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A Line Drawn By Unsteady Hands: Section 170, Charitable Contributions, And Return Benefits in Hernandez v. C.I.R.

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A LINE DRAWN BY UNSTEADY HANDS: SECTION 170, CHARITABLE CONTRIBUTIONS, AND RETURN BENEFITS IN *HERNANDEZ v. C.I.R.*

INTRODUCTION

In *Hernandez v. C.I.R.*,[1] the Supreme Court reputedly resolved a developing controversy concerning the nature of the quid pro quo/return benefit of a charitable contribution. The Court granted certiorari in order to resolve a conflict which existed among the federal appellate courts.[2] Generally, the *Hernandez* case touches vital areas for charitable donors and recipients. More specifically, the case concerns religious organizations. *Hernandez* probes the external framework in which charitable contributions are given and accepted, the nature of the benefit received in return, and constitutional questions revolving around the issue of selective prosecution and the first amendment's Establishment Clause.[3]

The Court sought to collect all of the varied opinions of the federal district courts and resolve the matter.[4] Yet, in doing so, the Court may have ignored, swept aside, or only superficially answered some of the valid policy concerns this issue raises.[5] The powerful dissenting opinion of Justice O'Connor refused to allow the Court to ignore these policy concerns and accused the Court of drawing a line with an "unsteady hand."[6]

This Note analyzes the majority decision and dissenting opinion in *Hernandez,* which have far-reaching implications for charitable organizations, taxpayers, and the government. Traditional tax deductions for charitable organizations may be in danger and these organizations may suffer economic difficulty.[7]

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[1] Hernandez v. C.I.R., 109 S. Ct. 2136 (1989).

[2] *Id.* at 2143. The cases in conflict, aside from the principal case, included Christiansen v. C.I.R., 843 F.2d 418 (10th Cir.), *cert. denied*, 109 S. Ct. 3174 (1989); Miller v. IRS, 829 F.2d 500 (4th Cir. 1987), *cert. denied*, 109 S. Ct. 3174 (1989); Neher v. C.I.R., 852 F.2d 848 (6th Cir. 1988), *vacated*, 882 F.2d 217 (6th Cir. 1989); Foley v. C.I.R., 844 F.2d 94 (2d Cir. 1988), *vacated*, 109 S. Ct. 3151 (1989); Staples v. C.I.R., 821 F.2d 1324 (8th Cir. 1987), *vacated*, 109 S. Ct. 3271 (1989); and Graham v. C.I.R., 822 F.2d 844 (9th Cir. 1987), *aff'd*, 109 S. Ct. 2136, *reh'g denied*, 110 S. Ct. 16 (1989). *Graham* was consolidated with the principal case for hearing before the U.S. Supreme Court.

[3] *"Congress shall make no law respecting an establishment of religion,* or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I. (emphasis added) A relevant treatment of the interaction between the Establishment Clause of the U.S. Constitution and religious organizations may be found in Esbeck, *Establishment Clause Limits on Governmental Interference with Religious Organizations*, 41 WASH. & LEE L. REV. 347 (1984).

[4] *Hernandez*, 109 S. Ct. at 2143.

[5] These problems are discussed in more detail in the ANALYSIS.

[6] *Hernandez*, 109 S. Ct. at 2155 (O'Connor, J., dissenting, joined by Scalia, J.) (quoting United States v. Allegheny County, 322 U.S. 174, 176 (1944) (Jackson, J.)

[7] Mitz, *Save Your Local Church or Synagogue: When are Taxpayer Contributions to Religious Organizations Deductible Under Section 170?*, 63 N.Y.U. L. REV. 840, 841 (1988).

STATEMENT OF THE CASE

Hernandez directly concerns the Church of Scientology.[8] This church arose in the 1950's.[9] Founder L. Ron Hubbard offered Scientology as an element of a new religion.[10] The Church of Scientology of California (the "Mother Church") began establishing congregations throughout the nation by means of "indoctrination of the laity, training and ordination of ministers," and providing support to affiliated organizations.[11]

Scientology teaches that the individual is a spiritual being having a mind and body.[12] Part of the mind is "reactive, unconscious and filled with mental images that are frequently the source of irrational behavior."[13] Interested potential members and converts who wish to further their "discipleship" are individually administered an "auditing" process by a trained auditor.[14] This process is designed to help the parishioner erase the reactive mind and gain spiritual awareness. The "auditing" involves the auditor asking questions and measuring the response of the parishioner with an electronic device called an E-Meter attached to the skin.[15] The E-Meter assists the auditor in identifying spiritual difficulty.[16]

A major tenet of Scientology is the "Doctrine of Exchange" which "teaches that people should pay for whatever value received."[17] Therefore, branch churches require a donation for the auditing process according to a fixed schedule.[18] The revenues collected for auditing sessions are a major source of income for the Church of Scientology.[19] The fees are not based on ability to pay, and with few exceptions, are not given for free.[20]

The Church does provide assistance in a variety of community ministries,[21] and conducts christenings, funerals, weddings, regular Sunday services, and mar-

[8] *Hernandez*, 109 S. Ct. at 2140-41.

[9] Kuznicki, *Section 170, Tax Expenditures, and the First Amendment: The Failure of Charitable Religious Contributions For the Return of a Religious Benefit*, 61 TEMP. L. REV. 443, 448 (1988).

[10] *Id.* at 448 n.28.

[11] Church of Scientology v. C.I.R., 823 F.2d 1310, 1313 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 1752 (1988).

[12] *Id.* at 1313.

[13] *Id.*

[14] *Id.* These parishioners (recruits and members) are called "pre-clears." *Id.* Also, for the purpose of this article, "auditing" and "training" are treated as synonymous terms.

[15] *Id.* The E-Meter is an electronic device used by "auditors" during the auditing session. The meter has several attachments that are placed on various sensitive parts of the participant's (called "preclear") skin. As certain questions are asked of the preclear, the auditor reads the meter to measure the skin responses. This process helps the auditor to identify the preclear's areas of spiritual difficulty. *Id.* (citing 83 T.C. 575, 577 (1984), *aff'd*, 822 F.2d 844 (9th Cir. 1987).

[16] *Id.*

[17] *Id.*

[18] *Id.* For a complete description of this schedule and administration of fees, see Graham v. Commissioner, 83 T.C. 575, 577-79 (1984).

[19] Church of Scientology v. C.I.R., 83 T.C. 381, 415-17 (1984).

[20] Church of Scientology v. C.I.R., 823 F.2d at 1313.

[21] *Id.*

riage and family counseling.[22] These services are free of charge to the community.[23]

The petitioners in *Hernandez* each made payments to a branch church to participate in these auditing or training sessions.[24] The petitioners sought to deduct these payments on their federal income tax returns as charitable contributions under Internal Revenue Code section 170.[25] The Commissioner disallowed these deductions. The petitioners sought review of these determinations in the U.S. Tax Court.[26] The Tax Court agreed to consolidate the three petitioners' cases.[27] Hernandez agreed to be bound by the findings while reserving the right to a separate appeal.[28] After a three-day bench trial, the court upheld the Commissioner's decision.[29]

The Tax Court found that the term "charitable contribution" in section 170 "is synonymous with the word 'gift.'"[30] Case law has defined gift as a "*voluntary transfer* of property by the owner to another *without consideration* therefor."[31] The court determined that the petitioners had received consideration for their payments, primarily in the nature of the benefit of the religious services provided.[32] Hernandez appealed to the United States Court of Appeals for the First Circuit, which affirmed the decision of the Tax Court.[33] The Court of Appeals stated that the denial of the deduction can be based on return of a commensurate religious benefit, and not on economic or financial benefits alone.[34] The court also dismissed the argument that this decision violated the First Amendment's Establishment Clause.[35] The court found no evidence of selective prosecution.[36] The United States Court of Appeals for the Ninth Circuit heard petitioner Graham's appeal of the Tax Court's decision.[37] It also affirmed the disallowance of the deduction and paid special attention paid to the external features of the auditing transaction.[38]

A circuit conflict became apparent when the Eighth[39] and the Sixth[40] Circuits

[22] *Id.*
[23] *Id.*
[24] Hernandez v. C.I.R., 109 S. Ct. at 2141.
[25] *Id.* at 2141-42.
[26] *Id.* at 2142.
[27] These consolidated cases were decided in Graham v. Commissioner, 83 T.C. 575 (1984), *aff'd*, 822 F.2d 844 (9th Cir. 1987), *aff'd*, 109 S. Ct. 2136 (1989).
[28] *Hernandez*, 109 S. Ct. at 2142.
[29] *Id.*
[30] *Graham*, 83 T.C. at 580 (citing DeJong v. Commissioner, 6 T.C. 896, 899 (1961), *aff'd*, 309 F.2d 373 (9th Cir. 1962)).
[31] *Id.*
[32] *Id.*
[33] Hernandez v. C.I.R., 819 F.2d 1212 (1st Cir. 1987).
[34] *Id.* at 1216-17.
[35] *Id.* at 1218-19.
[36] *Id.* at 1225-27.
[37] Graham v. C.I.R., 821 F.2d at 848. The constitutional arguments raised in *Graham* were similar to the arguments of *Hernandez*, and were likewise dismissed.
[38] *Id.*
[39] Staples v. C.I.R., 821 F.2d 1324.
[40] Neher v. C.I.R., 852 F.2d 848. (The judgment of *Neher* was vacated on Aug. 18, 1989 in accordance with

allowed the deductions under section 170. The United States Supreme Court granted certiorari in order to resolve the conflict.[41]

BACKGROUND

The Purpose of Charitable Deductions

Internal Revenue Code section 170[42] provides for a deduction of charitable contributions for individual taxpayers.[43] Over the past 70 years, the legislature has sought to refine the use of the deduction, focusing primarily on increasing the number of permissive donees, adjusting the percentage limitations on the deduction, limiting the deduction to certain types of property interests transferred, and providing for carryovers of deductions disallowed in a given year.[44] But Congress has given little direction for regulating the deduction for charitable contributions, including a failure to define "contribution" or "gift."[45] Consequently, the courts have had to fill the vacuum, determining tests and approaches, especially in the area of charitable contributions and return benefits.[46]

In *Duffy v. Birmingham*,[47] the court stated that "the common element of charitable purposes . . . is the relief of the public of a burden which otherwise belongs to it." In other words, tax-exemption for charitable purposes is to encourage and provide a public service for beneficial good.[48]

DeJong: The "Detached Generosity" Test

Several courts in recent years have devised tests for determining the deductibility of a charitable contribution when there is a return benefit.[49] These courts have then applied the tests to disallow the deduction.[50] In *DeJong v. C.I.R.*,[51] the Ninth Circuit ruled that tuition paid to The Society for Christian Instruction (a tax-exempt religious education institute) on behalf of the DeJong children was not deductible.

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the decision of *Hernandez*.)

[41] Certiorari was granted in 108 S. Ct. 1467 (1988) and 108 S. Ct. 1994 (1988).

[42] 26 U.S.C. section 170 (1982 & Supp. V 1987) is the relevant portion of the Internal Revenue Code which governs charitable contributions and gifts. In particular, sections 170(a)(1) and 170(c)(2) define charitable contributions and gifts in this situation.

[43] 26 U.S.C. § 170 (1982 & Supp. V 1987).

[44] Kuznicki, *supra* note 9, at 463-64.

[45] *Id.* at 464.

[46] *Id.*

[47] 190 F.2d 738, 740 (8th Cir. 1951).

[48] Peacock, *Emerging Criteria for Tax-Exempt Classification For Religious Organizations*, 60 TAXES 61, 62 (1982).

[49] *See* Mitz, *supra* note 7, at 847-51.

[50] The cases discussed in this section are not intended to be an exhaustive treatment, but are illustrative of the legal development in this area.

[51] 309 F.2d 373 (9th Cir. 1962). The DeJong's claim of $1,075 was reduced by $400 by the Commissioner. *Id.* at 374.

The court stated:

> The value of a gift may be excluded from gross income only if the gift proceeds from a "detached and disinterested generosity" or "out of affection, admiration, charity or like impulses" and must be included only if the claimed gift proceeds primarily from "the constraining force of any moral or legal duty" or from "the incentive of anticipated benefit of an economic nature."[52]

Oppewal - DeJong Extended

Ten years later, in *Oppewal v. C.I.R.*,[53] the First Circuit extended *DeJong*. Under facts similar to *DeJong*, the court proposed scrutinizing tuition payments claimed as charitable contributions with the question: "however the payment was designated, and whatever motives the taxpayer had in making it, was it, to any substantial extent, offset by the cost of services rendered to the taxpayers in the nature of tuition?"[54] In other words, the payment to the extent of an offset is regarded as tuition (or as value received for money paid), and not a charitable contribution.[55]

Sedam and Haak: The "Commensurate Return Benefit" Test

In 1975, the Seventh Circuit decided in *Sedam v. U.S.*[56] that the taxpayer's intention behind the gift is also determinative.[57] In *Sedam*, the taxpayer characterized his donation to his mother's nursing home as a "gift," although the arrangement clearly showed that the gift equalled the mother's room fee.[58] The court found that the donor intended to secure a room, and therefore, the "exchange" of the room for the gift prohibited the tax deductibility of the contribution.[59]

In *Haak v. U.S.*,[60] the United States District Court for the Western District of Michigan scrutinized the nature of the return benefit.[61] In *Haak*, similar to *DeJong* and *Oppewal* (tuition payments to a tax-exempt organization), the court held that the primary factors in determining whether a gift/contribution is deductible is whether the gift/contribution was made with:

> 1) no expectation of financial return commensurate with the amount of the gift, [and] . . .

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[52] *Id.* at 379.
[53] 468 F.2d 1000 (1st Cir. 1972).
[54] *Id.* at 1002.
[55] *Id.*
[56] 518 F.2d 242 (7th Cir. 1975).
[57] *Id.* at 245.
[58] *Id.* at 242-44.
[59] *Id.* at 245.
[60] 451 F. Supp. 1087 (W.D. Mich. 1978).
[61] *Id.* at 1090-91.

2) no expectation of receiving specific tangible benefits in return for the gift.[62]

American Bar Endowment: "Excess Contribution" Test

Finally, in *United States v. American Bar Endowment*,[63] the United States Supreme Court held that for a contribution to be deductible when a portion of the payment induces a return commensurate benefit, the taxpayer, at a minimum, must demonstrate that s/he purposely contributed money (or property) in excess of the value received. To measure the cost of the return benefit, the Supreme Court applied a market value analysis, or the cost of providing that benefit as compared with similar benefits in the general market.[64]

Allen, Staples, and Neher: No Tangible Benefits

Courts have also applied tests and found the charitable contribution to be qualified as a deduction under section 170. In 1976, the Ninth Circuit applied a test similar to that used in *Sedam* (intent behind the gift) to *Allen v. United States*.[65] In *Allen*, the taxpayer donated 9.2 acres of redwoods to the City of Mill Valley, California, and reported the land transfer as a charitable deduction.[66] The *Allen* court said that "the dominant purpose of the transaction is the determining factor, [and] the expectation of a benefit received need not be the sole purpose of a transaction in order to preclude" charitable deduction status.[67] While Allen did receive some tangible benefits from the land transfer,[68] the dominant purpose of the land transfer was to save and preserve the redwoods.[69] The court allowed the transfer as a deduction.[70]

In *Staples v. C.I.R.*,[71] the Eighth Circuit held that "an amount remitted to a qualified church with no return other than participation in strictly spiritual and doctrinal practices is a contribution within the meaning of section 170."[72] With the exact facts as in *Hernandez* (Scientology auditing payments), the *Staples* court focused on the return benefit, and found that the federal tax system does not recognize "religious services as commodities that are purchased in commercial

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[62] *Id.*
[63] 477 U.S. 105, 118 (1986). This is often referred to as the "dual payment" (payment for a return benefit plus a charitable gift). *Id.* at 117.
[64] *Id.* at 116-18.
[65] 541 F.2d 786, 788 (9th Cir. 1976).
[66] *Id.* at 787.
[67] *Id.* at 788.
[68] These benefits included favorable rezoning of land Allen purchased for investment, and tax savings. *Id.*
[69] *Id.*
[70] *Id.* The *Allen* case was vacated and remanded back to the district court for related, but separate, reasons.
[71] 821 F.2d at 1327. For a complete review of this case, see Comment, *The Deductibility of Fixed Donations Made To Churches as Charitable Contributions Under the Internal Revenue Code: Staples v. Commissioner*, 72 MINN. L. REV. 1055 (1988).
[72] *Staples*, 821 F.2d at 1327.

transactions.''[73] The *Staples* court refused to characterize these payments as ''dual contributions.'' The Court held that a necessary component of a dual contribution is the return of a tangible benefit capable of valuation from the intangible benefit, and the Staples received no tangible benefit from the auditing sessions.[74] The *Staples* court recognized ''that there is a world of difference between economic and religious benefits.''[75]

In a similar case, *Neher v. C.I.R.*,[76] the Sixth Circuit reviewed many of the tests used by the courts and decided that the proper test was the ''objective test'' set forth in *Oppewal*.[77] The *Neher* court felt that this test was the only applicable test[78] in a context where the return benefit is strictly spiritual with no tangible or recognizable value.[79]

ANALYSIS

The Majority Decision

This decision, as all of the Scientology cases decided in the federal districts and tax courts, operated under an evidentiary stipulation.[80] The tax-exempt status of the Church of Scientology was pending throughout most of the procedural developments, and was only resolved against the Church in 1987.[81] The stipulation was that, for the purposes of the issue at bar, the Commissioner of the Internal Revenue would treat the branch churches of Scientology as tax-deductible organizations under section 170.[82]

The majority[83] rejected Hernandez' argument that a quid pro quo analysis is inappropriate when the benefit is purely religious.[84] The court stated that the argument was flawed in light of the language of section 170: ''The code makes no special preference for payments made in the expectation of gaining religious benefits or access to a religious service.''[85] The majority focused on the external features of the

[73] *Id.* The Court added: ''Spiritual gain to an individual church member cannot be valued by any measure known in the secular realm.'' *Id.*

[74] *Id.* at 1327-28.

[75] Kuznicki, *supra* note 9, at 459.

[76] 852 F.2d at 852.

[77] *Id.* (citing Oppewal v. C.I.R., 468 F.2d at 1002.)

[78] The *Neher* court accepted the ''objective test'' (contribution made with no expectation of commensurate economic value), rejecting the ''detached and disinterested generosity'' test of *DeJong* as subjective. *Id.*

[79] *Id.* at 855.

[80] Hernandez v. C.I.R., 109 S. Ct. at 2142.

[81] Church of Scientology v. C.I.R., 823 F.2d 1310. The tax-exempt status was revoked due to the commercial nature, and abuses, of the organization. *Id.* at 1320.

[82] *Hernandez*, 109 S. Ct. at 2142-43. *See also Neher*, 852 F.2d at 850-51.

[83] The author of the majority decision in *Hernandez* was Justice Thurgood Marshall, in whose decision Chief Justice Rehnquist, and Justices White, Blackmun, and Stevens joined. Justices Brennan and Kennedy took no part in the decision.

[84] *Hernandez*, 109 S. Ct. at 2145.

[85] *Id.* (citing Foley v. C.I.R., 844 F.2d at 98.)

auditing transaction and found that the commercial nature of the transaction[86] was part of a "quintessential quid pro quo exchange" in which the parishioner paid for, and received, auditing sessions.[87] The majority cited *American Bar Endowment* in applying this external feature analysis.[88] However, the majority ignored the questions of tangible return benefits as opposed to intangible return benefits that were raised in both *Staples* and *Neher*.[89] For the majority, commercial features indicated tangible return benefits, and the intangible spiritual benefits were not fully considered save for a passing reference to the unconstitutionality of monitoring and differentiating "religious" from "secular" services.[90]

The majority asserted that allowing these auditing fees to be qualified as charitable contributions under section 170 would thwart congressional intent.[91] "Congress has specified that a payment to an organization . . . is deductible *only* if such a payment is a 'contribution or gift.'"[92] The majority believed that to allow these fees to be deductible would go beyond the provision of Congress. Taxpayers would likely make similar claims regarding tuition payments to religious or parochial schools, church-sponsored counseling sessions, and medical care at church-affiliated hospitals.[93] The majority found that Congress intended that only contributions or gifts were deductible and auditing fees are not contributions or gifts because they have commercial features.[94] However, the majority left vital questions unanswered. Tuition payments, counseling sessions, and medical care all have market value (i.e., similar market practices which help to deduce some comparative value to the practice). What market value can be compared to auditing sessions designed to increase the spirituality of a church member? Do commercial features alone signal tangible benefits? Do not all charitable contributions have some form of commercial features?[95]

The *Hernandez* majority satisfied itself that selective prosecution did not exist.[96] Hernandez asserted that to disallow his claimed deduction was contrary to the

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[86] These features include: fixed price schedule with calibrated prices; refunds for the sessions not performed; "account cards" to monitor unclaimed but prepaid services; and the categorical bar against free sessions. *Id.*

[87] *Id.* The majority stated: "Each of these practices reveals the inherently reciprocal nature of the exchange." *Id.*

[88] *Id.* at 2144. *American Bar Endowment* contains the crucial statement: "the sine qua non of a charitable contribution is a transfer of money or property without adequate consideration." 477 U.S. 105, 118. Thus, in the majority's analysis, the external features of *Hernandez* seem to indicate a certain exchange of consideration.

[89] *See Hernandez*, 109 S. Ct. at 2152 (O'Connor, J., dissenting).

[90] *Id.* at 2146.

[91] *Id.* at 2145.

[92] *Id.* (citing 26 U.S.C. § 170(c)).

[93] *Id.* at 2145-46.

[94] *See id.* at 2142-45.

[95] These are questions Justice O'Connor forcefully stated and implied in her dissenting opinion. *Id.* at 2152 (O'Connor, J., dissenting).

[96] *Id.* at 2149. Selective prosecution is the narrow focus in the broad discussion of the Establishment Clause and the "Free Exercise" clause. *Id.* at 2146-51.

traditional Internal Revenue Service (IRS) stance of deducting payments made to other religious organizations and indicated intentional governmental discrimination.[97] The majority swept this argument aside. They claimed that the petitioners had shifted from the procedural arguments to a more specific argument that the IRS "accorded payments for auditing and training disparately harsh treatment compared to other churches and synagogues."[98] Hernandez argued that the auditing fees were indistinguishable from these other payments and should be deductible.[99] The majority refused to consider this issue because no lower court had reviewed the other payments and the Court had no specific facts about the nature of these transactions.[100]

This result was unfortunate. Certainly the First Circuit voiced self-doubt about the continuing validity of the deductibility of pew rents and mandatory church dues.[101] And the IRS revenue rules do approve these allowances for various other payments to religious organizations.[102] Once again, the majority left a vital and germane question unanswered.

Justice O'Connor's Dissent

From the first sentence of her dissenting opinion, Justice O'Connor charges the majority with inconsistency and discrimination: "The Court today acquiesces in the decision of the IRS to manufacture a singular exception to its 70-year practice of allowing fixed payments indistinguishable from those made by petitioners to be deducted as charitable contributions."[103]

Justice O'Connor faulted the majority for ignoring the stipulations agreed to in the lower courts regarding the tax-exempt status of the Church of Scientology.[104] Justice O'Connor implied that the majority's focus upon the commercial nature of the auditing transaction made this fact evident.[105] Justice O'Connor also implied that the 1987 revocation of the Church of Scientology's tax-exempt status in *Church of Scientology v. C.I.R.*[106] may have contributed to the "air of artificiality" surrounding the case.[107]

Justice O'Connor agreed that fixed donations in exchange for benefits with

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[97] *Id.* at 2149-50.

[98] *Id.*

[99] *Id.* Hernandez also argued that since Congress had allowed these other payments to be deductible through acquiescence, such treatment was due Scientology auditing payments. *Id.*

[100] *Id.* at 2150-51.

[101] *Hernandez*, 819 F.2d at 1227.

[102] In particular, *see* Rev. Rul. 70-47, 1970-1 C.B. 49.

[103] *Hernandez*, 109 S. Ct. at 2151 (O'Connor, J., dissenting).

[104] *Id.* at 2151-52 (O'Connor, J., dissenting).

[105] *Id.* at 2152 (O'Connor, J., dissenting). O'Connor particularly faulted the Solicitor General for shifting the focus in his argument to the commercial features of Scientology in disregard of the trial stipulation. *Id.* (O'Connor, J., dissenting).

[106] 823 F.2d 1310.

[107] *Hernandez*, 109 S. Ct. at 2151 (O'Connor, J., dissenting).

commercial value are not deductible. However, she raised the now familiar question: what is the tangible benefit received in an auditing session, and how can it be commercially valued?[108] Faced with this dilemma, Justice O'Connor claimed that the practicable option for the Government through the years has been to allow deductions for all the religious organizations, and that this option had been affirmed and reaffirmed by the IRS in various rulings.[109]

Justice O'Connor traced a broad outline of the types of allowed payments to religious organizations: pew rents in Christian worship; synagogue attendance tickets for the Jewish High Holy Days; Mormon temple "recommends"; Roman Catholic Mass stipends.[110] Justice O'Connor faulted the IRS for not evaluating these practices under a quid pro quo analysis, and stated: "There is no indication whatever that the IRS has abandoned its 70-year practice with respect to payments made by those other than Scientologists."[111] Quoting Justice Jackson in *United States v. Allegheny County*,[112] she accused the IRS of drawing a "line between the taxable and the immune . . . by an unsteady hand."[113]

For Justice O'Connor, there was only one conclusion. The majority decision involved a "differential application of a standard based on constitutionally impermissible differences drawn by the Government among religions."[114] She called the majority's refusal to review the IRS treatment of other religious contributions an "unprincipled approach."[115]

Consequences And Implications For The Future

There are several future consequences and implications as a result of the *Hernandez* decision. Immediately, and most apparent, payments made by Scientologists to the Church of Scientology for auditing and training are not deductible as charitable gifts.[116]

The future implications are not so readily apparent but are logical extensions of the *Hernandez* decision. First, "many traditional tax deductions for payments to religious organizations . . . may no longer be permitted."[117] Religious institutions

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[108] *See id.* at 2152 (O'Connor, J., dissenting).
[109] *See id.* at 2153 (O'Connor, J., dissenting).
[110] *Id.* at 2154 (O'Connor, J., dissenting).
[111] *Id.* (O'Connor, J., dissenting).
[112] 322 U.S. at 176.
[113] *Hernandez*, 109 S. Ct. at 2155 (O'Connor, J., dissenting).
[114] *Id.* (O'Connor, J., dissenting). As such, it is a violation of the Establishment Clause of the U.S. Constitution. *Id.* at 2156 (O'Connor, J., dissenting).
[115] *Id.* at 2155 (O'Connor, J., dissenting). The court encouraged the IRS to review these practices on a case-specific approach. *See id.* at 2156 (O'Connor, J., dissenting).
[116] Coupled with the revocation of the Church of Scientology's tax-exempt status, a devastating financial blow has been delivered to Scientology.
[117] Mitz, *supra* note 7, at 841.

which rely on those contributions for necessary revenue may face economic difficulties as taxpayers may be less willing to grant financial support.[118] Consequently, there may be a forced reduction in the amount and quality of programs these religious institutions can offer.[119] Second, as was warned by the *Neher* court, the door may have been opened for the Government to become excessively entangled in church affairs by monitoring, auditing, and evaluating church records.[120] Third, the Internal Revenue Service has been given power to determine the nature and value of spiritual benefits, which is probably beyond the competence of the Service.[121]

Finally, there is the issue of what the proper approach is for the resolution of this issue. Perhaps the concurring opinion of Justice Wellford in *Neher* offered sound advice.[122] He stated:

> It seems to me that the proper avenue of challenge by the government is to the tax exemption claimed by this organization which seems to possess more characteristics of commercial activity than of spiritual concerns usually associated with a church or religion.[123]

The Ninth Circuit revoked this tax-exempt status in 1987 as noted herein,[124] and while the majority in *Hernandez* cited this decision, it was not used properly in view of the evidentiary stipulation. The Supreme Court's attempt to resolve the issue of return benefits has mired them in an inescapable bog and opened the floodgate for more difficult future issues.

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[118] *Id.*

[119] *See id.* at 876.

[120] Neher v. C.I.R., 852 F.2d at 856.

[121] Kuznicki, *supra* note 9, at 487. Kuznicki views this as an additional reason for Congress to remove government spending programs from the tax code. *Id.* at 483-84, 487.

[122] *Neher*, 852 F.2d at 857-58.

[123] *Id.* at 858.

[124] Church of Scientology v. C.I.R., 823 F.2d 1310.