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Is Tax Law Different? Unconstitutional Conditions, Religious Organizations, and Taxation

Lloyd Hitoshi Mayer

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INTRODUCTION

In common with other charities, religious organizations enjoy significant benefits under federal tax law, including exemptions from income tax and the ability of donors to deduct their contributions for income, gift, and estate tax purposes.[1] A subset of religious organizations consisting of "churches," which include houses of worship for all sects, and certain church-related entities also enjoy unique and significant procedural advantages.[2] These include not having to apply to the Internal Revenue Service (IRS) for recognition of tax exemption, not having to file annual information returns with the IRS, and being subject to IRS inquiries and examinations only if the IRS satisfies certain procedural requirements.[3]

But these benefits are not costless. Also in common with other charities, religious organizations are prohibited from providing private inurement and private benefit, engaging in a significant amount of lobbying, intervening in political campaigns, promoting illegality, or

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1 *See, e.g.*, I.R.C. §§ 170(c)(2) (2018) (income tax deduction), 501(a), (c) (income tax exemption), 2055(a)(2) (estate tax deduction), 2106(a)(2)(A)(ii) (nonresident, noncitizen estate tax deduction), 2522(a)(2), (b)(2) (gift tax deduction).

2 For detailed discussions of the federal tax law definition of "church" and certain church-related entities, see generally Wendy Gerzog Shaller, *Churches and Their Enviable Tax Status*, 51 U. PITT. L. REV. 345, 350–55 (1990); Charles M. Whelan, *"Church" in the Internal Revenue Code: The Definitional Problems*, 45 FORDHAM L. REV. 885 (1977).

3 I.R.C. §§ 508(c)(1)(A) (2018) (application exception), 6033(a)(3)(A)(i) (annual return exception), 7611 (restrictions on church tax inquiries and examinations).

acting contrary to fundamental public policy.[4] Private inurement refers to distributing assets or earnings for the benefit of private individuals or entities who exercise substantial influence over the organization, including if the organization pays more than fair market value for services or goods or allows rent-free use of the organization's property; private benefit refers to more than incidentally serving the private interests of any individual or noncharitable entity.[5] Lobbying means attempting to influence legislation, and political campaign intervention means supporting or opposing the election of a candidate to public office.[6] The illegality and fundamental public policy limitations, both drawn from charitable trust law deemed incorporated by Congress into the applicable federal tax statutes, apply if an organization engages in substantial activities that violate federal, state, or local statutes (usually criminal ones), or substantial activities contrary to fundamental (federal) public policy that therefore demonstrate a substantial noncharitable purpose.[7]

The IRS takes the position that these limitations apply with equal force to all tax-exempt charities, including religious organizations.[8] Some religious organizations have challenged the application of the lobbying, political campaign intervention, illegality, and fundamental public policy limitations on religious liberty grounds, invoking the

4 *Id.* §§ 170(c)(2)(C), (D), 501(c)(3), 2055(a)(2), 2106(a)(2)(ii), 2522(a)(2), (b)(2) (all prohibiting private inurement, significant lobbying, and political campaign intervention); Treas. Reg. § 1.501(c)(3)-1(d)(1)(ii) (1990) (prohibiting private benefit); Rev. Rul. 75-384, 1975-2 C.B. 204 (prohibiting promoting illegality); Rev. Rul. 80-278, 1980-2 C.B. 175 (prohibiting activities contrary to clearly defined and established public policy).

5 *See* Treas. Reg. § 1.501(c)(3)-1(c)(2), (d)(1)(ii) (1990); IRS, *Overview of Inurement/Private Benefit Issues in IRC 501(c)(3)*, *in* EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION TECHNICAL INSTRUCTION PROGRAM FOR FISCAL YEAR 1990 (1989), https://www.irs.gov/pub/irs-tege/eotopicc90.pdf [https://perma.cc/V93C-MP9F].

6 *See* Treas. Reg. § 1.501(c)(3)-1(c)(3)(ii), (iii) (1990); JUDITH E. KINDELL & JOHN FRANCIS REILLY, *Lobbying Issues*, *in* EXEMPT ORGANIZATIONS TECHNICAL INSTRUCTION PROGRAM FOR FY 1997, at 261, 273 (1996), https://www.irs.gov/pub/irs-tege/eotopicp97.pdf [https://perma.cc/RG8K-KWGC]; JUDITH E. KINDELL & JOHN FRANCIS REILLY, *Election Year Issues*, *in* EXEMPT ORGANIZATIONS TECHNICAL INSTRUCTION PROGRAM FOR FY 2002, at 335, 339 (2001), https://www.irs.gov/pub/irs-tege/eotopici02.pdf [https://perma.cc/2LC4-UJRU].

7 *See* JEAN WRIGHT & JAY H. ROTZ, *Illegality and Public Policy Considerations*, *in* EXEMPT ORGANIZATIONS TECHNICAL INSTRUCTION PROGRAM FOR FY 1994 (1993), https://www.irs.gov/pub/irs-tege/eotopicl94.pdf [https://perma.cc/9JSW-FG75]; IRS, *Activities That Are Illegal or Contrary to Public Policy*, *in* EXEMPT ORGANIZATIONS TECHNICAL INSTRUCTION PROGRAM FOR FY 1985 (1984), http://www.irs.gov/pub/irs-tege/eotopicj85.pdf [https://perma.cc/S3LK-LXU7].

8 IRS, TAX GUIDE FOR CHURCHES & RELIGIOUS ORGANIZATIONS 4–7 (2015), https://www.irs.gov/pub/irs-pdf/p1828.pdf [https://perma.cc/8XP3-5YWL].

Free Exercise of Religion Clause of the First Amendment and, more recently, the Federal Religious Freedom Restoration Act (RFRA).[9] To date, however, federal courts have rejected these challenges, concluding that they are permissible conditions on the tax benefits enjoyed by religious organizations.[10]

This Essay reconsiders this conclusion and the arguments in support of it. One such argument is that Congress intended these tax benefits to support a charitable "program" and therefore, under general unconstitutional conditions principles articulated by the Supreme Court, Congress is permitted to refuse to provide those benefits to any organization that engages in activities inconsistent with being charitable.[11] The problems with this argument include that the tax benefits only partially and indirectly fund the activities of charitable organizations,[12] it is questionable whether some of the limitations—particularly the lobbying and political campaign intervention limitations[13]—are inconsistent with being charitable, and it assumes, perhaps incorrectly as Michael A. Helfand argues in his contribution to this Symposium, that general unconstitutional conditions principles should apply in the free exercise of religion context.[14] I therefore set aside this argument to consider a different argument drawn from the relevant caselaw.

This alternate argument is that tax law is somehow different from other legal contexts for purposes of applying the unconstitutional conditions doctrine to religious organizations. The consistent refusal of the courts to allow free exercise of religion–based exemptions from generally applicable federal tax laws suggests this may be the case.[15] This difference could be viewed as a strand of the increasingly disfavored view sometimes referred to as "tax exceptionalism."[16] But upon

9 *See infra* notes 25, 31, 43, and 44 and accompanying text.

10 *See infra* notes 27, 32, 43, and 45 and accompanying text.

11 *See infra* note 51 and accompanying text (citing Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 570 U.S. 205 (2013)).

12 *See infra* note 52 and accompanying text.

13 *See, e.g.*, Johnny Rex Buckles, *The Penalty of Liberty*, 25 TEX. REV. L. & POL. 159, 165–78 (2020) (reviewing PHILIP HAMBURGER, LIBERAL SUPPRESSION: SECTION 501(C)(3) AND THE TAXATION OF SPEECH (2018)) (summarizing and critiquing Philip Hamburger's argument that certain political forces led to the political speech limitations); Andrew Grossman & Alexander Lyman Reid, *And the Walls Came Tumbling Down: The Liberation of Civil Society*, FEDERALIST SOC'Y (Nov. 17, 2022), https://fedsoc.org/commentary/fedsoc-blog/and-the-walls-came-tumbling-down-the-liberation-of-civil-society [https://perma.cc/42H3-MDHS] (arguing that questionable political motivations led to the political speech limitations).

14 *See* Michael A. Helfand, *There Are No Unconstitutional Conditions on Free Exercise*, 98 NOTRE DAME L. REV. REFLECTION (SPECIAL ISSUE) S50, S51 (2023).

15 *See infra* Parts I & II.

16 *See infra* note 69 and accompanying text.

further consideration, I argue that this difference instead fits within the more traditional compelling governmental interest and least restrictive means analysis codified in RFRA and that arguably applied in the Free Exercise of Religion Clause context before the Supreme Court's decision in *Employment Division v. Smith*.[17]

More specifically, tax law is different because of its complex rules applicable to all individuals and entities relating to expenditures for lobbying, political campaign intervention, and illegal activity. The complexity of these rules, and the risk that granting exemptions from them for any reason would undermine their uniform and consistent application, support the conclusion that the government has a compelling interest in not allowing exemptions, and that the existing limitations imposed on tax-exempt charities, including religious organizations, are the least restrictive means to do so. As a result, constitutional and RFRA free exercise of religion rights do not require exemptions for religious organizations from these existing limitations even when such organizations are motivated by their religious beliefs to engage in the limited activities. Furthermore, while this argument does not apply to the contrary to a fundamental public policy limitation, the Supreme Court has correctly concluded that in the instances where there is a fundamental public policy, ensuring that tax-supported charities do not undermine that policy is also a compelling governmental interest and prohibiting them from doing so is the least restrictive means of furthering that interest.[18]

I. A BRIEF HISTORY OF UNCONSTITUTIONAL CONDITIONS, RELIGIOUS ORGANIZATIONS, AND TAXATION

There have been only a handful of federal court decisions that have squarely addressed whether the limitations imposed by Congress on tax-exempt charities can, constitutionally, apply to religious organizations. With respect to the prohibition on private inurement and private benefit, it does not appear that any religious organization has sought to challenge in court its application on religious liberty grounds.[19] Instead, churches and other religious organizations facing denial or loss of tax-exempt status because of alleged violations of this prohibition have disputed whether in fact the violations have

17 *See infra* notes 54–55 and accompanying text.

18 *See infra* note 45 and accompanying text.

19 The only constitutional challenge that appears to have been brought by a church facing allegations of prohibited private inurement or private benefit is a claim of unconstitutional selective prosecution based on religious animus. *See* Church of Scientology of California. v. Comm'r, 823 F.2d 1310, 1320–21 (9th Cir. 1987) (rejecting this claim).

occurred.[20] This may be because it is difficult for a religious organization to credibly assert that providing private inurement or private benefit is religiously motivated and, even if it could do so, taking that position would likely be problematic as a public relations matter.[21] Or it may be that religious organizations and their lawyers have determined, likely correctly, that this prohibition is so inherent to the legal concept of charitable that challenging it on religious liberty grounds would be futile, if not frivolous.[22]

In contrast, two federal appellate courts have addressed religious liberty challenges to the political campaign intervention prohibition, and one of them also addressed the lobbying limitation. *Christian Echoes National Ministry, Inc. v. United States*[23] involved a religious organization that distributed information through broadcasts and publications to educate the public about the threats of communism, socialism, and political liberalism, including urging the public to contact members of Congress about legislation and attacking candidates and incumbent politicians the organization felt were too liberal.[24] The organization argued that the IRS's denial of tax-exempt status for both political campaign intervention and excessive lobbying violated its right to free exercise of religion under the First Amendment.[25] The U.S. Court of Appeals for the Tenth Circuit rejected this argument, concluding that "the limitations imposed by Congress in Section 501(c)(3) are constitutionally valid" and "only in keeping with an overwhelming and compelling Governmental interest: That of guarantying that the wall

20 *See, e.g.*, *id.* at 1317–19; Bethel Conservative Mennonite Church v. Comm'r, 746 F.2d 388, 390–92 (7th Cir. 1984); Basic Unit Ministry of Alma Karl Schurig v. Comm'r, 670 F.2d 1210, 1211 (D.C. Cir. 1982) (per curiam); Founding Church of Scientology v. United States, 412 F.2d 1197, 1199–1202 (Ct. Cl. 1969).

21 Perhaps the most visible dispute along these lines was not with the IRS but instead the then-ranking member of the Senate Finance Committee, who publicly questioned the finances of megachurches that reportedly supported their ministers' lavish lifestyles and some of which promulgated "the prosperity gospel." *See* Kathy Lohr, *Senator Probes Megachurches' Finances*, NPR (Dec. 4, 2007, 7:57 PM), https://www.npr.org/templates/story/story.php?storyId=16860611 [https://perma.cc/RME7-PUW4]. All six of the churches he targeted eventually asserted that they fully complied with federal tax laws, as opposed to challenging the application of those laws on free exercise of religion grounds. *See* Rachel Zoll, *Televangelists Escape Penalty in Senate Inquiry*, NBC NEWS (Jan. 7, 2011, 5:48 AM), https://www.nbcnews.com/id/wbna40960871 [https://perma.cc/JK5B-7RVG].

22 *See* RESTATEMENT OF CHARITABLE NONPROFIT ORGS. § 1.01 cmt. f (AM. L. INST. 2021).

23 470 F.2d 849 (10th Cir. 1972).

24 *See id.* at 851–52, 855–56.

25 *See id.* at 856.

separating church and state remain high and firm."[26] And in rejecting a related free speech challenge under the First Amendment, the court further noted that "tax exemption is a privilege" and the organization "may engage in all such activities without restraint, subject, however, to withholding of the exemption or, in the alternative, the taxpayer may refrain from such activities and obtain the privilege of exemption."[27] It also stated these limitations were constitutionally justified based on "the principle that government shall not subsidize, directly or indirectly, those organizations whose substantial activities are directed toward the accomplishment of legislative goals or the election or defeat of particular candidates."[28]

Branch Ministries v. Rossotti[29] involved a church that placed newspaper ads published four days before the 1992 presidential election urging Christians not to vote for then presidential candidate Bill Clinton.[30] The church argued that the IRS's revocation of its tax-exempt status for political campaign intervention violated its right to free exercise of religion under both the First Amendment and RFRA.[31] The U.S. Court of Appeals for the District of Columbia Circuit rejected this argument, concluding that the church's exercise of religion was not substantially burdened for several reasons, including that the church was free to engage in political campaign intervention by forming a related organization tax exempt under § 501(c)(4) that in turn could form a tax-exempt § 527 political organization, although both the 501(c)(4) organization and the 527 organization would have to operate without the benefit of tax-deductible contributions.[32]

In reaching this conclusion, the court relied on *Regan v. Taxation with Representation of Washington*, a Supreme Court decision upholding the lobbying limitation in the face of a free speech challenge brought

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26 *Id.* at 857. All section references are to the Internal Revenue Code, 26 U.S.C., unless otherwise indicated.

27 *Id.*

28 *Id.*

29 211 F.3d 137 (D.C. Cir. 2000).

30 *Id.*

31 *Id.* at 142.

32 *See id.* at 143. The court overstated the limitations on political activities for § 501(c)(4) organizations, in that it said such organizations cannot engage in political campaign intervention when in fact they can do so to a limited extent. *See* Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii) (1990); I.R.S. Gen. Couns. Mem. 34,233 (Dec. 3, 1969); T.D. 6391, 1959-2 C.B. 139, 145–46; John Francis Reilly & Barbara A. Braig Allen, *Political Campaign and Lobbying Activities of IRC 501(c)(4), (c)(5), and (c)(6) Organizations*, *in* EXEMPT ORGANIZATIONS-TECHNICAL INSTRUCTION PROGRAM FOR FY 2003, at L1, L-2 to L-3 (2002), https://www.irs.gov/pub/irs-tege/eotopicl03.pdf [https://perma.cc/4Q78-KSST].

by a nonreligious, charitable organization.[33] In that decision, the Supreme Court concluded that the tax benefits enjoyed by charities constituted a subsidy and so Congress was constitutionally permitted to deny that subsidy for certain types of speech as long as (1) charities had an alternative, albeit less tax-favored, vehicle to engage in the congressionally disfavored speech and (2) Congress was not trying to suppress "dangerous ideas."[34] Based on this reasoning, the Supreme Court squarely rejected the charity's argument that the limitation on lobbying was an unconstitutional condition on the receipt of tax-deductible contributions.[35] In a concurrence, Justice Blackman emphasized that this holding depended on the charity having the ability to engage in the otherwise limited speech through a related, noncharitable organization, a point the Court in a later decision confirmed was an aspect of its *Taxation with Representation* decision.[36]

Numerous commentators have criticized the holdings in *Christian Echoes* and *Branch Ministries* or raised constitutional and RFRA concerns with the application of these limitations to religious organizations, particularly churches.[37] And the separation of church and state rationale of the *Christian Echoes* court is highly questionable.[38] But the *Christian Echoes* court also relied on the subsidy rationale later adopted by the Supreme Court in *Taxation with Representation* with respect to a free speech claim and then extended by the court in *Branch Ministries*

33 *Branch Ministries*, 211 F.3d at 143 (citing Regan v. Tax'n with Representation of Washington, 461 U.S. 540 (1983)).

34 *See Regan*, 461 U.S. at 544 & n.6, 548 (quoting Cammarano v. United States, 358 U.S. 498, 513 (1959)).

35 *Id.* at 545. The availability of an alternate, nonsubsidized channel and the lack of intent to suppress dangerous ideas formed the basis for the Court to distinguish *Taxation with Representation* from the earlier case of *Speiser v. Randall*, 357 U.S. 513 (1958), where the Court found that conditioning a state property tax exemption on the otherwise eligible individual signing a declaration stating they did not advocate the forcible overthrow of the United States government was unconstitutional. *Regan*, 461 U.S. at 545, 548.

36 *See Regan*, 461 U.S. at 552–53 (Blackman, J., concurring); FCC v. League of Women Voters of California, 468 U.S. 364, 400 (1984); *Branch Ministries*, 211 F.3d at 143 (making this point).

37 *See, e.g.*, Anne Berrill Carroll, *Religion, Politics, and the IRS: Defining the Limits of Tax Law Controls on Political Expression by Churches*, 76 MARQ. L. REV. 217, 250–56 (1992); Steffen N. Johnson, *Of Politics and Pulpits: A First Amendment Analysis of IRS Restrictions on the Political Activities of Religious Organizations*, 42 B.C. L. REV. 875, 887–901 (2001); Lloyd Hitoshi Mayer, *Politics at the Pulpit: Tax Benefits, Substantial Burdens, and Institutional Free Exercise*, 89 B.U. L. REV. 1137, 1183–97 (2009); Allan J. Samansky, *Tax Consequences When Churches Participate in Political Campaigns*, 5 GEO. J.L. & PUB. POL'Y 145, 175–78 (2007). *See generally* NINA J. CRIMM & LAURENCE H. WINER, POLITICS, TAXES, AND THE PULPIT: PROVOCATIVE FIRST AMENDMENT CONFLICTS 263–92 (2011) (discussing at length the application of the unconstitutional conditions doctrine in this context under both the First Amendment and RFRA).

38 *See* Carroll, *supra* note 37, at 250–51.

to a free exercise of religion claim.[39] Several commentators have also questioned the continued viability of the holding and reasoning in *Taxation with Representation* in light of the Supreme Court's more recent decision in *Citizens United v. FEC*.[40] But most commentators have concluded that *Taxation with Representation* remains good law.[41] More importantly, the Supreme Court has continued to cite *Taxation with Representation* without any indication that it may no longer be binding precedent.[42]

Finally, the few religious organizations that have challenged the illegality and fundamental public policy limitations on religious grounds have also failed. For example, the U.S. Tax Court upheld the revocation of tax-exempt status for the Church of Scientology of California based in part on a proven conspiracy by church leaders to violate federal tax law.[43] And more prominently, the Supreme Court upheld the revocation of tax-exempt status of Bob Jones University and another Christian school because their racially discriminatory policies were in conflict with the fundamental federal public policy of opposing racial discrimination in education.[44] The Court reasoned that vindicating this policy was a compelling governmental interest that "outweigh[ed] whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs" and that there was no less restrictive means for achieving that interest.[45]

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39 *See* Christian Echoes Nat'l Ministry, Inc. v. United States, 470 F.2d 849, 857 (10th Cir. 1972); *Regan*, 461 U.S. at 544; *Branch Ministries*, 211 F.3d at 143–44; *supra* notes 32–34 and accompanying text.

40 Citizens United v. FEC, 558 U.S. 310 (2010); *see, e.g.*, Paul Weitzel, *Protecting Speech from the Heart: How* Citizens United *Strikes Down Political Speech Restrictions on Churches and Charities*, 16 TEX. REV. L. & POL. 155, 163–67 (2011); Jennifer Rigterink, Comment, *I'll Believe It When I "C" It: Rethinking § 501(c)(3)'s Prohibition on Politicking*, 86 TUL. L. REV. 493, 506–07 (2011).

41 *See, e.g.*, Ellen P. Aprill, *Regulating the Political Speech of Noncharitable Exempt Organizations After* Citizens United, 10 ELECTION L.J. 363, 401 (2011); Roger Colinvaux, *The Political Speech of Charities in the Face of* Citizens United*: A Defense of Prohibition*, 62 CASE W. RSRV. L. REV. 685, 732 (2012); Miriam Galston, *When Statutory Regimes Collide: Will* Citizens United *and* Wisconsin Right to Life *Make Federal Tax Regulation of Campaign Activity Unconstitutional?*, 13 U. PA. J. CONST. L. 867, 929–30 (2011); Lloyd Hitoshi Mayer, *Charities and Lobbying: Institutional Rights in the Wake of* Citizens United, 10 ELECTION L.J. 407, 415–16 (2011).

42 *See, e.g.*, Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2389 (2021); Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 140 S. Ct. 2082, 2088 (2020); Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 570 U.S. 205, 214 (2013); Armour v. City of Indianapolis, 566 U.S. 673, 680 (2012).

43 Church of Scientology of California v. Comm'r, 83 T.C. 381, 502–09 (1984), *aff'd on other grounds*, 823 F.2d 1310 (9th Cir. 1987).

44 Bob Jones Univ. v. United States, 461 U.S. 574, 602–04 (1983).

45 *Id.* at 604.

II. IS TAX DIFFERENT?

Especially in the context of this Symposium, what is surprising about the above decisions is that conditioning tax benefits on refraining from certain types of religiously motivated activities would seem to be a classic example of an unconstitutional condition. As Kathleen Sullivan has written, the doctrine of unconstitutional conditions is implicated when the

> [g]overnment offers a benefit that it is constitutionally permitted but not compelled to offer, on condition that the recipient undertake (or refrain from) future action that is legal for him to undertake (or to refrain from) but that government could not have constitutionally compelled (or prohibited) without especially strong justification.[46]

It is true that the limitations imposed by Congress as a condition for the tax benefits enjoyed by religious organizations appear to be valid and neutral laws of general applicability and so do not require a strong justification under the First Amendment's Free Exercise of Religion Clause as interpreted by the Supreme Court in *Employment Division v. Smith*.[47] But under RFRA Congress is still prohibited from imposing a substantial burden on religiously motivated activities absent a strong justification in the form of a compelling governmental interest that is furthered by the regulation at issue as the least restrictive means.[48]

Yet the courts have avoided this conclusion usually by first characterizing those benefits as a subsidy—a point disputed by some commentators[49]—and then reasoning that the ability of affected organizations to engage in the disfavored activities through nonsubsidized channels renders any burden on free exercise of religion (or free speech) insubstantial.[50] The Supreme Court has recently concluded

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46 Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1427 (1989).

47 494 U.S. 872, 879 (1990). And unlike the situation in *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1878–79 (2021), there are no exceptions to these limitations that would render them not generally applicable.

48 42 U.S.C. § 2000bb-1 (2018).

49 *See, e.g.*, William D. Andrews, *Personal Deductions in an Ideal Income Tax*, 86 HARV. L. REV. 309, 345–46 (1972) (arguing that in most situations the charitable contribution deduction is not a subsidy); Ellen P. Aprill & Lloyd Hitoshi Mayer, *Tax Exemption Is Not a Subsidy—Except for When It Is*, 172 TAX NOTES FED. 1887, 1892–95 (2021) (arguing that tax exemption is a subsidy only in certain situations and for certain types of income of nonprofit organizations); Johnny Rex Buckles, *The Community Income Theory of the Charitable Contributions Deduction*, 80 IND. L.J. 947 (2005) (arguing that tax exemption and the charitable contribution deductions for charities reflect theoretically correct taxation of community income and therefore are not subsidies).

50 *See supra* notes 32–36 and accompanying text.

that this argument is a part of a larger "federal program" approach for addressing unconstitutional-conditions challenges when government funding is conditioned in a way that implicates constitutional rights.[51] It did so despite the fact that even if the tax benefits enjoyed by religious organizations constitute government subsidies, they at most only represent indirect and partial funding of the activities of religious organizations, including any lobbying or political campaign intervention.[52] This raises the question of whether the federal courts are treating tax as a special context, different from other areas where they have been more open to finding that a condition on a benefit created a substantial and unconstitutional (or RFRA-violating) burden on free exercise of religion.

There is caselaw suggesting the Supreme Court does treat free exercise of religion claims differently when they relate to tax law.[53] Between 1963, when the Supreme Court decided in *Sherbert v. Verner* to apply strict scrutiny to government regulation of religiously motivated conduct,[54] and 1990, when the Supreme Court decided in *Employment Division v. Smith* to reject strict scrutiny when that regulation was in the form of a valid and neutral law of general applicability,[55] the Supreme Court considered free exercise of religion challenges to federal tax law in three instances, including two involving tax-exempt organizations.[56] In each of these instances the party or parties bringing the free exercise of religion claim lost.

First, in *United States v. Lee* an Amish employer sought an exemption from Social Security tax on religious grounds.[57] The Court concluded that the government's interest in maintaining a sound tax system, including mandatory and continuous participation in and contribution to the Social Security system, sufficiently justified the interference with the employer's free exercise of religion rights without considering whether granting the exemption would in fact undermine

51 Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 570 U.S. 205, 217, 214–17 (2013); *see* Lloyd Hitoshi Mayer, *Nonprofits, Speech, and Unconstitutional Conditions*, 46 CONN. L. REV. 1045, 1068–70 (2014) (discussing this conclusion).

52 Mayer, *supra* note 51, at 1070–71.

53 *See* Ira C. Lupu, *Of Time and the RFRA: A Lawyer's Guide to the Religious Freedom Restoration Act*, 56 MONT. L. REV. 171, 183 (1995) ("The leading cases [in which the Supreme Court weakened free exercise review] all involve taxation.").

54 374 U.S. 398, 403 (1963).

55 494 U.S. 872, 879 (1990).

56 Mayer, *supra* note 37, at 1158–60. The Court also considered a free exercise of religion challenge to a state sales and use tax in *Jimmy Swaggart Ministries v. Board of Equalization*, but there the taxpayer did not allege that payment of the tax, by itself, violated its sincere religious beliefs. 493 U.S. 378, 391–92 (1990).

57 455 U.S. 252, 254–55 (1982).

that interest.[58] More specifically, the Court reasoned that both Social Security specifically and federal income tax more generally were comprehensive, national systems that depended on mandatory participation.[59] It therefore concluded, that "[b]ecause the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax."[60]

Second, in *Bob Jones University v. United States* two schools argued that even if their religiously motivated racially discriminatory policies were contrary to fundamental public policy and so inconsistent with tax-exempt status as a charity under § 501(c)(3), revoking that status was contrary to their right to free exercise of religion.[61] The Court did not specifically refer to the government's interests relating to the tax system, but similarly to its reasoning in *Lee*, it relied on the government's compelling interest in eradicating racial discrimination in education without any consideration of whether granting the specific exemptions sought would seriously undermine that interest.[62] Instead and as noted previously, it concluded that the combination of that compelling interest, the limited burden imposed by loss of tax benefits, and the lack of a less restrictive means to further that interest supported the revocation.[63]

Finally, in *Hernandez v. Commissioner* donors to a church challenged the government's denial of charitable-contribution deductions on the grounds that they received a *quid pro quo* benefit in return.[64] Having found that there was in fact a *quid pro quo* benefit, the Court then rejected the donors' free exercise of religion challenge to the denial, relying on the reasoning of *Lee* to conclude that the government's interest in maintaining a sound tax system was sufficient to justify any burden on the donors' free exercise, even a substantial one.[65]

More recent Supreme Court cases indicate that the Court continues to endorse the reasoning in *Lee*. For example, in *Burwell v. Hobby Lobby Stores, Inc.*, the Court stated that even if RFRA had applied to the

58 *See id.* at 257–60; *id.* at 262 (Stevens, J., concurring in the judgment) (noting that the Court's rejection of the free exercise of religion claim was not based on the relatively minor problems that would be created by granting the exemption sought in the case but instead "because of the risk that a myriad of other claims would be too difficult to process").

59 *See id.* at 258–60 (majority opinion).

60 *Id.* at 260.

61 461 U.S. 574, 602–03 (1983).

62 *See id.* at 604.

63 *Supra* note 45 and accompanying text.

64 490 U.S. 680, 692 (1989).

65 *Id.* at 699–70 (citing United States v. Lee, 455 U.S. 252, 260 (1982)).

Lee situation the result would have been the same, "[b]ecause of the enormous variety of government expenditures funded by tax dollars, allowing taxpayers to withhold a portion of their tax obligations on religious grounds would lead to chaos."[66] Similarly, in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, the Court described *Lee* as illustrating a situation where an exemption based on religious belief could not be accommodated.[67]

III. SHOULD TAX BE DIFFERENT?

Parts I and II above demonstrate that when it comes to free exercise of religion claims, including ones challenging conditions imposed on benefits otherwise enjoyed by religious organizations, federal courts have shown a great deal of deference to the government in the tax law context. This likely is driven in part by the government not disfavoring religious organizations in any way with respect to taxation, since Congress has both provided the same tax benefits to religious organizations as it provides to nonreligious, charitable organizations and has also provided certain unique procedural advantages to churches and certain church-related entities.[68] Nevertheless, it appears that every attempt by a religious organization to claim an exemption from a federal tax rule for religiously motivated behavior has failed in the courts, including attempts based on the unconstitutional-conditions doctrine. The question is whether this approach, which has sometimes been called "tax exceptionalism," is appropriate when it comes to these types of claims.[69]

The idea of tax exceptionalism arose because of a perception among government officials, academics, and practitioners that tax law and especially federal income tax law is unique as an area of law for a variety of reasons, including because it intrudes into the life of every individual, its primary function is raising revenue for the federal government as opposed to shaping the conduct of individuals or entities, it depends on a culture of voluntary obedience, and it is an incredibly complex set of detailed rules.[70] The Treasury Department, the courts,

66 573 U.S. 682, 734 (2014).

67 546 U.S. 418, 435 (2006).

68 *See supra* notes 1–3 and accompanying text.

69 *See* Lawrence Zelenak, *Maybe Just a Little Bit Special, After All?*, 63 DUKE L.J. 1897, 1901 (2014) (Tax exceptionalism as used in this sense is "the notion that tax law is somehow deeply different from other law, with the result that many of the rules that apply transsubstantively across the rest of the legal landscape do not, or should not, apply to tax.").

70 *See, e.g.*, Alice G. Abreu & Richard K. Greenstein, *Tax: Different, Not Exceptional*, 71 ADMIN. L. REV. 663, 686 (2019) (revenue collection purpose, obedience, and complexity);

and scholars have in turn explored how this idea applies in a variety of contexts, including with respect to interpreting tax statutes, tax administration, and tax litigation.[71] Perhaps the most prominent area has been tax administration, where the Treasury Department has maintained for decades that its tax regulations are not necessarily subject to the procedural requirements of the Administrative Procedure Act, including notice and comment.[72]

At the same time, many scholars have rejected tax exceptionalism.[73] They argue that the tax law is not alone in its reach, often is used by Congress to attempt to influence behavior, and is not unique in either its reliance on (mostly) voluntary obedience or its complexity.[74] Karla Simon was particularly troubled by any suggestion that constitutional provisions should apply differently based upon these asserted differences.[75] That said, some scholars have argued that while tax is not unique and so not exceptional, it does of course often differ in some respects from other areas of law and those differences may be salient in some situations.[76]

Reflecting these criticisms, in the administrative law area the Supreme Court rejected tax exceptionalism in 2011, albeit in a case where the taxpayer, not the government, argued against the application of usual administrative law standards to tax regulations.[77] More

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Paul L. Caron, *Tax Myopia, or Mamas Don't Let Your Babies Grow Up to Be Tax Lawyers*, 13 VA. TAX REV. 517, 531 (1994) (complexity); Karla W. Simon, *Constitutional Implications of the Tax Legislative Process*, 10 AM. J. TAX POL'Y 235, 237–39, 241 (1992) (intrusion and complexity); Zelenak, *supra* note 69, at 1919 (complexity, revenue collection, and intrusion). *But see* Kristin E. Hickman, *The Need for* Mead*: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537, 1590–1600 (2006) (in the administrative law context, focusing instead on tradition, penalty severity, revenue maximization concerns, and expertise).

71 Caron, *supra* note 70, at 518–19; *see also* Anthony C. Infanti, *LGBT Taxpayers: A Collision of "Others"*, 13 GEO. J. GENDER & L. 1, 8–17 (2012) (discussing tax exceptionalism with respect to various areas, including tax legislation, tax administration, and tax litigation).

72 *See, e.g.*, Alice G. Abreu & Richard K. Greenstein, *Tax as Everylaw: Interpretation, Enforcement, and the Legitimacy of the IRS*, 69 TAX LAW. 493, 498–99 (2016); Hickman, *supra* note 70, at 1545.

73 *See, e.g.*, Caron, *supra* note 70, at 531; Hickman, *supra* note 70, at 1600.

74 *See, e.g.*, Abreu & Greenstein, *supra* note 70, at 686–89, 696–97; Lynn D. Lu, *Standing in the Shadow of Tax Exceptionalism: Expanding Access to Judicial Review of Federal Agency Rules*, 66 ADMIN. L. REV. 73 (2014) (noting use of tax law, and particularly tax exemption under § 501(c)(3), to implement policy as opposed to collect revenue); Simon, *supra* note 70, at 239, 243.

75 *See* Simon, *supra* note 70, at 259.

76 *See, e.g.*, Abreu & Greenstein, *supra* note 70, at 701; Zelenak, *supra* note 69, at 1919–20.

77 *See* Mayo Found. for Med. Educ. & Rsch. v. United States, 562 U.S. 44, 53–56 (2011). *But see* Jasper L. Cummings, Jr., *Tax Exceptionalism Overblown*, 177 TAX NOTES FED. 225, 227

specifically, the Court stated "we are not inclined to carve out an approach to administrative review good for tax law only" and that "[w]e see no reason why our review of tax regulations should not be guided by agency expertise pursuant to *Chevron* to the same extent as our review of other regulations."[78] Not surprisingly, that decision has led to a wave of taxpayer challenges to regulations, including some longstanding ones, that continues today.[79] That said, there are indications that the Treasury and the lower federal courts have not completely accepted the Supreme Court's holding.[80] And of course that holding only directly applies to the administrative law context.

With respect to the free exercise of religion context, the Supreme Court's reasoning in *Lee* bears some resemblance to arguments for tax exceptionalism.[81] *Lee* could be read as asserting that the creation of exemptions based not on congressional policy decisions but instead the right to free exercise of religion would drastically undermine the soundness of the tax law system because those exemptions could significantly reduce revenue, create the perception that some citizens by asserting religious beliefs could flout obedience to tax law, and upset the complex arrangements of the tax rules. This view is supported by Justice Stevens' concurrence in that decision.[82] While Justice Stevens concurred primarily because he felt the correct standard to apply was to deny religious exemptions when the law at issue was a valid and neutral one of general applicability (foreshadowing *Employment Division v. Smith*), he also noted that he agreed "with the Court's conclusion that the difficulties associated with processing other claims to tax exemption on religious grounds justify a rejection of this claim."[83]

This brings us to whether the courts should continue to treat tax law differently from other types of law in the free exercise of religion context, even assuming recent scholars (and the Supreme Court with respect to administrative law) are correct that such differential treatment should not apply across the board. The strongest argument for doing so relies on an application of the complexity point commonly raised to support tax exceptionalism more generally and that is

(2022) (arguing that as a tax-rule-favoring decision this case did not end, or even address, tax exceptionalism).

78 *Mayo*, 562 U.S. at 55–56.

79 *See, e.g.*, Kristin E. Hickman, *The Federal Tax System's Administrative Law Woes Grow*, ABA TAX TIMES, May 2022, at 6 (summarizing recent court decisions in this area).

80 *See* Abreu & Greenstein, *supra* note 70, at 668–69 (describing ongoing litigation and scholarly disputes over this issue).

81 *See supra* notes 58–60 and accompanying text.

82 *See* United States v. Lee, 455 U.S. 252, 261–63 (1982) (Stevens, J., concurring).

83 *Id.* at 263.

implicitly invoked by *Lee*'s sound-tax-system reasoning.[84] More specifically, three limitations that religious organizations have challenged unsuccessfully to date as unconstitutional conditions relate to lobbying, political campaign intervention, and illegality. But these limitations are not the only way that Congress has chosen to disfavor these activities in federal tax law; Congress has also prohibited individuals and for-profit entities from deducting expenditures for these activities even if absent this prohibition they would be deductible as, for example, ordinary and necessary business expenses.[85]

Why does the treatment of expenditures for these activities for individuals and for-profit entities matter? Because if the courts were to find that religious organizations could not be denied eligibility to receive tax-deductible contributions for engaging in lobbying, political campaign intervention, or illegality if that activity was religiously motivated, then individuals and for-profit entities could avoid the denial of deductions for lobbying, political campaign intervention, and illegal expenditures by making tax-deductible contributions to religious organizations motivated to engage in the desired lobbying, political campaign intervention, or illegal activity. Moreover, there would be a temptation to create purportedly religious organizations with beliefs supporting political positions, candidates, or illegal activities attractive to potential donors, both to leverage that support through the ability of donors to take the charitable contribution deduction and for the financial benefits that would flow to the individuals who organized and ran those groups.

This is not a purely hypothetical risk. In the 1970s and '80s, numerous individuals seeking to evade federal income taxes exploited the tax benefits available to churches as part of a broader tax protester

84 *See supra* note 70 and accompanying text.

85 *See* I.R.C. § 162(c) (2018) (denial of trade or business expense deduction for certain illegal payments); *id.* § 162(e) (denial for lobbying and political campaign intervention expenditures); *id.* § 162(f) (denial for fines, penalties, and certain other amounts); *id.* § 162(g) (denial for certain antitrust damages); *id.* § 280E (denial of deduction for expenses from trafficking in controlled substances); Buckles, *supra* note 13, at 200 (2020) ("[N]o provision of federal tax law authorizes a deduction for lobbying or political-campaign intervention in its own right."); Douglas A. Kahn & Howard Bromberg, *Provisions Denying a Deduction for Illegal Expenses and Expenses of an Illegal Business Should Be Repealed*, 18 FLA. TAX REV. 207, 208 (2016); *see also* Rev. Rul. 77-126, 1977-1 C.B. 47–48 (denying a loss deduction arising from an illegal business). The denial of a deduction for illegal activity expenditures is only partial, in that Congress intended the specific § 162 denial provisions cited to replace a broader frustration-of-public-policy common-law denial rule. Kahn & Bromberg, *supra* note 85, at 210 & nn.10–11.

movement.[86] These efforts were fueled by "mail-order ministries" that, for a fee, would provide ordinations and a road map to creating a tax-favored "church."[87] The trend eventually declined, likely because of extensive IRS enforcement efforts that increased the risks of this strategy and changes in the tax laws that lessened its benefits.[88] But given the current well-publicized lack of IRS enforcement, particularly with respect to tax-exempt organizations,[89] and increasing demands for financial resources to fund political efforts and candidates,[90] opening the door for religious organizations to engage in significant lobbying and political campaign intervention would create an opportunity to meet the demand for increased political spending by funneling it through deductible contributions to religious organizations. While illegal activity might appear to be less attractive for such a strategy, there have recently been instances of purported churches seeking to promote the use of controlled substances that could be vehicles for avoiding the tax-law prohibition on deductions for expenditures relating to trafficking in such substances.[91]

The complexity of federal income tax law and the risk of undermining broader tax rules, at least in the areas of political activities and illegal activities, therefore argues against a robust application of the unconstitutional conditions doctrine for the benefit of religious organizations. Indeed, it is not necessary to engage with the unconstitutional conditions doctrine at all, as Michael A. Helfand argues should be

86 *See* Bruce J. Casino, Note, *"I Know It When I See It": Mail-Order Ministry Tax Fraud and the Problem of a Constitutionally Acceptable Definition of Religion*, 25 AM. CRIM. L. REV. 113 (1987); Anthony L. Scialabba, Melissa B. Kurtzman & Lance J.M. Steinhart, *Mail-Order Ministries Under the Section 170 Charitable Contribution Deduction: The First Amendment Restrictions, the Minister's Burden of Proof, and the Effect of TRA '86*, 11 CAMPBELL L. REV. 1 (1988).

87 *See* Casino, *supra* note 86, at 113–14; Scialabba et al., *supra* note 86, at 2.

88 *See* Casino, *supra* note 86, at 121–28; Scialabba et al., *supra* note 86, at 13–26.

89 *See, e.g.*, Eric Franklin Amarante, *States as Laboratories for Charitable Compliance: An Empirical Study*, 90 GEO. WASH. L. REV. 445, 447–49 (2022); Roger Colinvaux, *Charity in the 21st Century: Trending Toward Decay*, 11 FLA. TAX REV. 1, 17, 64–65 (2011); Lloyd Hitoshi Mayer, *"The Better Part of Valour Is Discretion": Should the IRS Change or Surrender Its Oversight of Tax-Exempt Organizations?*, 7 COLUM. J. TAX L. 80, 83–94 (2016).

90 *See, e.g.*, Taylor Giorno & Pete Quist, *Total Cost of 2022 State and Federal Elections Projected to Exceed $16.7 Billion*, OPEN SECRETS (Nov. 3, 2022, 12:55 PM), https://www.opensecrets.org/news/2022/11/total-cost-of-2022-state-and-federal-elections-projected-to-exceed-16-7-billion/ [https://perma.cc/9BB8-HX9Z].

91 Iowaska Church of Healing v. United States, No. 21-02475, 2023 WL 2733774 (D.D.C. Mar. 31, 2023) (upholding the IRS denial of tax-exempt status for a church that planned to use as a sacrament a psychedelic drug containing a controlled substance); John Tuohy, *First Church of Cannabis Wins IRS Nonprofit Status*, INDYSTAR (June 2, 2015, 3:35 PM), https://www.indystar.com/story/news/2015/06/02/first-church-cannabis-wins-irs-nonprofit-status/28357541/ [https://perma.cc/4Q8W-ZC56] (explaining that the First Church of Cannabis was recognized by the IRS as a tax-exempt church).

generally the case in the free exercise of religion context.[92] Instead, it is sufficient to conclude that the government's interest in maintaining a uniform tax system is a compelling one, and refusing to grant exemptions from generally applicable tax rules, including by refusing to exempt religious organizations that are eligible to receive tax-deductible contributions from them, is the least restrictive means for doing so.[93] So even if the lobbying, political campaign intervention, and illegality limitations imposed on religious organizations as a condition of receiving the benefits of tax exemption and tax deductibility for their donors are a substantial burden on free exercise of religion, that burden is both constitutional and consistent with RFRA.[94]

As for the fundamental public policy limitation, the Supreme Court in *Bob Jones University* squarely addressed the application of the Free Exercise of Religion Clause to that limitation.[95] It concluded, based on pre-*Smith* standards, that the limitation both furthered a compelling governmental interest—not providing tax benefits to support the undermining of a fundamental public policy—and was the least restrictive means for doing so.[96] While many commentators have criticized this decision on various grounds, the Supreme Court has not indicated any willingness to revisit it.[97] Moreover, if the reading of the relevant federal tax statute that is the basis for this holding is accepted, it is difficult to argue that vindicating a fundamental public policy is not a compelling governmental interest or that there is a less restrictive

92 *See* Helfand, *supra* note 14, at S51.

93 I and others have observed that the Supreme Court may have applied a more deferential standard in the pre-*Smith* tax cases than the one articulated in the text here, but for the reasons detailed in the text the Court did not need to apply a more deferential standard to reach the conclusions that it did in those cases. *See* Mayer, *supra* note 37, at 1158–61; Elliot M. Schachner, *Religion and the Public Treasury After* Taxation with Representation of Washington, Mueller *and* Bob Jones, 1984 UTAH L. REV. 275, 305 (1984).

94 The burden is also limited because denial of tax benefits does not deny a religious organization the ability to exist legally or even thrive, as illustrated by the continued existence and success of Bob Jones University for decades after it lost its favored tax status (and which it only reclaimed in 2017). *See* Nathaniel Cary, *Bob Jones University Regains Nonprofit Status 17 Years After It Dropped Discriminatory Policy*, GREENVILLE NEWS (Feb. 21, 2017, 12:48 PM), https://www.greenvilleonline.com/story/news/education/2017/02/16/bju-regains-nonprofit-status-17-years-after-dropped-discriminatory-policy/98009170/ [https://perma.cc/LS7W-F3BF].

95 The prohibitions on illegality and acting contrary to fundamental public policy also align with a recent Supreme Court unconstitutional-conditions decision suggesting these limitations are allowed constitutionally because the tax benefits fund a "program" that is limited to charitable organizations and these limitations are inherent to being a charity. *See supra* note 51 and accompanying text.

96 *Supra* note 45 and accompanying text.

97 *See* Lloyd Hitoshi Mayer & Zachary B. Pohlman, *What Is Caesar's, What Is God's: Fundamental Public Policy for Churches*, 44 HARV. J.L. & PUB. POL'Y 145, 151–52 (2021).

means of doing so as compared to denying the tax benefits normally enjoyed by religious organizations. That said, this limitation is most vulnerable to challenge on free exercise of religion grounds when it interferes with the autonomy of churches, as I and a coauthor have argued elsewhere (and so I will not revisit here)[98] and as Elizabeth Clark's contribution to this Symposium suggests.[99]

CONCLUSION

Is tax different? I conclude that it is for purposes of considering the legality under the First Amendment and RFRA of the conditions Congress has imposed on religious organizations in exchange for the tax benefits they enjoy. This is because any exemptions from these conditions risk undermining broader tax rules because the lobbying, political campaign intervention, and illegality limitations are part of a group of tax rules designed by Congress to deny tax deductibility for expenditures for these activities. Allowing religious organizations to still receive tax-deductible charitable contributions while engaging in these activities, even when they do so because of religious motivations, would therefore undermine this complex and generally applicable scheme. Preventing this undermining is a compelling governmental interest, and prohibiting religious organizations that claim these tax benefits from engaging in these activities is the least restrictive means of furthering that interest.

The one exception is the limitation on substantial activities that are contrary to a fundamental public policy. But preventing the undermining of fundamental public policy is also a compelling governmental interest and denying tax benefits to religious organizations that engage in such undermining is the least restrictive means of furthering that interest, as the Supreme Court held in *Bob Jones University*. That limit therefore also survives First Amendment and RFRA challenge.

One aspect of this conclusion is inconsistent with an earlier position I have taken; in a previous article, I supported a narrow free exercise of religion exemption for religiously motivated political campaign intervention conducted by pastors from their pulpits and addressed solely to their in-person congregations.[100] But given both the continued decline in IRS enforcement with respect to tax-exempt

98 *See id.* at 217–24.

99 *See* Elizabeth A. Clark, *A Non-Categorical Approach to Free Exercise Rights*, 98 NOTRE DAME L. REV. REFLECTION (SPECIAL ISSUE) S124, S147–58 (2023).

100 *See* Mayer, *supra* note 37.

organizations[101] and the increasing levels of spending on political campaign intervention, particularly independently of candidates and political parties,[102] I am now less sanguine about the ability of the IRS to successfully administer any such exemption. In other words, the Supreme Court was correct in *Lee*: maintaining a sound tax system is a compelling governmental interest that requires courts to be wary of creating exemptions even when they are based on the right to free exercise of religion.

That said, this conclusion is limited to the existing limitations that are either embedded in broader tax policies relating to lobbying, political campaign intervention, and illegal activities or, for the fundamental public policy limitation, where the limitation is the least restrictive means of furthering another compelling government interest.[103] It therefore does not extend to possible future conditions that lack these contexts. For example, conditioning federal tax benefits on not engaging in sexual-orientation discrimination, as Thomas C. Berg discusses in this Symposium, falls outside this conclusion unless and until prohibiting such discrimination becomes a fundamental public policy.[104] This conclusion therefore does not provide Congress with an unlimited license to use tax law to impose additional limitations on the activities of religious organizations.

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101 *See* sources cited *supra* note 89.

102 *See* source cited *supra* note 90.

103 The reliance on a broader tax context or a compelling governmental interest also is a barrier to the discriminatory-effect concerns raised by Elizabeth Clark in her piece for this Symposium. *See* Clark, *supra* note 99, at S155–57.

104 *See* Thomas C. Berg, *Free Exercise Renewal and Conditions on Government Benefits*, 98 NOTRE DAME L. REV. REFLECTION (SPECIAL ISSUE) S20, S33 (2023). Contrary to some commentators, I read the recently enacted Respect for Marriage Act as not providing a basis for claiming prohibiting sexual-orientation discrimination or disfavoring same-sex marriage is contrary to fundamental public policy. *See* Respect for Marriage Act, Pub. L. No. 117-228, § 7(a), 136 Stat. 2305, 2306 (2022) (to be codified at 1 U.S.C. § 7 note) (stating that "[n]othing in [the] Act . . . shall be construed to deny or alter any benefit, status, or right . . . which does not arise from a marriage, including tax-exempt status"). *But see* Letter from Timothy Cardinal Dolan, Chairman, Comm. for Religious Liberty, U.S. Conf. of Cath. Bishops & Robert E. Barron, Chairman, Comm. on Laity, Marriage, Fam. Life & Youth, U.S. Conf. of Cath. Bishops, to Congress 2 (Nov. 23, 2022) (arguing that the Act will create a basis for arguing that recognizing same-sex marriages as valid is a compelling governmental interest); Roger Severino, *Fact-Checking 7 Claims by Defenders of Democrats' Same-Sex Marriage Bill*, HERITAGE FOUND. (Nov. 21, 2022), https://www.heritage.org/marriage-and-family/commentary/fact-checking-7-claims-defenders-democrats-same-sex-marriage-bill [https://perma.cc/6N6A-S334] (asserting that the Act provides a basis for the IRS to revoke the tax-exempt status of organizations that oppose same-sex marriage).