.C. § 170 (West 1994). See supra note 9.

133 Staples v. Comm'r, 821 F.2d at 1326.

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

135 Id. The plaintiffs also cited cases and legislative history for the proposition that the prohibited return for § 170 payments generally involves a material, financial, or economic benefit, not a strictly spiritual return. Staples, 821 F.2d at 1326 (citing Winters v. Comm'r, 468 F.2d 778, 780-81 (2d Cir. 1972); Murphy v. Comm'r, 54 T.C. 249, 253 (1970); H.R. REP. NO. 83-1337, reprinted in 1954 U.S.C.C.A.N. 4017, 4180; Rev. Rul. 76-232, 1976-1 C.B. 62, 62).

136 Staples, 821 F.2d at 1326.

137 Id. (citing Helvering v. Bliss, 293 U.S. 144, 151 (1934) (charitable contributions deduction not to be narrowly construed) and Crosby Valve & Gage Co. v. Comm'r, 380 F.2d 146, 147 (1st Cir. 1967) (finding that, with respect to charitable contributions, attention should be paid to the charitable purposes and works of the qualifying organization, rather than the subjective intent of the contributor)).

138 Id.

139 Id. (citing Murdock v. Pennsylvania, 319 U.S. 105, 111 (1943)).

140 Id. at 1327.

141 Id.

142 Id.

143 Id.

144 Id.

145 Id.

146 Id.

147 Id.

148 Id.

149 Id.

150 Id. The First Circuit had cited United States v. American Bar Endowment for the proposition that a payment cannot constitute a charitable contribution if the taxpayer expects a benefit in return. See United States v. American Bar Endowment, 477 U.S. 105 (1986). Because the Eighth Circuit in Staples concluded that participation in strictly religious practices was not a recognizable return benefit under § 170, it determined that American Bar Endowment was inapplicable to the situation at bar. Staples, 821 F.2d at 1328.

151 See Christianson v. Comm'r, 843 F.2d 418 (10th Cir. 1988) (holding payments made for auditing and training sessions not deductible); Miller v. IRS, 829 F.2d 500 (4th Cir. 1987) (same); Graham v. Comm'r, 822 F.2d 844 (9th Cir. 1987), aff'd sub nom. Hernandez v. Comm'r, 490 U.S. 680 (1989) (same); Hernandez v. Comm'r, 819 F.2d 1212 (1st Cir. 1987), aff'd, 490 U.S. 680 (1989) (same); Neher v. Comm'r, 852 F.2d 848 (6th Cir. 1988) (holding payments made for auditing and training sessions deductible); Foley v. Comm'r, 844 F.2d 94 (2d Cir. 1988) (same); Staples v. Comm'r, 821 F.2d 1324 (8th Cir. 1987) (same).

152 485 U.S. 1005 (1988); 486 U.S. 1022 (1988).

153 Hernandez, 490 U.S. at 690.

154 Id.

155 See S. REP. NO. 83-1622, at 196 (1954); H.R. REP. NO. 83-1337, at A44 (1954).

156 Hernandez, 490 U.S. at 691.

157 Id.

158 Id. at 692.

159 Id.

160 Id.

161 Id. at 693.

162 Id.

163 Id.

164 Id. at 694.

165 Id.

166 Id.

167 Id. The Court noted that petitioners had not alleged that their payments qualified as "dual payments" under the IRS regulations. It therefore declined to decide whether the payments were entitled to a partial deduction, i.e., to the extent the payments exceeded the value of the benefit received. Id. at 684 n.10.

168 See supra text accompanying notes 65-81, 101-16.

169 Hernandez, 490 U.S. at 695.

170 456 U.S. 220 (1982). See supra text accompanying notes 74-77.

171 Hernandez, 490 U.S. at 695.

172 403 U.S. 602 (1971).

173 Id. This test has since been criticized by members of the Court, but, given its role in the Hernandez decision, a short discussion of its findings is appropriate. See, e.g., Thomas A. Schweitzer, Lee v. Weisman: Whither the Establishment Clause and the Lemon v. Kurtzman Three-Pronged Test?, 9 TOURO L. REV. 401 (1993).

174 Hernandez, 490 U.S. at 695-96 (citing Larson, 456 U.S. at 246-47 n.23).

175 Id. at 696.

176 Id. The Court recognized that the "contribution or gift" requirement might impose a heavier burden on some religions than others. However, "a statute primarily having a secular effect does not violate the Establishment Clause merely because it happens to coincide or harmonize with the tenets of some or all religions." Id. (quoting McGowan v. Maryland, 366 U.S. 420, 442 (1961)).

177 Id.

178 Id. at 697. Petitioners' second challenge to the statute under the Establishment Clause simply alleged excessive government entanglement with religion, but, as stated above, the Supreme Court rejected the claim and upheld the statute.

179 Id. at 698-99.

180 Id. at 699. For a description of the auditing process, see supra note 10. For a description of the doctrine of exchange, see notes 36-41 and accompanying text.

181 Hernandez, 490 U.S. at 699 (citing Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 141-42 (1987); Thomas v. Review Bd., 450 U.S. 707, 717-19 (1981); Wisconsin v. Yoder, 406 U.S. 205, 220-21 (1972)).

182 Id.

183 Id.

184 Id. at 699-700 (citing United States v. Lee, 455 U.S. 252, 260 (1982)).

185 Id. at 700.

186 Id. at 701.

187 Id.

188 Id.

189 Id. at 703. The Court noted that the theory of administrative inconsistency emerged only on appeal and thus the record had not been developed accordingly. The record contained no evidence regarding financial transactions in other religious faiths, i.e., whether a particular payment made to a religious organization was obligatory, mandatory, or merely encouraged. Id. at 702.

190 945 F.2d 374 (11th Cir. 1991).

191 Id. at 375.

192 Id.

193 Id.

194 Id.

195 Complaint of Appellant, Powell v. United States, 945 F.2d 374 (S.D. Fla. 1990) (No. 90-8271-CIV-JLK).

196 Powell, 945 F.2d at 374.

197 Id. at 376.

198 Id.

199 Id.

200 Id. (citing A.R.M. 2, 1 C.B. 150 (1919)) (holding the distinction of pew rents, church dues, and the like from basket collections unwarranted by § 170). See also Rev. Rul. 70-47, 1970-1 C.B. 49 (1978) (stating: "Pew rents, building fund assessments, and periodic dues paid to a church . . . are all methods of making contributions to the church, and such payments are deductible charitable contributions within the limitations set out in § 170 of the Code.").

201 Powell, 945 F.2d at 377.

202 Id.

203 Id.

204 Id.

205 See supra text accompanying note 199.

206 Powell, 945 F.2d at 377.

207 Hernandez v. Comm'r, 490 U.S. 680, 702 (1989).

208 Powell, 945 F.2d at 378.

209 Id.

210 See Newton, supra note 2, at A1; Paul Streckfus, Church of Scientology Recognized as Tax Exempt, 61 TAX NOTES 279 (1993).

211 See Newton, supra note 2.

212 Id.

213 Id.

214 Id.

215 Id.

216 Rev. Rul. 93-73, 1993-2 C.B. 75. See supra notes 18-19 and accompanying text.

217 See supra notes 197-202 and accompanying text.

218 Jerome Kurtz, IRS Should Fully Explain Its Settlement with Church of Scientology, 63 TAX NOTES 1783 (1994).

219 Id.

220 Id. at 1784.

221 Paul Streckfus, Latest IRS Ruling Provides More Good News for the Scientologists, 61 TAX NOTES 643, 644 (1993).

222 Id.

223 Id.

224 Id. In his article, Paul Streckfus asked the question this Comment addresses: Can they do this? Can the IRS ignore a Supreme Court decision? The article does not attempt to answer the question but merely sets the stage for further analysis of the issue.

225 Hernandez v. Comm'r, 490 U.S. 680, 684 (1989).

226 The possible ramifications of this course of action are discussed infra, Part IV.

227 Frothingham v. Melon, 262 U.S. 447 (1923).

228 In addition to Powell, a number of similar challenges were consolidated for trial in the Tax Court. See Garrison v. Comm'r, T. C. Nos. 18956-88, 11707-89, 17184-89, 7210-91, and 28717-91.

229 Flast v. Cohen, 392 U.S. 83 (1968).

230 See supra notes 185-89 and accompanying text.

231 Farina, supra note 24, at 452.

232 Discussed infra Part IV.B.

233 Hernandez v. Comm'r, 490 U.S. 680, 683-84 n.1 (1989).

234 See Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

235 I.R.C. § 7805(a) (West 1994).

236 Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 844 (1984).

237 See supra note 25.

238 Chevron, 467 U.S. at 842.

239 Id.

240 Id. at 843.

241 Robert A. Anthony, Which Agency Interpretations Should Bind Citizens and the Courts?, 7 YALE J. ON REG. 1 (1990).

242 Id. at 4.

243 Id. at 5.

244 Id.

245 Chevron, 467 U.S. at 842.

246 Hernandez v. Comm'r, 490 U.S. 680, 690 (1989).

247 Id.

248 I.R.C. § 162(b) (West 1994).

249 Hernandez, 490 U.S. at 690 n.7.

250 Chevron, 467 U.S. at 844.

251 See supra notes 237-40 and accompanying text.

252 Chevron, 467 U.S. at 844. See supra notes 247-49 and accompanying text.

253 See supra notes 241-44 and accompanying text.

254 Chevron, 467 U.S. at 844.

255 Id.

256 Anthony, supra note 241, at 36.

257 See Chevron, 467 U.S. at 843.

258 Jacob Mertens, Jr., MERTENS LAW OF FEDERAL INCOME TAXATION § 47.146 (1992).

259 Id.

260 Anthony, supra note 241, at 4.

261 Id. at 36.

262 Id. at 40.

263 Recall the assumption laid out at the beginning of this section. See supra notes 233-34 and accompanying text.

264 See supra notes 245-52 and accompanying text.

265 Anthony, supra note 241, at 40.

266 I.R.C. § 7805 (West 1994); see supra note 235 and accompanying text.

267 Anthony, supra note 241, at 44.

268 Id. (quoting Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 844 (1984)).

269 Chevron, 467 U.S. at 843.

270 Farina, supra note 24, at 456 (citing Chevron, 467 U.S. at 843-44).

271 Id. (citing Chevron, 467 U.S. at 864-66).

272 Chevron, 467 U.S. at 844.

273 Id. at 863-64.

274 See supra notes 29-30 and accompanying text. Section A of Part IV argues that the Supreme Court was interpreting § 170 of the Code, and not an agency interpretation thereof. The Court determined that § 170 of the Code did not encompass fixed payments made to the Church of Scientology for auditing and training sessions.

275 Chevron, 467 U.S. at 842.

276 See supra notes 250-52 and accompanying text.

277 Chevron, 467 U.S. at 843.

278 See supra notes 233-34 and accompanying text.

279 Bill Latham, Note, Valley Forge Christian College v. Americans United for Separation of Church and State: Taxpayer Standing and the Establishment Clause, 34 BAYLOR L. REV. 748, 748 (1982).

280 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-7, at 68 (1988).

281 Baker v. Carr, 369 U.S. 186, 204 (1962).

282 CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS 68 (5th ed. 1994).

283 Dana S. Treister, Note, Standing to Sue the Government: Are Separation of Powers Principles Really Being Served?, 67 S. CAL. L. REV. 689, 691 (1994). Separation of powers concerns include "minimizing friction between the branches of government, forestalling public perception that the judiciary infringes on the political arena, and prohibiting the judicial branch from unconstitutionally performing duties delegated to the executive branch." Id. at 691 n.7 (citing David A. Logan, Standing to Sue: A Proposed Separation of Powers Analysis, 1984 WIS. L. REV. 37, 47-48).

284 U.S. CONST. art. III. The other doctrines include political question, ripeness, and mootness.

285 TRIBE, supra note 280, at 68.

286 Sierra Club v. Morton, 405 U.S. 727 (1972).

287 Warth v. Seldin, 422 U.S. 490, 499 (1975) (quoting Linda R.S. v. Richard D., 410 U.S. 614, 617 (1973)).

288 United States v. Richardson, 418 U.S. 166, 175 (1974) (quoting Flast v. Cohen, 392 U.S. 83, 106 (1968)).

289 262 U.S. 447 (1923).

290 U.S. CONST. amend. X.

291 Frothingham, 262 U.S. at 479.

292 Id. at 480.

293 Id. at 489.

294 Id. at 488.

295 392 U.S. 83 (1968).

296 The funds were being spent under Titles I and II of the Elementary and Secondary Education Act of 1965. Id. at 85.

297 U.S. CONST. amend. I.

298 Flast, 392 U.S. at 85.

299 Id. at 92 n.6 (citations omitted).

300 Id. at 94. It is interesting to note that in at least three taxpayer suits prior to Frothingham, the Court accepted jurisdiction without addressing the question of standing. See Wilson v. Shaw, 204 U.S. 24 (1907); Millard v. Roberts, 202 U.S. 429 (1906); Bradfield v. Roberts, 175 U.S. 291 (1899).

301 Flast, 392 U.S. at 99.

302 Id. at 99-100.

303 Id. at 100.

304 Baker v. Carr, 369 U.S. 186, 204 (1962).

305 Flast, 392 U.S. at 101.

306 Id.

307 Id. at 102.

308 Id.

309 Id.

310 Id. Article I, section 8, clause 1 provides that "[t]he Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States." U.S. CONST. art. I, § 8, cl.1.

311 Flast, 392 U.S. at 102.

312 Id. at 102-03.

313 Id. at 103.

314 Id.

315 Id.

316 Plaintiffs also alleged that the Elementary and Secondary Education Act of 1965 violated the Free Exercise Clause of the First Amendment. The Court declined to decide the issue of whether the Free Exercise claim alone would confer standing in light of its holding that the Establishment Clause claim established the requisite nexus. Flast, 392 U.S. at 104 & n.25.

317 Id. at 103-04.

318 Id. at 103.

319 Id. at 104.

320 Id. at 106.

321 See, e.g., United States v. Richardson, 418 U.S. 166 (1974) (holding that the Article I, section 9 requirement that "a regular statement and account of the receipts and expenditures of all public money shall be published from time to time," was not a specific constitutional limitation on Congress's taxing and spending power); Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982) (holding that a gift of surplus government-owned real estate to a religious college was authorized not by the taxing and spending powers, but by the Property Clause, U.S. CONST. art. IV, § 3, cl. 2).

322 See supra Part II.D.

323 Hernandez v. Comm'r, 490 U.S. 680, 693 (1989).

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

325 U.S. CONST. amend. I. See supra note 65.

326 Baker v. Carr, 369 U.S. 186, 204 (1962).

327 Flast v. Cohen, 392 U.S. 83, 102 (1968).

328 Id.

329 Id.

330 See, e.g., Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982).

331 Flast, 392 U.S. at 102.

332 Id. at 103.

333 Id. at 102-03.

334 Id. at 104.

335 Id. at 103-04.

336 Hernandez v. Comm'r, 490 U.S. 680, 695 (1989).

337 See discussion supra notes 172-73 and accompanying text.

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

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

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

341 Lemon, 403 U.S. at 612.

342 Id.

343 Id.

344 Id. at 613.

345 See supra note 173.

346 112 S. Ct. 2649 (1992).

347 492 U.S. 573 (1989).

348 Id. at 659 (Kennedy, J., concurring in part and dissenting in part).

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