

# SHOULD THE GOVERNMENT BE IN THE BUSINESS OF TAXING CHURCHES?

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## INTRODUCTION

Throughout our entire history as a nation, the United States has never imposed a federal income tax on churches.<sup>1</sup> In spite of this longstanding policy for over two centuries and the principle it represents of the separate spheres of sovereignty of church and state in America, some critics have recently become more vocal in questioning the legitimacy of church tax-exempt status, based primarily on financial and constitutional concerns.<sup>2</sup>

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<sup>1</sup> While not all faiths use the term “church” to describe their associations of believers and places of worship, this Article uses the term church for the sake of readability and for consistency with the Internal Revenue Service’s own use of the term in a generic sense to refer to associations of believers and places of worship across different religious traditions. See I.R.S., U.S. DEP’T. OF TREASURY, PUB. NO. 1828, TAX GUIDE FOR CHURCHES AND RELIGIOUS ORGANIZATIONS 1 (2015) [hereinafter TAX GUIDE FOR CHURCHES], <http://www.irs.gov/pub/irs-pdf/p1828.pdf>.

<sup>2</sup> See, e.g., Miranda Fleischer, *Churches Are More Private Club than Public Good. Why Do They Need Tax Exemptions?*, WASH. POST (Sept. 17, 2015), [https://www.washingtonpost.com/news/in-theory/wp/2015/09/17/churches-are-more-club-than-public-good-why-do-they-need-tax-exemptions/?utm\\_term=.80e8a1d48872](https://www.washingtonpost.com/news/in-theory/wp/2015/09/17/churches-are-more-club-than-public-good-why-do-they-need-tax-exemptions/?utm_term=.80e8a1d48872) (challenging the validity of church tax exemptions under the public goods rationale); Mark Oppenheimer, *Now’s the Time to End Tax Exemptions for Religious Institutions*, TIME (June 28, 2015), <http://time.com/3939143/nows-the-time-to-end-tax-exemptions-for-religious-institutions/> (stating that the Supreme Court’s holding in *Obergefell v. Hodges* begs reexamination of tax-exempt status for religious institutions). Likewise, supporters of church tax exemption have become more vocal in expressing the reasons for this exemption that have been implicit in our tax system since the founding of the United States. See, e.g., Richard W. Garnett, *Tax Exemptions Protect Religious Freedom. We Should Keep Them.*, WASH. POST (Sept. 15, 2015), [https://www.washingtonpost.com/news/in-theory/wp/2015/09/15/religious-tax-exemptions-protect-religious-freedom-we-should-keep-them/?utm\\_term=.3ef5f65757a2](https://www.washingtonpost.com/news/in-theory/wp/2015/09/15/religious-tax-exemptions-protect-religious-freedom-we-should-keep-them/?utm_term=.3ef5f65757a2) (arguing that the requirement of Church-State separation limits the government’s power to tax religious institutions); John Inazu, *Want a Vibrant Public Square? Support Religious Tax Exemptions.*, WASH. POST (Sept. 16, 2015), [https://www.washingtonpost.com/news/in-theory/wp/2015/09/16/want-a-vibrant-public-square-support-religious-tax-exemptions/?utm\\_term=.f5896d24e9ce](https://www.washingtonpost.com/news/in-theory/wp/2015/09/16/want-a-vibrant-public-square-support-religious-tax-exemptions/?utm_term=.f5896d24e9ce) (discussing the

As a practical matter, the courts and Congress are the two institutions where the unbroken practice of church tax exemption could be placed at risk. As the dissenting Supreme Court justices observed in *Obergefell v. Hodges*, the newly interpreted constitutional right to same-sex marriage in the courts could evolve to threaten tax exemptions and other freedoms heretofore enjoyed by religious organizations.<sup>3</sup> Also, with one political party now controlling Congress and the White House after the 2016 elections,<sup>4</sup> new legislation like comprehensive tax reform has its greatest chance of passage in decades. And as with any scenario involving tax reform, there is always the chance that churches and other types of corporations and entities could find their tax status changing under a new paradigm. In light of these developments, more people may be asking: “Why should churches continue to be tax-exempt?” As the title of this Article suggests, perhaps a more appropriate way to frame the inquiry might be: “Should the government be in the business of taxing churches?”<sup>5</sup>

From ancient times to the present day, the relationship between government and religion could be described as strained at its best, and violent at its worst.<sup>6</sup> The founding of the United States was no exception to the historic tug of war between politics, religion, and money.<sup>7</sup> In declaring their independence from the tyrannical British government, the colonists cited religious and financial grievances to justify their revolution.<sup>8</sup> Before the American Revolution, the colonists were taxed to support the Church of England, the British government’s official state church.<sup>9</sup> And when independence was finally achieved from England

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importance of maintaining tax exemptions for religious organizations, even when they disagree with new trends embracing same-sex marriage).

<sup>3</sup> 135 S. Ct. 2584, 2625–26 (2015) (Roberts, C.J., dissenting).

<sup>4</sup> See Mark Z. Barabak & Lisa Mascaro, *Republicans Hold the House and Senate, but Will That End the Washington Gridlock Even with President Trump?*, L.A. TIMES (Nov. 9, 2016, 12:10 AM), <http://www.latimes.com/politics/la-na-pol-election-congress-control-20161108-story.html> (stating that the 2016 election resulted in a unified Republican government).

<sup>5</sup> Or, as Notre Dame law professor Richard Garnett has described it, “[i]nstead of asking whether churches and religious organizations deserve to be tax-exempt, we should ask why governments should be able to tax them at all. Taxation, after all, involves interference by the state, and in a free society such interference needs to be justified.” Garnett, *supra* note 2.

<sup>6</sup> See *Walz v. Tax Comm’n*, 397 U.S. 664, 673 (1970) (“Governments have not always been tolerant of religious activity, and hostility toward religion has taken many shapes and forms—economic, political, and sometimes harshly oppressive.”).

<sup>7</sup> See *id.* (describing the conflict between government and religion as part of America’s “national heritage” and one of the “roots [of] the Revolution itself”).

<sup>8</sup> THE DECLARATION OF INDEPENDENCE paras. 1–18 (U.S. 1776).

<sup>9</sup> *Walz*, 397 U.S. at 668.

following the war, the Framers of the Constitution ensured that religious belief and expression in America would be free from government interference by adopting the First Amendment in 1791: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .”<sup>10</sup> In a letter to the Danbury Baptist Association in 1802, Thomas Jefferson famously described the First Amendment’s protection of religious freedom as “building a wall of separation between church and [s]tate.”<sup>11</sup>

In practice, the wall of separation between church and state in America has included the federal tax exemption of churches since the founding era.<sup>12</sup> This automatic policy<sup>13</sup> of exempting churches dates back to the first federal income tax around the early 1900s and was codified in the 1940s as the familiar Section 501(c)(3) of the Internal Revenue Code,<sup>14</sup> providing that “[c]orporations, and any community chest, fund, or foundation, organized and operated exclusively for religious . . . purposes” shall be “exempt from taxation.”<sup>15</sup> The IRS Tax Guide for Churches and Religious Organizations explains:

Congress has enacted special tax laws that apply to churches, religious organizations and ministers in recognition of their unique status in American society and of their rights guaranteed by the First Amendment of the Constitution of the United States. Churches and religious organizations are generally exempt from income tax and receive other favorable treatment under the tax law . . . .<sup>16</sup>

Undeniably, much is at stake in the battle over the purse strings of American churches. According to figures compiled by the Gallup Polling organization, between 2002 and 2013, the majority of Americans continued making financial contributions to religious organizations

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<sup>10</sup> U.S. CONST. amend. I.

<sup>11</sup> Letter from Thomas Jefferson to the Danbury Baptist Association (Jan. 1, 1802), in 8 THE WRITINGS OF THOMAS JEFFERSON: BEING HIS AUTOBIOGRAPHY, CORRESPONDENCE, REPORTS, MESSAGES, ADDRESSES, AND OTHER WRITINGS, OFFICIAL, AND PRIVATE. 113, 113–14 (H.A. Washington ed., Taylor & Maury 1854).

<sup>12</sup> See *Lemon v. Kurtzman*, 403 U.S. 602, 624 (1971) (describing the non-taxation of churches in the United States as “more than 200 years of virtually universal practice imbedded in our colonial experience and continuing into the present.”); *Walz*, 397 U.S. at 677–78 (recounting the “unbroken practice” of granting tax exemption to churches since the early 1800s).

<sup>13</sup> TAX GUIDE FOR CHURCHES, *supra* note 1, at 2 (“Churches that meet the requirements of IRC Section 501(c)(3) are automatically considered tax exempt and are not required to apply for and obtain recognition of tax-exempt status from the IRS.”); see also I.R.C. § 508(c)(1)(A) (2012) (codifying the “[m]andatory exception[]” rule that churches need not apply for IRS recognition of tax-exempt status).

<sup>14</sup> I.R.C. § 501(c)(3) (2012).

<sup>15</sup> *Id.* §§ 501(a), (c)(3).

<sup>16</sup> TAX GUIDE FOR CHURCHES, *supra* note 1, at ii.

despite difficult economic times.<sup>17</sup> Moreover, Giving USA reports that of an estimated \$373.25 billion given to charity in 2015,<sup>18</sup> more than \$119 billion was donated for religious causes.<sup>19</sup> Clearly, if advocates of taxing religion are successful, the government stands to gain.<sup>20</sup>

While some legal scholars have suggested the legitimacy of church tax exemption may be on the decline in the modern era,<sup>21</sup> this Article offers reminders of the constitutional, historical, and public policy rationales that have supported church tax exemption since the establishment of our federal government. Ultimately, it contends that protection for religious freedom guaranteed by the Framers of the Constitution precludes the federal government from levying taxes on churches,<sup>22</sup> and furthermore, that the government may not constitutionally revoke the historic tax-exempt status of churches based on their religious nature.<sup>23</sup> Part I briefly recounts the history of church tax exemption from ancient civilizations to its “unbroken” practice within the United States since the founding. Part II advocates constitutional rationales for church tax exemption, including promoting the proper degree of separation of church and state, protecting the free

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<sup>17</sup> Gallup Editors, *Most Americans Practice Charitable Giving, Volunteerism*, GALLUP (Dec. 13, 2013), <http://www.gallup.com/poll/166250/americans-practice-charitable-giving-volunteerism.aspx>.

<sup>18</sup> GIVING USA FOUND., *THE ANNUAL REPORT ON PHILANTHROPY FOR THE YEAR 2015* 5 (2016), <http://cfnwmo.org/wp-content/uploads/2016/07/Giving-USA-2016.pdf>.

<sup>19</sup> *Id.* at 6.

<sup>20</sup> If churches were to lose their tax-exempt status, the government would gain not only additional revenue from imposing taxes on churches directly but also very likely from donors no longer being able to claim itemized deductions for their contributions to churches. I.R.C. § 170(a) (2012).

<sup>21</sup> See, e.g., Shannon Weeks McCormack, *Too Close to Home: Limiting the Organizations Subsidized by the Charitable Deduction to Those in Economic Need*, 63 Fla. L. Rev. 857, 911 (2011) (“The most direct response would require revision of § 170, which determines which organizations are entitled to receive subsidies through the charitable deduction. . . . efficiency analysis would suggest that it is economically unnecessary to allow donors to deduct amounts contributed to organizations such as specific schools and churches that generally suffer minimal underfunding issues.”); Christine Roemhildt Moore, Comment, *Religious Tax Exemption and the “Charitable Scrutiny” Test*, 15 REGENT U. L. REV. 295 (2003) (“While tax-exempt status has long benefited American churches and religious institutions, given the development of modern case law and a changing attitude toward the role that religion plays in American life, churches may not continue to enjoy the benefits of tax exemption.”); John W. Whitehead, *Tax Exemption and Churches: A Historical and Constitutional Analysis*, 22 CUMB. L. REV. 521, 593 (1992) (“[D]ifficult questions persist about tax exemption for churches, and the questions must be expanded to include those of tax exemption for organizations associated with or adjunct to the church. These questions will become increasingly important in environments of economic tension, limited resources and expanding government bureaucracies.”).

<sup>22</sup> See discussion *infra* Sections II.A.–B.

<sup>23</sup> See discussion *infra* Section II.C.

exercise of religion, and ensuring equal access for religious organizations to public benefit programs. Finally, Part III concludes with economic and public policy rationales that suggest exempting churches from government taxation is in the overall best interest of society.

### I. HISTORY SUPPORTS CHURCH TAX EXEMPTION

In *Walz v. Tax Commission*,<sup>24</sup> the U.S. Supreme Court held that New York's grant of property tax exemption to church realty used solely for religious worship was consistent with the constitutional guarantee of the right to freedom of religion and, moreover, did not violate the First Amendment by constituting an "establishment of religion."<sup>25</sup> In reaching its landmark conclusion in favor of church tax exemption, the Supreme Court referenced the "unbroken practice" of granting tax exemptions to churches since the very founding of the United States.<sup>26</sup> The Court articulated, "Few concepts are more deeply embedded in the fabric of our national life, beginning with pre-Revolutionary colonial times, than for the government to exercise at the very least this kind of benevolent neutrality toward churches and religious exercise . . . ."<sup>27</sup>

The exemption of churches and other religious institutions from government taxation is not unique to the founding of the United States; to the contrary, religious tax exemption is a practice that has been observed in a variety of cultural traditions since antiquity.<sup>28</sup> In fact, religious tax exemption can be traced back for so many centuries that even historians have a difficult time pinpointing the exact time period in which the practice originated.<sup>29</sup> As one expert in the area of church tax exemption has explained, "No one can find that point in history where some great lawgiver declared, 'Come now, and let us exempt the church from taxation, for behold! [I]t is as part of the fabric of the state and a pillar of the throne.'"<sup>30</sup> All jesting aside, the same scholar noted, "There is no time before which churches were taxed and in which we can seek

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<sup>24</sup> 397 U.S. 664 (1970).

<sup>25</sup> *Id.* at 673, 675 ("We cannot read New York's statute as attempting to establish religion; it is simply sparing the exercise of religion from the burden of property taxation levied on private profit institutions.").

<sup>26</sup> *Id.* at 678.

<sup>27</sup> *Id.* at 676–77.

<sup>28</sup> *See, e.g.,* Whitehead, *supra* note 21, at 524–29 (providing a timeline of both ancient and other historical civilizations that granted some form of tax relief to religious bodies).

<sup>29</sup> *See, e.g.,* Claude W. Stimson, *The Exemption of Property from Taxation in the United States*, 18 MINN. L. REV. 411, 416 (1934) ("A perusal of the history of tax exemption indicates that the granting of tax immunity to ecclesiastical and military property is probably as old as the institution of taxation.").

<sup>30</sup> DEAN M. KELLEY, WHY CHURCHES SHOULD NOT PAY TAXES 5 (1977).

the reason for exemption. It has always been the case, clear back to the priests of Egypt and beyond them into the coulisses of prehistory.”<sup>31</sup>

While not all scholars would be so gracious to concede that church tax exemption predates reliable historical records, there is some consensus that tax exemption for religious institutions is at least as old as the early Jewish civilizations recorded in the Old Testament: “You are also to know that you have no authority to impose taxes, tribute or duty on any of the priests, Levites, musicians, gatekeepers, temple servants or other workers at this house of God.”<sup>32</sup> Like the Jews, other ancient societies, such as the Sumerians (2800 B.C.), Babylonians (2169–1703 B.C.), Egyptians (1880–1233 B.C.), Persians (539 B.C.), and Romans (306–337 A.D.) also extended some form of tax exemption to religious leaders and organizations.<sup>33</sup> Historically, when taxes were levied on religion, the outcome was by no means favorable. For instance, during the twelfth century when Spain was dominated by Christian influence, Jewish minorities were persecuted by means of severe government taxation.<sup>34</sup>

As discussed previously in the Introduction, disputes over taxation and religious liberty were two of the primary factors motivating the early American colonists to engage in revolution against the English Crown and, later, to ensure the constitutional protection of the right to religious freedom in the First Amendment.<sup>35</sup> Consequently, from its earliest days, Congress has consistently granted tax relief and immunity to religious bodies.<sup>36</sup> Since the first income tax code was attempted in 1894,<sup>37</sup> Congress has exempted churches “organized and operated exclusively for religious . . . purposes” from the payment of income tax.<sup>38</sup> In addition, all fifty states grant some form of church tax exemption through statutory provisions, constitutional provisions, or both.<sup>39</sup> While

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<sup>31</sup> *Id.*

<sup>32</sup> *Ezra* 7:24 (New International Version).

<sup>33</sup> Whitehead, *supra* note 21, at 524–29.

<sup>34</sup> *Id.* at 529.

<sup>35</sup> *See supra* notes 8–10 and accompanying text.

<sup>36</sup> *Walz v. Tax Comm’n*, 397 U.S. 664, 677–78 (1970) (describing some of Congress’ earliest religious tax exemptions dating back to 1802, including income tax exemption, property tax exemption, and sales tax exemption).

<sup>37</sup> Sheldon D. Pollack, *Origins of the Modern Income Tax, 1894–1913*, 66 *TAX L.* 295, 295, 301–06 (2013) (describing the development and progression of the first income tax provision); Act of Aug. 27, 1894, ch. 349, § 27, 28 Stat. 509, 553 (1894), *invalidated in relevant part* by *Pollack v. Farmers’ Loan & Tr. Co.*, 157 U.S. 429, 586 (1895).

<sup>38</sup> The current federal tax exemption of churches and other organizations operated exclusively for religious purposes was codified in 1954 as I.R.C. § 501(c)(3) (2012).

<sup>39</sup> EVELYN BRODY, *PROPERTY-TAX EXEMPTION FOR CHARITIES: MAPPING THE BATTLEFIELD* 174 (2002).

over the years some have questioned whether the government should indeed grant tax exemption to churches,<sup>40</sup> the unbroken practice in the United States of exempting churches from government taxation evidences a historical consensus that churches have the right to be exempt from taxation as a separate, sovereign institution from the state, or at the very least, that churches lawfully deserve certain tax immunities because of their indispensable contributions to the public good.<sup>41</sup> For these reasons, the Supreme Court emphasized in *Walz* that such a time-honored tradition—unbroken for centuries—“is not something to be lightly cast aside.”<sup>42</sup>

## II. THE CONSTITUTION SUPPORTS CHURCH TAX EXEMPTION

While centuries of history lend support to the notion that churches should be exempt from paying taxes to fund the government,<sup>43</sup> the First Amendment’s commitment to religious freedom provides the greatest legal justification for the exemption. The following Sections present three of the primary constitutional arguments in favor of church tax exemption: (1) promoting the proper degree of separation of church and state; (2) protecting the free exercise of religion; and (3) ensuring equal access for religious organizations to public benefit programs.

### *A. Church Tax Exemption Promotes the Proper Degree of Separation of Church and State.*

The earliest American political leaders understood that man-made government should be limited to the proper role of protecting the unalienable rights and liberties of its citizens—who, in fact, are responsible for instituting government among men for the good of society.<sup>44</sup> Of the many injuries and abuses the early American colonists endured at the hands of the tyrannical British government, one blatant injustice was the mandate to worship through the British government’s

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<sup>40</sup> See, e.g., John Witte, Jr., *Tax Exemption of Church Property: Historical Anomaly or Valid Constitutional Practice?*, 64 S. CAL. L. REV. 363, 382–83 (1991) (recounting the historic separation of church and state concerns surrounding church tax exemption voiced by leading American politicians, such as Presidents James Madison and Ulysses S. Grant).

<sup>41</sup> See discussion *infra* Sections II.A.–C.

<sup>42</sup> *Walz v. Tax Comm’n*, 397 U.S. 664, 678 (1970).

<sup>43</sup> See discussion *supra* Part I.

<sup>44</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.

*Id.*

official state religion, The Church of England.<sup>45</sup> When the colonists had the opportunity to institute their own form of government in the United States following the American Revolution, they ensured that religious belief and expression would be free from government interference by adopting the First Amendment to the U.S. Constitution in 1791.<sup>46</sup> To this day, any inquiry into the permissibility of a government action that involves religion must begin with the familiar provisions of the First Amendment's text that government must avoid both an "establishment of religion" and "prohibiting the free exercise [of religion]."<sup>47</sup>

### 1. Church Tax Exemption Is Not an Establishment of Religion.

In the first U.S. Supreme Court case to consider the constitutionality of church tax exemption, *Walz v. Tax Commission*, the Court rejected the claims of a New York realty owner that a state property tax exemption for churches was an unconstitutional "establishment of religion" because the tax exemption allegedly required the realty owner to make indirect financial contributions to religious bodies.<sup>48</sup> The Court began its analysis of the legal issue with the historical context that to those who penned the First Amendment, the "establishment" of a religion [would have] connoted sponsorship, financial support, and active involvement of the [government] in religious activity.<sup>49</sup> Despite the seemingly unqualified language of the First Amendment, the Court admitted, "No perfect or absolute separation [of church and state] is really possible; the very existence of the Religion Clauses is an involvement of sorts—one that seeks to mark boundaries to avoid excessive entanglement."<sup>50</sup>

No doubt, the Supreme Court realized it found itself between a rock and a hard place in determining whether a state tax immunity scheme for churches resulted in an excessive entanglement of religion. The Court reasoned that inevitably church taxation and church tax exemption both result in "some degree of governmental involvement with religion."<sup>51</sup> On the one hand, granting tax exemption to churches provides religious

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<sup>45</sup> CHESTER JAMES ANTIEAU ET AL., FREEDOM FROM FEDERAL ESTABLISHMENT 2–3 (1964).

<sup>46</sup> See Comment, *The Supreme Court, the First Amendment, and Religion in the Public Schools*, 63 COLUM. L. REV. 73, 73 (1963) (stating that the First Amendment was desired by the early American population).

<sup>47</sup> *Id.* (quoting the First Amendment).

<sup>48</sup> *Walz v. Tax Comm'n*, 397 U.S. 664, 667 (1970). Although the dispute in *Walz* involved a property tax exemption, the Court's reasoning is equally relevant in the context of income tax exemptions.

<sup>49</sup> *Id.* at 668.

<sup>50</sup> *Id.* at 670.

<sup>51</sup> *Id.* at 674 (emphasis added).

bodies with an indirect economic benefit over for-profit organizations.<sup>52</sup> On the other hand, imposing taxes on churches to raise financial support for the government obviously results in a more direct instance of excessive entanglement between government and religion.<sup>53</sup> After weighing the two alternatives in light of the historical context of the drafting of the First Amendment,<sup>54</sup> the Supreme Court concluded: “[E]xemption creates only a minimal and remote involvement between church and state and far less than taxation of churches. It restricts the fiscal relationship between church and state, and tends to complement and reinforce the desired separation insulating each from the other.”<sup>55</sup>

In its analysis, the *Walz* Court made an important distinction between a direct money subsidy, which would impermissibly create an excessive entanglement between church and state, and the historical exemption of churches from government taxation.<sup>56</sup> The Court reasoned that a grant of tax exemption does not amount to a government subsidy because the government does not transfer part of its revenue to churches, but, instead, merely abstains from demanding that the church support the state.<sup>57</sup> In the end, the Supreme Court in *Walz* logically reasoned, “There is no genuine nexus between tax exemption and establishment of religion.”<sup>58</sup>

In his treatise on church tax exemption, Dean Kelley explains why, both logically and historically, church tax exemptions should not be equated with government subsidies.<sup>59</sup> Kelley suggests this misconception is based upon the pretotalitarian assumption that “government has a claim upon every penny in our pockets, every activity of our lives, every expression or undertaking we attempt, and restrains that claim only by affirmative and magnanimous generosity toward those particular endeavors it (after due deliberation) favors and fosters.”<sup>60</sup> Furthermore, Kelley debunks the “tax exemption equals a subsidy” myth by recalling historically that when Congress wrote the first modern income tax

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<sup>52</sup> *Id.* at 674–75.

<sup>53</sup> *Id.* at 675.

<sup>54</sup> *Id.* (“We cannot ignore the instances in history when church support of government led to the kind of involvement we seek to avoid.”).

<sup>55</sup> *Id.* at 676.

<sup>56</sup> *Id.* at 675–76.

<sup>57</sup> *Id.* at 675.

<sup>58</sup> *Id.*

<sup>59</sup> KELLEY, *supra* note 30, at 11–13, 33–34. Using similar logic, the majority of the U.S. Supreme Court recently contrasted the difference between tax credits (or exemptions) and direct government subsidies. See *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 141–42 (2011).

<sup>60</sup> KELLEY, *supra* note 30, at 11.

statutes in 1894 and 1913, only “net income” was taxed.<sup>61</sup> Because nonprofit organizations, including churches, are fundamentally designed

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<sup>61</sup> *Id.* In expounding upon the *Walz* Court’s logical conclusion that tax exemptions do not amount to government subsidies, Kelley summarized six operational distinctions between subsidies and exemptions:

1. In a tax exemption, *no money changes hands* between government and the organization. There is no financial transaction with applications, checks, warrants, vouchers, receipts, accounting or audits; “. . . government does not transfer part of its revenue . . .”
2. A tax exemption, in and of itself, *does not provide one cent* to an organization. Without contributions from its supporters, it has nothing to spend. Government cannot create or sustain—by tax exemption—any organization which does not attract contributions on its own merits.
3. The *amount* of a subsidy is determined by the legislature or an administrator; there is no “amount” involved in a tax exemption because it is “open-ended”; the organization’s income is dependent solely on the generosity of its several contributors, each of whom decides freely and individually how much he or she will give.
4. Consequently, there is *no periodic legislative or administrative struggle* to obtain, renew, maintain, or increase the amount, as would be the case with a subsidy; political allegiances are not mobilized to support or to oppose it; the energies of the organization are not expended in applying for, defending, reporting, qualifying, undergoing audits and evaluations, etc., and the resources of government are not expended in administering them.
5. A subsidy is not *voluntary* in the same sense that tax-exempt contributions are. When the legislature taxes the citizenry and appropriates a portion of the revenues as a subsidy to an organization, the individual citizen has nothing determinative to say as to the amount of the subsidy or the selection of the recipient. . . .
6. A tax exemption does not convert the organization into an agency of “state action,” whereas a subsidy—in certain circumstances—may.

*Id.* at 33–34 (quoting the Court’s opinion in *Walz* to explain the difference between tax exemptions and subsidies). In *Bob Jones University v. United States*, the Supreme Court would later take the view that every tax exemption constitutes a subsidy in that they affect nonqualifying taxpayers, forcing them to become indirect and vicarious donors. 461 U.S. 574, 591 (1983). The Supreme Court in *Tex. Monthly, Inc. v. Bullock* would later cite the *Bob Jones* view with approval. 489 U.S. 1, 14 (1989). The dissent in *Tex. Monthly*, authored by Justice Scalia, sharply called into question the Court’s classification of tax exemptions and general subsidies as functional equivalents. *Id.* at 35 (Scalia, J., dissenting). Justice Scalia cited past Court precedent to support the view that tax exemptions are qualitatively different than general subsidies because although they both provide economic assistance, subsidies involve the much more obvious entanglement of state and religion by direct transfers of actual public money and resources exacted from taxpayers as a whole. *Id.* It is perhaps worthy to note, in considering the future merits of this view within the Court, that none of the Justices constituting the plurality in *Tex. Monthly* (Justices Brennan, Marshall, Stevens, O’Connor, Blackmun, and White) who treated tax exemption as a government subsidy are still sitting members of the Court; on the other hand, only Justice Kennedy, who dissented in *Tex. Monthly*, remains on the Court and is known for being a key swing vote between the more conservative and liberal wings of the Court. See *Members of the Supreme Court of the United States*, U.S. SUPREME COURT, <http://www.supremecourt.gov/about/members.aspx> (providing a timeline of the members of the United States Supreme Court). If the “tax exemption as a subsidy” question were to come before the

not to produce a profit or enrich owners like a business, it would have been inconceivable for contributions to these organizations to be viewed as taxable under the original federal tax provisions.

## 2. Even the *Bob Jones* Case Respects Church Tax Exemption.

Thirteen years after the Supreme Court first upheld church tax exemptions against First Amendment challenges in *Walz*, the Court in *Bob Jones University v. United States* was called to answer a slightly different question: Could the IRS lawfully deny tax-exempt status to religious educational institutions engaging in racial discrimination based on sincerely held religious beliefs?<sup>62</sup> Although *Bob Jones* did not specifically involve a church, the case has sometimes been cited to suggest that churches are granted tax-exempt status merely as a matter of privilege,<sup>63</sup> notwithstanding the fact that the Court explicitly rejected reaching this conclusion with churches: “We deal here only with religious *schools*—not with churches or other purely religious institutions . . . .”<sup>64</sup> The Court’s analysis in *Bob Jones* should be carefully examined in determining whether and to what extent churches may claim tax-exempt status as a matter of constitutional right.

In *Bob Jones*, the Supreme Court held that nonprofit private schools that prescribe and enforce racially discriminatory admissions standards on the basis of sincerely held religious beliefs do not qualify as charitable tax-exempt organizations under Section 501(c)(3) of the Internal Revenue Code.<sup>65</sup> In 1970, the IRS had issued a ruling, which declared that all private, nonprofit educational institutions must adopt racially nondiscriminatory policies as to their students or risk forfeiting their tax-exempt status in the alternative.<sup>66</sup> In response, Bob Jones University and Goldsboro Christian Schools asserted the IRS ruling violated their First Amendment rights because of their sincerely held religious beliefs related to race.<sup>67</sup> The Supreme Court rejected the religious schools’ Free

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current Justices of the Supreme Court, it is at least plausible that the view of Justice Kennedy would prevail, reasoning that tax exemption is not the functional equivalent of a governmental subsidy.

<sup>62</sup> 461 U.S. 574, 577 (1983).

<sup>63</sup> See, e.g., Moore, *supra* note 21, at 312–13 (citing to *Bob Jones* to support the assertion that religious tax exemption may be viewed as a privilege instead of a right).

<sup>64</sup> *Bob Jones*, 461 U.S. at 604 n.29.

<sup>65</sup> *Id.* at 605.

<sup>66</sup> *Id.* at 578–79.

<sup>67</sup> *Id.* at 580 (“The sponsors of the University genuinely believe that the Bible forbids interracial dating and marriage.”); *id.* at 583 n.6 (“According to the interpretation espoused by Goldsboro, race is determined by descentance from one of Noah’s three sons . . . . Cultural or biological mixing of the races is regarded as a violation of God’s command.”).

Exercise and Establishment Clause challenges, holding instead that because the schools' racially discriminatory policies were contrary to the compelling national public policy of racial non-discrimination, neither organization continued to meet the common law requirement that a tax-exempt organization be organized for "charitable" purposes.<sup>68</sup> In other words, the Court declared that because these educational institutions engaged in racial discrimination against public policy, they could not be viewed in the eyes of the law as truly "charitable" and therefore did not merit the privilege of tax exemption.

In making its determination, the Supreme Court in *Bob Jones* traced Congress' intent in adopting Section 501(c)(3) of the tax code to the English laws of charitable trusts.<sup>69</sup> From that history, the Court perceived that Congress' intent in providing charitable tax exemptions was to bestow preferential tax treatment on qualifying organizations, but only to the extent that they provide a measurable benefit to society.<sup>70</sup> This rationale justifying charitable tax exemption has commonly been categorized as the "public benefit,"<sup>71</sup> "good works,"<sup>72</sup> or "*quid pro quo*"<sup>73</sup> theory of tax exemption. The *Bob Jones* majority's view of charitable tax exemption based on a "public benefit" understanding was sharply criticized even in Justice Powell's concurring opinion in the case.<sup>74</sup> Although agreeing that the IRS had the right to revoke the tax-exempt status of private nonprofit schools that failed to adopt racially nondiscriminatory policies,<sup>75</sup> Justice Powell objected to the majority's reasoning regarding the justification for charitable tax exemption:

I am unconvinced that the critical question in determining tax-exempt status is whether an individual organization provides a clear "public benefit" as defined by the Court. . . . [The Court majority] suggest[s] that the primary function of a tax-exempt organization is to act on

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<sup>68</sup> *Id.* at 595–96 ("Racially discriminatory educational institutions cannot be viewed as conferring a public benefit with the 'charitable' concept discussed earlier, or within the congressional intent underlying § 170 and § 501(c)(3).").

<sup>69</sup> *Id.* at 589.

<sup>70</sup> *Id.* at 591 ("Charitable exemptions are justified on the basis that the exempt entity confers a public benefit—a benefit which the society or the community may not itself choose or be able to provide, or which supplements and advances the work of public institutions already supported by tax revenues.").

<sup>71</sup> *See, e.g., Moore, supra* note 21, at 296–97 ("Various rationales have been proposed over the years for the existence of these statutory exemptions from taxation. The current favorite is the public benefit rationale. This justification focuses on the benefit society receives as a direct result of the charitable works of the exempt organization.").

<sup>72</sup> *See Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970) (rejecting the "good works" rationale for tax exemption as applied to churches).

<sup>73</sup> *See BRODY, supra* note 39, at 175.

<sup>74</sup> *Bob Jones*, 461 U.S. at 606 (Powell, J., concurring).

<sup>75</sup> *Id.* at 608.

behalf of the Government in carrying out governmentally approved policies. In my opinion, such a view of § 501(c)(3) ignores the important role played by tax exemptions in encouraging diverse, indeed often sharply conflicting, activities and viewpoints. . . . [T]he provision of tax exemptions to nonprofit groups is one indispensable means of limiting the influence of governmental orthodoxy on important areas of community life.<sup>76</sup>

While some have suggested that the “public benefit” rationale for charitable tax exemption employed in *Bob Jones* signals a shift from the Supreme Court’s conclusion in *Walz* that churches are entitled to tax exemption as a matter of law and historical practice,<sup>77</sup> a careful reading of *Bob Jones* suggests otherwise. In the majority opinion, the Court was careful to limit the scope of its holding only to “charitable” organizations which are not purely religious.<sup>78</sup> Therefore, a proper reading of the *Bob Jones* majority opinion would suggest only that the Court believed the government has a freer hand in regulating tax exemption of “charitable” institutions which are not purely religious in nature, because unique separation of church and state concerns arise under the First Amendment when churches are forced to pay taxes to fund the operation of the state.<sup>79</sup>

*B. Taxing Church Contributions Would Infringe upon the Free Exercise of Religion.*

In addition to respecting the separate sovereigns of church and state, the First Amendment also guarantees the constitutional right to

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<sup>76</sup> *Id.* at 608–10.

<sup>77</sup> Whitehead, *supra* note 21, at 557–58; Moore, *supra* note 21, at 314–17.

<sup>78</sup> *Bob Jones*, 461 U.S. at 604 n.29.

<sup>79</sup> BRODY, *supra* note 39, at 175. For additional analysis of the *Bob Jones* decision and its impact on religious organizations in light of contemporary issues involving same-sex marriage and sexual orientation and gender identity, see generally James A. Davids, *Enforcing a Traditional Moral Code Does Not Trigger a Religious Institution’s Loss of Tax Exemption*, 24 REGENT U. L. REV. 433 (2012) (criticizing public policy arguments directed at religious institutions’ tax-exempt statuses); Lindsay N. Kreppel, *Will the Catholic Church’s Tax Exempt Status Be Threatened Under the Public Policy Limitation of § 501(c)(3) If Same-Sex Marriage Becomes Public Policy?*, 16 DUQ. BUS. L.J. 241 (2014) (examining the staying power of the Catholic Church’s religious tax-exempt status following the Supreme Court’s invalidation of DOMA); Roger Severino, *Or For Poorer? How Same-Sex Marriage Threatens Religious Liberty*, 30 HARV. J.L. & PUB. POL’Y 939 (2007) (examining the potential consequences for religious institutions that refuse to recognize same-sex marriages); Timothy J. Tracey, *Bob Jonesing: Same-Sex Marriage and the Hankering to Strip Religious Institutions of Their Tax-Exempt Status*, 11 FLA. INT’L U. L. REV. 85 (2015) (analyzing the enmity between the public policy of same-sex marriage and religious institutions’ tax-exempt statuses).

exercise religion freely from governmental interference.<sup>80</sup> The Free Exercise Clause would clearly be implicated if the government began imposing taxes on financial contributions to churches because a variety of religious traditions view the act of making material offerings to God (through the local church) as a spiritual duty and holy act of worship.<sup>81</sup> The U.S. tax code has historically avoided these free exercise concerns by recognizing that both contributions given to the church (deductible to the giver) and received by the church (exempt by the church on receipt) are immune from government taxation.<sup>82</sup>

Because offering financial contributions to a church, mosque, synagogue, or temple is undoubtedly an exercise of religious belief, questions arise surrounding to what extent the government may interfere with this practice without violating the Free Exercise Clause. Taken literally, any common definition of the term “free” would seem to include the idea of being unencumbered, and not bearing a cost. If it does not mean that, what does it mean? And to whom is the First Amendment directed? That is, who is prohibited from impinging on that right to “free” exercise? The government. And how might the government impinge on that right to “free” exercise? The answer: taxes.

In 1970, the Supreme Court in *Walz* recognized that state and federal tax exemption of churches serves the important role of preserving the free exercise of religion guaranteed by the First Amendment.<sup>83</sup> The *Walz* Court emphasized the historic reality that governments have not always been tolerant of religious activity and that grants of tax exemption reflect the concern of the latent dangers inherent in the imposition of government taxation.<sup>84</sup> In upholding the New York property tax exemption at issue, the Court reasoned that the law exempting churches from state taxation was “simply sparing the exercise of religion from the burden of property taxation levied on private profit institutions.”<sup>85</sup> Two later Supreme Court cases, *Texas*

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<sup>80</sup> U.S. CONST. amend. 1 (“Congress shall make no law . . . prohibiting the free exercise [of religion].”).

<sup>81</sup> *E.g.*, *Leviticus* 27:30 (Judaism); *Matthew* 6:1 (Christianity); *Qur’an* 2:271 (Islam).

<sup>82</sup> TAX GUIDE FOR CHURCHES, *supra* note 1, at 2.

<sup>83</sup> *Walz v. Tax Comm’n*, 397 U.S. 664, 673 (1970).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* Similarly, in *M’Culloch v. Maryland*, the Supreme Court considered whether the State of Maryland, as a sovereign and separate entity from the federal government, could lawfully impose a tax on the operation of the U.S. government’s then-existing national bank. 17 U.S. (4 Wheat.) 316, 319–20 (1819). In holding that Maryland could not constitutionally tax the U.S. bank, the Supreme Court famously opined, “An unlimited power to tax involves, necessarily, a power to destroy . . .” *Id.* at 327. The same principle could be applied to the imposition of government taxation on the operation of the church, which, as a sovereign institution, predates the very founding of the United States. *See*

*Monthly, Inc. v. Bullock*<sup>86</sup> and *Swaggart Ministries v. Board of Equalization*,<sup>87</sup> both held that a generally applicable sales tax on religious organizations does not violate the Free Exercise Clause when states choose to tax religious organizations' sales of merchandise to the public at the same level it taxes for-profit businesses engaged in retail sales. Although these cases shed some light on the question of whether, in general, taxes on religious organizations violate the Free Exercise Clause, the more specific question of whether financial offerings (contributions) to the church may constitutionally be taxed in light of the First Amendment remains to be seen. This Section focuses its inquiry precisely on that question.

### 1. Foundational Free Exercise Precedent

Like all other fundamental rights guaranteed by the Constitution, the Supreme Court has wrestled over the years with determining the proper scope of the First Amendment's safeguard of the right to freely practice religion. In *Cantwell v. Connecticut*, the Supreme Court issued its first major decision broadly protecting the right to freely exercise religion by reversing the criminal convictions of three Jehovah's Witnesses who were arrested for violating a city ordinance restricting solicitation.<sup>88</sup> The *Cantwell* Court concluded the First Amendment right to freely exercise religion was so fundamental that the right should constitutionally be guaranteed not only against the federal government, but also against state and local governmental entities via the Due Process Clause of the Fourteenth Amendment.<sup>89</sup> The Court recognized in *Cantwell* that the First Amendment embraces an absolute freedom to believe and a qualified freedom to engage in religious conduct, subject to reasonable state regulation aimed at protecting the common good.<sup>90</sup> The Court failed, however, to identify precisely what forms of governmental

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Glenn Goodwin, *Would Caesar Tax God? The Constitutionality of Governmental Taxation of Churches*, 35 *DRAKE L. REV.* 383, 390–93 (1985) (explaining the relationship between sovereignty and religious tax exemptions). If the historic grant of church tax exemption were removed, then government would be given unbridled discretion to tax churches and other religious houses of worship to fund the operation of the state—leaving churches largely at the mercy of the government to decide the level of taxation the church should endure. This sort of excessive entanglement of church and state is precisely what the Founders sought to avoid through adopting the First Amendment. *Walz*, 397 U.S. at 674–75.

<sup>86</sup> 489 U.S. 1, 5 (1989).

<sup>87</sup> 493 U.S. 378, 392 (1990).

<sup>88</sup> 310 U.S. 296, 310–11 (1940).

<sup>89</sup> *Id.* at 303–04.

<sup>90</sup> *Id.*

regulation would rise to the level of “unreasonable”—leaving that particular determination in the hands of future Courts.

## 2. The “Golden Age” of Free Exercise and the Aftermath of *Smith*

Not until the 1960s and 1970s would the Supreme Court finally attempt to craft a workable test for defining and protecting the right to freely exercise religion. What emerged from cases such as *Sherbert v. Verner*,<sup>91</sup> *Wisconsin v. Yoder*,<sup>92</sup> and *Thomas v. Review Board of Indiana Employment Security Division*,<sup>93</sup> was the concept that cases involving a conflict between an individual’s religious practice and government regulation deserve the strictest of judicial scrutiny in determining whether the right to freely exercise religion had been violated. In invoking this powerful protection for religious liberty, the Court refused to uphold government action that interfered with religious exercise, unless the state could prove the regulation was motivated by a compelling governmental interest and would be accomplished by least restrictive means.<sup>94</sup> Unfortunately, the standard of strict scrutiny review, which the Court afforded religious liberty claims through the *Sherbert* framework, would be toppled in the Court’s 1990 *Employment Division v. Smith* decision.<sup>95</sup> As one scholar and religious liberties advocate remarked, *Smith* marked the end of the “Golden Age of free exercise of religion” that lasted virtually without interruption from the 1960s until 1990.<sup>96</sup>

In *Smith*, the Supreme Court was faced with the difficult question of whether adherents of a Native American minority religion could collect unemployment compensation from the state after being released from their jobs for using the peyote drug as part of their ceremonial religious rituals.<sup>97</sup> In holding that the Free Exercise Clause did not guarantee such a right, the Supreme Court cast aside *Sherbert*’s strict scrutiny review for free exercise claims and invoked a new judicial framework centered on whether the state regulation was a “neutral law of general applicability.”<sup>98</sup> The *Smith* decision shocked civil libertarians to the core and was met with fierce and immediate resistance.<sup>99</sup> As

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<sup>91</sup> 374 U.S. 398, 410 (1963).

<sup>92</sup> 406 U.S. 205, 215, 234–36 (1972).

<sup>93</sup> 450 U.S. 707, 718–19 (1981).

<sup>94</sup> *Sherbert*, 374 U.S. at 403; *Thomas*, 450 U.S. at 718.

<sup>95</sup> *Emp’t Div. v. Smith*, 494 U.S. 872, 884–85 (1990).

<sup>96</sup> Bradley P. Jacob, *Free Exercise in the “Lobbying Nineties,”* 84 NEB. L. REV. 795, 808 (2006).

<sup>97</sup> *Smith*, 494 U.S. at 874–75.

<sup>98</sup> *Id.* at 879, 890.

<sup>99</sup> Jacob, *supra* note 96, at 814–15.

Shakespeare once famously penned, “[m]isery acquaints a man with strange bed-fellows,”<sup>100</sup> and such was the case in the wake of *Smith*. An unprecedented alliance, dubbed “The Coalition for the Free Exercise of Religion,” arose to oppose *Smith*’s neutral laws of general applicability test and sought legislative protection for the First Amendment right to freely exercise religion.<sup>101</sup> The Coalition successfully lobbied Congress to adopt the Religious Freedom Restoration Act (“RFRA”), which would reinstitute strict scrutiny as the standard to be applied in free exercise claims.<sup>102</sup> RFRA was passed unanimously in the House and by a decisive majority in the Senate of ninety-seven to three.<sup>103</sup>

Despite outspoken opposition to *Smith* and Congress’ attempt at a legislative fix through RFRA, the Supreme Court would not allow RFRA to have the final say in the religious liberties debacle. In 1997, the Court, in *City of Boerne v. Flores*, ruled that RFRA was unconstitutional as applied to state and local governmental entities.<sup>104</sup> Following *Boerne*, religious liberties claims against the state and local governments would generally be subject to the “neutral laws of general applicability” standard of *Smith*, while free exercise claims against the federal government would enjoy the strict scrutiny standard of RFRA—the exception being for states that had adopted their own mini-RFRAs to impose strict scrutiny review of religious liberties claims at the state level.<sup>105</sup>

### 3. Church Tax Exemption in the Supreme Court’s Current Free Exercise Framework

Under the Supreme Court’s existing Free Exercise framework, claims involving the revocation of federal tax exemption would invoke the strict scrutiny standard mandated by RFRA.<sup>106</sup> In other words, the U.S. government would be required to prove that a federal income tax on churches serves a compelling governmental interest and accomplishes such an objective using the least restrictive means possible.<sup>107</sup> Under RFRA’s high level of protection for free religious exercise, it is doubtful

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<sup>100</sup> WILLIAM SHAKESPEARE, *THE TEMPEST* act 2, sc. 2, ll. 38–39 (Peter Hulme & William H. Sherman eds., W. W. Norton & Co. 2004).

<sup>101</sup> Jacob, *supra* note 96, at 816.

<sup>102</sup> *Id.* at 817.

<sup>103</sup> *Id.* at 822.

<sup>104</sup> 521 U.S. 507, 532–36 (1997).

<sup>105</sup> Jacob, *supra* note 96, at 813.

<sup>106</sup> See *City of Boerne*, 521 U.S. at 532–36 (holding that although RFRA is unconstitutional as applied to the states, it is still binding law as applied to the federal government).

<sup>107</sup> *Id.* at 534 (discussing the demanding standards of RFRA).

the federal government could constitutionally impose taxes on religiously motivated contributions to the church.

At the state level (where the federal RFRA protections do not apply), it is more conceivable that a state could tax contributions to the church without violating the Free Exercise Clause of the First Amendment; however, the case is not entirely clear in states that have enacted their own mini-RFRAs, and in light of the Supreme Court's 1993 holding in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*.<sup>108</sup> In *Lukumi*, the City of Hialeah, Florida had enacted several local ordinances aimed at curbing the controversial practices of the Santeria religion, namely animal sacrifice.<sup>109</sup> Because the case involved a state free exercise claim (in a jurisdiction without a mini-RFRA), the Court applied the *Smith* standard, evaluating whether the ordinances were neutral laws of general applicability to withstand the First Amendment challenge by the church.<sup>110</sup> Because the circumstances in the cases revealed that the ordinances' intents and effects were clearly not neutral or generally applicable, the Court subjected the ordinances discriminating against Santeria to strict scrutiny review and, in turn, struck down the ordinances as unconstitutional.<sup>111</sup>

The *Lukumi* Court began with the general proposition "that the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general."<sup>112</sup> And after examining the City of Hialeah's ordinances for neutrality and general applicability, the Court concluded the impermissible object of the ordinances was the suppression of religion.<sup>113</sup> In reaching this important decision, the Court announced:

The Free Exercise Clause commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures. Those in office must be resolute in resisting importunate demands and must ensure that the sole reasons for imposing the burdens of law and regulation are secular. *Legislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices.*<sup>114</sup>

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<sup>108</sup> 508 U.S. 520 (1993).

<sup>109</sup> *Id.* at 527–28.

<sup>110</sup> *Id.* at 531–32.

<sup>111</sup> *Id.* at 547.

<sup>112</sup> *Id.* at 532.

<sup>113</sup> *Id.* at 538–40.

<sup>114</sup> *Id.* at 547 (emphasis added).

The *Lukumi* case makes clear that under the *Smith* standard, any state or local law aimed at discouraging religious exercise will survive a constitutional challenge only if the law serves a compelling governmental interest and is accomplished by the least restrictive means.<sup>115</sup> Should a state choose to revoke the tax-exempt status of its churches and leave the exemption in place for other “charitable” organizations, such a policy would likely be found unconstitutional under the Court’s holding in *Lukumi* based on the apparent motivation of the state to discourage religious exercise. On the other hand, a neutral and generally applicable law requiring the taxation of all “charitable” organizations on a non-discriminatory basis may withstand Free Exercise challenges—but again, only if churches and other religious organizations were placed on *at least* a level playing field as other types of charitable organizations.<sup>116</sup> And given the more recent unanimous precedent of the Supreme Court in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, churches and other religious organizations should arguably be exempt from even a neutrally-applicable tax applied to other nonprofits given the “text of the First Amendment itself, which gives special solicitude to the rights of religious organizations.”<sup>117</sup>

While some have contended that arguments in favor of church tax exemption on free exercise grounds are unpersuasive,<sup>118</sup> the above discussion demonstrates that these conclusions may not be concrete as a matter of constitutional interpretation. A federal tax imposed on churches would have to be evaluated under the strict scrutiny standard provided by Congress in RFRA, and any state tax aimed at discouraging religious exercise would be subject to the Supreme Court’s holding in *Lukumi* that such laws discriminating against religious organizations also withstand strict scrutiny review.

*C. The Equal Access Doctrine Ensures that Churches Are Entitled to Tax Exemption.*

Assuming, *arguendo*, that churches are not constitutionally entitled to federal or state tax exemption, the Supreme Court’s “equal access” doctrine would nevertheless bar the government from levying taxes on

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<sup>115</sup> *Id.*

<sup>116</sup> *See, e.g.,* Jimmy Swaggart Ministries v. Bd. of Equalization, 493 U.S. 378, 389 (1990) (holding that collection and payment of generally applicable sales and use tax did not impose a constitutionally significant burden on religious practices or beliefs, and thus the Free Exercise Clause did not require California to grant a religious organization a tax exemption); *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 25 (1989) (striking down a Texas statute that exempted only religious publications from paying state sales tax).

<sup>117</sup> 132 S. Ct. 694, 706 (2012).

<sup>118</sup> *E.g.,* Moore, *supra* note 21, at 308–11.

churches, unless all other “charitable” institutions likewise forfeited their privileged status under the tax code. As the cases in the following Sections demonstrate, when the government invites an individual or group to partake in the benefit of some specified government resource, the government may not, in turn, discriminate among recipients based on their expressed viewpoints, religious or otherwise.

1. *Rosenberger v. University of Virginia*: Religious Groups Deserve Equal Access to Public Resources.

The 1995 U.S. Supreme Court case of *Rosenberger v. University of Virginia* stands for the principle that government must ensure groups from all viewpoints receive equal access to government benefits and resources when the government has chosen to make its benefits and resources generally available to the public.<sup>119</sup> In *Rosenberger*, the University of Virginia (a public educational institution of the Commonwealth of Virginia) refused to fund the printing costs of an official student group’s publication simply because the publication was written from an explicitly religious viewpoint.<sup>120</sup> The University attempted to justify its denial of the printing costs to the publication by arguing that making university funds available to a Christian student organization would result in an unconstitutional establishment of religion.<sup>121</sup> After the student organization, “Wide Awake Publications,” exhausted its appeals for relief within the University, the organization brought suit against the University in federal court arguing that the denial of funding violated their constitutional rights to freedom of speech and press, to the free exercise of religion, and to equal protection of the law.<sup>122</sup>

First, the Supreme Court reasoned that by agreeing to pay for some student-run publications to be printed, the University had created a “limited public forum” and, therefore, could not discriminate against participating individuals or organizations based solely on their expressed viewpoint.<sup>123</sup> The *Rosenberger* Court looked to its binding precedent in *Lamb’s Chapel v. Center Moriches Union Free School District*, where the Court unanimously refused to allow a school district to exclude a Christian group from using the school’s facilities after hours to show a film on child-rearing from a Christian perspective *after* the

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<sup>119</sup> 515 U.S. 819, 829–30, 861 (1995).

<sup>120</sup> *Id.* at 822–23 (noting that the University withheld payments for printing costs of the Christian magazine because their student paper “primarily promote[d] or manifest[ed] a particular belie[f] in or about a deity or an ultimate reality”).

<sup>121</sup> *Id.* at 837.

<sup>122</sup> *Id.* at 827.

<sup>123</sup> *Id.* at 829–30.

school district had already opened its facilities for use after school hours to other community groups for a wide variety of social, civic, and recreational purposes.<sup>124</sup> The Court likened the University of Virginia's denial of funding to the Christian student publication in *Rosenberger* to the unconstitutional viewpoint discrimination advanced by the New York school district in *Lamb's Chapel*.<sup>125</sup> The Court rejected the University's attempt to distinguish *Lamb's Chapel* based on the factual distinction that *Rosenberger* involved "the provision of funds rather than access to facilities."<sup>126</sup> More than simply rejecting the University's constitutional allegations as unfounded, the Court went on to describe the University's discrimination against the Christian student publication's viewpoint as a "danger to liberty."<sup>127</sup> The Court observed a major danger to liberty "lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and, if so, for the State to classify them."<sup>128</sup>

Ultimately, the Court concluded in *Rosenberger* that if the University of Virginia were to pay the printing costs of the Christian student publication—just like the University had done for other non-religious student publications—the allowance of funds would not result in an establishment of religion, but instead, would be an acceptable, neutral governmental program.<sup>129</sup> Moreover, implicit in the Court's reasoning in *Rosenberger* was an endorsement of the constitutionality of church tax exemption. While the Court acknowledged that a tax levied for the direct support of a church or group of churches would "run contrary to Establishment Clause concerns dating from the earliest days of the Republic," the Court did not cast any doubt on the government's practice of exempting churches from government taxation.<sup>130</sup>

## 2. *Widmar, Mergens, and Lamb's Chapel*: Equal Access on the Rise

As relied upon in *Rosenberger*, an uninterrupted line of historic Supreme Court precedent establishes the doctrine of equal access, maintaining that government must afford religious organizations at least the same access to its benefits and resources that are available to the public at large. Beginning in *Widmar v. Vincent*, the Supreme Court held unconstitutional the University of Missouri-Kansas City's exclusionary policy, which prevented one of the University's student

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<sup>124</sup> 508 U.S. 384, 387–89, 392–94 (1993).

<sup>125</sup> *Rosenberger*, 515 U.S. at 832.

<sup>126</sup> *Id.* at 832–33, 835.

<sup>127</sup> *Id.* at 835.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 845–46.

<sup>130</sup> *Id.* at 840.

groups from holding a Christian worship service on campus.<sup>131</sup> The policy officially prohibited the use of University buildings or grounds “for purposes of religious worship or religious teaching.”<sup>132</sup> After examining the Christian student group’s claims that the policy violated their rights to the free exercise of religion and free speech, the Court concluded in a decisive 8-1 opinion that the University’s exclusionary policy presumptively violated the First Amendment’s Free Speech Clause and, moreover, that equal inclusion of the Christian group would not have the purpose or effect of advancing religion specifically, but merely ensured the group neutral and equal treatment.<sup>133</sup> Also, the Court held that an equal access policy adopted by the University would not create an excessive entanglement with religion but rather would *avoid* entanglement by preventing the government from singling out religious expression for censorship.<sup>134</sup> The Supreme Court’s decision in *Widmar* affirmatively establishes that equal inclusion of religion in a government benefit program does not constitute an impermissible establishment of religion.<sup>135</sup>

Just three years after *Widmar*, Congress joined the Supreme Court’s efforts to promote equal access for religious organizations by passing the Equal Access Act of 1984.<sup>136</sup> The Act forbade schools from discriminating against religious clubs or denying them equal access to school facilities because of their philosophical or religious viewpoints.<sup>137</sup> The Act maintained that once a public school opened its facilities to any

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<sup>131</sup> 454 U.S. 263, 276–77 (1981).

<sup>132</sup> *Id.* at 265 n.3.

<sup>133</sup> *Id.* at 264, 274–77.

<sup>134</sup> *Id.* at 270–73.

<sup>135</sup> *Id.* at 276–77; *see also* *Zelmon v. Simmons-Harris*, 536 U.S. 639, 662–63 (2002) (holding that a neutral school-choice voucher program did not violate the Establishment Clause, even though it permitted parents to choose religious education for their children with the partial financial support of a government program); *Mitchell v. Helms*, 530 U.S. 793, 801–02, 835 (2000) (holding that religious schools were permitted to be included in a government benefit program providing publicly funded computers and other teaching aids to public and private schools); *Agostini v. Felton*, 521 U.S. 203, 234–35 (1997) (holding that the Establishment Clause was not violated if the government provided remedial education courses on the premises of private religious schools); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 13–14 (1993) (holding that the Establishment Clause was not violated if the government provided a sign-language interpreter to a hearing-impaired student attending a religious private school); *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250–53 (1990) (upholding against an Establishment Clause challenge the constitutionality of student religious group meetings at public secondary schools); *Bowen v. Kendrick*, 487 U.S. 589, 593, 617–18, 622 (1988) (holding that it is not a violation of the Establishment Clause to allow religious organizations to receive federal grants to conduct public programs on abstinence education for teens).

<sup>136</sup> Equal Access Act of 1984, 20 U.S.C. § 4071 (2012).

<sup>137</sup> *Id.* § 4071(a).

“noncurriculum related student group[],” the school must make its facilities available to *all* student groups, regardless of whether the school endorsed the group’s religious or philosophical views.<sup>138</sup> In 1990, the Supreme Court considered the constitutionality of the Equal Access Act in *Board of Education v. Mergens*.<sup>139</sup> In *Mergens*, the Court ruled that a high school violated the Equal Access Act by denying a student’s request to form a Christian club on campus, despite the fact that the proposed religious group would have only had the same privileges and benefits as any other student group at the high school.<sup>140</sup> Consistent with the Court’s reasoning in *Widmar*, the *Mergens* Court upheld the Equal Access Act against an Establishment Clause challenge after concluding the Act did not have the primary effect of advancing religion and did not create an excessive entanglement between government and religion.<sup>141</sup>

### 3. The Equal Access Doctrine Applied to Church Tax Exemption

When applied to the issue of church tax exemption, the logical consequence of *Widmar*, *Mergens*, *Lamb’s Chapel*, and *Rosenberger* is that churches and other religious organizations must be afforded at least the same benefits other charitable organizations receive from the government. The Supreme Court’s uncontroverted equal access precedents would not justify the double standard of exempting all nonprofit organizations from taxation except for churches simply because churches provide their services to society from a certain religious viewpoint.

Notwithstanding the logic underlying this precedent, church tax exemption has been met with some challenge over the years—even from groups who themselves benefit from tax exemption. Consider for example the Freedom from Religion Foundation, a nonprofit organization exempt from federal income tax under Section 501(c)(3) of the Internal Revenue Code.<sup>142</sup> According to the organization’s bylaws, the Freedom from Religion Foundation’s purposes are to promote “the constitutional principle of separation of state and church and to educate the public on matters related to nontheistic beliefs.”<sup>143</sup> Founded in 1978

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<sup>138</sup> See *id.* § 4071(b) (stating that a public school creates “a limited open forum” when it opens its facilities to noncurriculum related groups).

<sup>139</sup> 496 U.S. 226, 231 (1990).

<sup>140</sup> *Id.* at 232–33, 253.

<sup>141</sup> *Id.* at 249–50, 253.

<sup>142</sup> See *About the Foundation FAQ*, FREEDOM FROM RELIGION FOUND., <http://www.ffrf.org/faq/item/14999-about-the-foundation/what-is-the-foundations-purpose> (last visited Feb. 2, 2017).

<sup>143</sup> *Bylaws*, FREEDOM FROM RELIGION FOUND., INC. (last modified Oct. 2011) (adopted Apr., 1978), <https://ffrf.org/uploads/files/FFRF-Bylaws.pdf>.

and comprised of “atheists, agnostics and skeptics of any pedigree,”<sup>144</sup> the Foundation challenges alleged violations of separation of state and church on behalf of members and the public, including: prayers in public schools, payment of public funds for religious purposes, government funding of pervasively sectarian institutions, and the ongoing campaign against civil rights for women, gays, and lesbians led by churches.<sup>145</sup> In a section of the Foundation’s website entitled “Tax Exemption of Churches,” the organization recognizes that “the Supreme Court has [already] spoken on this question [of church tax exemption], finding it constitutional”; however, the Foundation goes on to list ways in which citizens can educate their communities about the “inherent problems and inequity” of church tax exemption.<sup>146</sup> While this section of the Foundation’s website ends with the assertion, “Because churches pay nothing, you pay more,”<sup>147</sup> other portions of the website, such as the “Getting Acquainted” page, tout the tax-exempt status of the Foundation and encourage donors to make tax deductible contributions to the organization:

The Foundation is a non-profit, tax-exempt organization. Non-profit status under the Internal Revenue Code, Section 501(c)3, was recognized originally in 1978, with a final tax-exempt determination in 1980. Contributions are deductible under Section 170 of the Internal Revenue Code for federal income tax purposes. Bequests, legacies, devises, transfers and gifts to or for the use of the Freedom From Religion Foundation are deductible for federal estate and gift tax purposes under the provisions of Sections 2055, 2106 and 2522 of the Code.<sup>148</sup>

So, on the one hand, Freedom from Religion Foundation expresses no qualms about its own tax exemption for the purposes of “promot[ing] the constitutional principle of separation of state and church” and of “educat[ing] the public on matters relating to nontheism,”<sup>149</sup> while, on the other hand, the Foundation simultaneously assaults tax exemption

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<sup>144</sup> *About the Foundation FAQ*, *supra* note 142.

<sup>145</sup> *About the Foundation*, FREEDOM FROM RELIGION FOUND., <https://ffrf.org/component/k2/item/14112-brochure-test> (last visited Feb. 2, 2017).

<sup>146</sup> *State/Church FAQ: Tax Exemption of Churches*, FREEDOM FROM RELIGION FOUND., <http://www.ffrf.org/faq/church-violations/tax-exemption-of-churches/> (last visited Feb. 2, 2017).

<sup>147</sup> *Id.*

<sup>148</sup> *Getting Acquainted*, FREEDOM FROM RELIGION FOUND., <https://ffrf.org/about/getting-acquainted> (last visited Feb. 2, 2017). In fact, according to IRS filings posted on the FFRF website, the organization received more than \$4 million in tax-exempt revenue during the 2015 calendar year. Freedom from Religion Foundation, Inc., *Form 990 Return of Organization Exempt from Income Tax*, FREEDOM FROM RELIGION FOUND. 1 (2015), <https://ffrf.org/images/2015Form990.PDF>.

<sup>149</sup> *About the Foundation FAQ*, *supra* note 142.

for churches and other organizations operating for religious purposes. The Foundation's position on the issue begs the questions, "What makes the Freedom from Religion Foundation's stated purposes any more 'beneficial' than those of religious organizations, and who should be left to make such a value judgment?"

Denying tax exemption to churches solely because they operate from a religious viewpoint is absolutely untenable with the equal access principles set forth by the Supreme Court in *Widmar*, *Mergens*, *Lamb's Chapel*, and *Rosenberger*. The ultimate conclusion to be drawn from these landmark cases is that if the government were to revoke the "benefit"<sup>150</sup> of tax exemption for churches and other religiously affiliated organizations, the government would also be required to revoke tax exemption of all other types of charitable organizations—a disastrous outcome that nearly no one, including groups like the Freedom from Religion Foundation, should advocate.

### III. PUBLIC POLICY SUPPORTS CHURCH TAX EXEMPTION

While the First Amendment's guarantee of the right to freedom of religion provides the strongest legal basis for church tax exemption, "public benefit" and "*quid pro quo*" rationales have also been offered as justifications for the unbroken historical practice of exempting churches and other religious organizations from being subject to government taxation.<sup>151</sup> Essentially, these theories together suggest that churches should be granted certain tax privileges because of the benefits they provide to society, which the government would otherwise be obligated to

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<sup>150</sup> This assumes tax exemption for churches is considered a benefit or privilege, rather than a mandate under the First Amendment.

<sup>151</sup> See Paul G. Kauper, *The Constitutionality of Tax Exemptions for Religious Activities*, in *THE WALL BETWEEN CHURCH AND STATE* 95, 97 (Dallin H. Oaks ed., 1963). In *Walz v. Tax Commission*, the Supreme Court was cautious to justify tax exemption solely on the public benefit or *quid pro quo* rationales:

We find it unnecessary to justify the tax exemption on the social welfare services or "good works" that some churches perform for parishioners and others—family counselling, aid to the elderly and the infirm, and to children. Churches vary substantially in the scope of such services; programs expand or contract according to resources and need. As public-sponsored programs enlarge, private aid from the church sector may diminish. The extent of social services may vary, depending on whether the church serves an urban or rural, a rich or poor constituency. To give emphasis to so variable an aspect of the work of religious bodies would introduce an element of governmental evaluation and standards as to the worth of particular social welfare programs, thus producing a kind of continuing day-to-day relationship which the policy of neutrality seeks to minimize. Hence, the use of a social welfare yardstick as a significant element to qualify for tax exemption could conceivably give rise to confrontations that could escalate to constitutional dimensions.

397 U.S. 664, 674 (1970).

perform on its own time and money.<sup>152</sup> D.B. Robertson, in his 1968 book *Should Churches Be Taxed?*, summarizes these theories and shares the financial implications of preserving church tax exemption that were relevant even decades ago:

The constitutions or statutes of all the states and the District of Columbia refrain from taxing property and activities of a nonprofit nature; this favor is granted . . . because churches, and other groups, serve the public welfare. The services would otherwise have to be paid for with public funds. Churches qualify as rendering public services, to some extent, in areas of education, charity, caring for the ill, the homeless, and the needy. Even though a considerable portion of these services are performed with voluntary labor or poorly paid labor, they nonetheless cost in our time several billions of dollars each year. If these public services were not performed by religious and other institutions, the total responsibility for them would fall upon the state.<sup>153</sup>

Decades later, researchers in 2016 published a report through the organization Faith Counts, confirming through empirical analysis the extraordinary value churches and other religious organizations provide to their communities.<sup>154</sup> The study estimates religion contributes \$1.2 trillion to our economy and society, exceeding the combined annual revenues of tech giants Apple, Amazon, and Google.<sup>155</sup> Faith Counts found that “[c]ongregations alone coordinate 7.5 million volunteers to help run 1.5 million social programs each year” and even during a time when Americans are less religiously affiliated than ever, “religious organizations have *tripled* the amount of money spent on social programs in the last 15 years—to \$9 billion.”<sup>156</sup>

So while the Supreme Court in *Walz* cautioned against the dangers of justifying church tax exemption solely on public benefit or *quid pro quo* rationales,<sup>157</sup> there are still some valid public policy considerations from these rationales related to how much society benefits from the good work of churches compared to the relatively small cost of tax exemption.

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<sup>152</sup> See Kauper, *supra* note 151, at 97 (arguing that courts invoking either theory find that legislatures grant tax exemptions to churches because of the value of the services provided and because church services relieves governmental burdens).

<sup>153</sup> D.B. ROBERTSON, *SHOULD CHURCHES BE TAXED?* 192 (1968).

<sup>154</sup> Brian J. Grim & Melissa E. Grim, *The Socio-economic Contribution of Religion to American Society: An Empirical Analysis*, 12 *INTERDISC. J. RES. ON RELIGION* 1, 27 (2016).

<sup>155</sup> BRIAN J. GRIM & MELISSA E. GRIM, *THE SOCIO-ECONOMIC CONTRIBUTIONS OF RELIGION TO AMERICAN SOCIETY: AN EMPIRICAL ANALYSIS* (2016), <http://faithcounts.com/wp-content/uploads/Summary-Sheet.pdf>.

<sup>156</sup> *Id.*

<sup>157</sup> *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970).

### A. *The Rudiments of Tax*

Perhaps it seems obvious, but the starting point for examining the logic behind any grant of tax exemption should be the nature of taxes themselves. The first questions that should arise are, “What is the purpose of collecting taxes in the first place, and who should be responsible for paying them?”

One leading expert in the debate over church tax exemption makes the simple case for exemption, grounded in the nature of taxes themselves: Individuals and corporations are taxed on *profit* as a way to share in the public’s cost of living in community.<sup>158</sup> If taxes, then, apply only to wealth generators, why should churches—which by their very definition are organized for religious and *not for profit-making* purposes—ever be considered a taxable class? Extending this line of logic one step further, the same expert points out that taxing nonprofit organizations would not only discourage their existence, but would also amount to “double taxation”:

Nonprofit collectivities are normally not included in the category of wealth producers in Western societies and are therefore not taxed, since each of the *members* of such collectivities already pays his or her share of the costs of the commonwealth, and need not be taxed *again* for the time, effort, interest, and money contributed to collective activities from which he or she derives no monetary gain.<sup>159</sup>

To elaborate on this notion of “double taxation,” consider the following illustration: Jane Smith manages a successful business in State X. At the end of each year, Jane is required to pay a certain percentage of her income to the U.S. federal government and to her home state, the State of X, that is, in addition to the multitude of other taxes Jane also pays to her city government located in State X. For example, when Jane buys her groceries, goes shopping, or drives her car down the road, she pays local government taxes. Of what remains in Jane’s paycheck after local, state, and federal taxes, she gives a set amount each month to her church based on her conviction that doing so is a requirement of her religious faith and a spiritual act of worship. Contrary to a transaction with a business, which is organized for the purpose of generating profit and wealth, Jane receives nothing tangible in return for her gift to her church. In this illustration, Jane is simply giving a gift to the church from her already heavily taxed personal income—a gift that will help the church cover its internal operational costs and fund community outreaches. Constitutional concerns aside, if hypothetically the government were to subject this transfer of funds

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<sup>158</sup> KELLEY, *supra* note 30, at 10.

<sup>159</sup> *Id.* at 10–11.

from Jane's pocketbook to the church, the obvious result would be double (or triple, or more) taxation. Jane's income was already subject to a number of federal, state, and local taxes before Jane ever gave her monthly contribution to the church.

In sum, the very nature of taxes—as the necessary collection of funds from wealth-generators to provide for the needs of living in community—precludes church taxation as a matter of policy and logic.

*B. Unrelated Business Income Tax and Revocation of Tax-Exempt Status*

As discussed in the previous Section, nonprofit organizations are considered tax-exempt precisely because they are organized for certain valuable purposes to society other than wealth generation. While critics have claimed that churches and other religious organizations should not be exempt from taxation because of their alleged accumulation of wealth untold behind closed doors,<sup>160</sup> the IRS already has procedures in place to address this concern. When the activities of a 501(c)(3) nonprofit organization, including churches, take on more characteristics of profit-making than tax-exempt purposes, the IRS has the option of imposing Unrelated Business Income Tax ("UBIT") on the net income of these endeavors.<sup>161</sup> Also, in extreme circumstances, the IRS has the option of revoking the tax-exempt status of an organization that repeatedly refuses to comply with basic IRS guidelines for tax exemption.<sup>162</sup> UBIT and revocation of tax-exempt status are appropriate enforcement measures to ensure that no organization claiming to be operated exclusively for religious or charitable purposes circumvents the system and gains an unfair advantage in competing with for-profit businesses.

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<sup>160</sup> See generally ALFRED BALK, *THE RELIGION BUSINESS* (1968).

<sup>161</sup> TAX GUIDE FOR CHURCHES, *supra* note 1, at 19–21. Income-producing activities, which are unrelated to the tax-exempt purposes of churches and religious organizations, "will be subject to the UBIT if the following three conditions are met: [1] the activity constitutes a trade or business, [2] the trade or business is regularly carried on, and [3] the trade or business is not substantially related to the organization's exempt purpose." *Id.* at 19.

<sup>162</sup> *Id.* at 4. To qualify as tax-exempt, all organizations, including churches and religious organizations "must abide by certain rules":

- [1] their net earnings may not inure to any private shareholder or individual;
- [2] they must not provide a substantial benefit to private interests;
- [3] they must not devote a substantial part of their activities to attempting to influence legislation;
- [4] they must not participate in, or intervene in, any political campaign on behalf of (or in opposition to) any candidate for public office; and
- [5] the organization's purposes and activities may not be illegal or violate fundamental public policy."

*Id.*

*C. The Importance of Maintaining a Robust Nonprofit Sector*

Last but not least, preserving church tax exemption is sound public policy because doing so helps promote a robust nonprofit sector. The Giving USA report cited in the Introduction reveals just how vital the nonprofit sector's role is in sustaining our society. In 2015, the people of the United States entrusted an estimated \$373.25 billion to nonprofit organizations to support charitable causes they found too important to be placed in the hands of a government agency.<sup>163</sup> Of this figure, more than \$119 billion was given to religious organizations, exceeding the amount of contributions to any other category of nonprofits.<sup>164</sup> Those who argue that religious and charitable tax exemptions should be stripped away to help fund the government's overwhelming deficit and debt perhaps do not fully understand the implications of such an assertion.

First of all, tax-exempt organizations are generally known for their scrupulous care in managing donor contributions.<sup>165</sup> Nonprofit organizations, including churches, realize that if their partners and donors are not satisfied with the way their gifts are managed, then contributors have the power of choosing to stop giving to the organization.<sup>166</sup> Every nonprofit CEO knows that too many disgruntled donors could bring the end to his or her organization. On the other hand, government is commonly berated for its broken promises and inefficient use of taxpayer funds. And the worst part is taxpayers are forced to fund this inefficiency each year without the same level of accountability that is the life and death of the nonprofit sector.

Second, it is understood as an axiom of wealth management that no matter how much money an individual has, one will naturally spend based on his or her means and be left wanting more.<sup>167</sup> The out-of-control spending habits of the U.S. federal government are a frightening illustration of this principle. For example, in 2015, the U.S. government took in \$3.25 trillion and yet still managed to find itself in debt by

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<sup>163</sup> GIVING USA FOUNDATION, *supra* note 18, at 6.

<sup>164</sup> *Id.*

<sup>165</sup> See Alnoor Ebrahim, *The Many Faces of Nonprofit Accountability*, in THE JOSSEY-BASS HANDBOOK OF NONPROFIT LEADERSHIP AND MANAGEMENT 101, 107–18 (David O. Renz ed., 3d ed. 2010) (detailing rigorous disclosure requirements, assessment tools, self-regulating practices, participation, and learning techniques needed to maintain accountability to interested parties in donor operations).

<sup>166</sup> Donors, after all, give their money to support the mission of their non-profit organization of choice, which means that non-profit organizations are accountable to how donor funds are managed. *See id.* at 117.

<sup>167</sup> *See, e.g.*, BRENT KESSEL, IT'S NOT ABOUT THE MONEY 3–4 (2008) (noting that most people believe happiness is linked to wealth, yet despite incredible economic progress since the nineteenth century, studies show there has been little overall change in individual happiness).

spending \$3.69 trillion, creating over a \$400 billion deficit in one year alone.<sup>168</sup> Combined with accumulating deficits from previous years, this figure puts the national debt over a staggering \$13 trillion.<sup>169</sup> The reasonable observer has to question, “If the government cannot manage well over \$3 trillion dollars it already has in hand each year, how would transferring a few billions of dollars in taxes from churches or other organizations really make a difference?” Instead of being viewed as a potential debt-reduction tool, these extra funds would simply be viewed as more money the government could get away with spending each year. Because churches and other nonprofits are kept accountable to their givers and the public, and are already forced to accomplish more with less, it makes no practical sense to start taxing churches when doing so would not effectively solve the government’s underlying problem of irresponsible spending habits.

#### CONCLUSION

Should the government be in the business of taxing churches? The historical, constitutional, and public policy bases for church tax exemption referenced in this Article answer a resounding “No.” Church tax exemption can be traced back to antiquity and remains an unbroken historical practice in the United States to this day. The U.S. Supreme Court has held that church tax exemption promotes the proper degree of separation between church and state and protects the free exercise of religion from undue government interference. Likewise, the practice of granting religious organizations equal access to public benefits and resources ensures that churches are at least entitled to the same exemptions that other charitable organizations receive from government taxation. Finally, it is clear from a purely economic standpoint that church tax exemption is prudent public policy given the immeasurable benefits churches provide society in a much more efficient manner than the federal government.

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<sup>168</sup> COMM. FOR A RESPONSIBLE FED. BUDGET, FY 2015 DEFICIT FALLS TO \$439 BILLION, BUT DEBT CONTINUES TO RISE 2 (2015), [http://crfb.org/sites/default/files/fy2015\\_deficit\\_falls\\_treasury\\_update\\_final.pdf](http://crfb.org/sites/default/files/fy2015_deficit_falls_treasury_update_final.pdf).

<sup>169</sup> *Id.* at 4.