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COMMENT

THE RISE OF THE VIRTUAL CHURCH: IS IT REALLY A CHURCH UNDER I.R.C. SECTION 170(B)(1)(A)(I)?

Brett M. Bloom[†]

I. INTRODUCTION

Words have meaning. Lawyers are well aware of this fact, for a simple word can change a client's outcome from being awarded damages to receiving nothing. Moreover, the misreading of a simple word can change a lawyer's outcome from compensation to liability for malpractice. Thus, the inevitable conclusion is that words are highly important. Each word plays an integral role in construing the overall meaning of a writing.

An area of law that causes controversy over the meaning of words is in determining the availability of tax benefits to churches. Congress provides churches with tax benefits not available to other tax-exempt organizations. For instance, churches are not required to file the time consuming forms other charities are required to file.¹ Additionally, churches receive greater protection from an Internal Revenue Service (the "Service") investigation.² Nevertheless, Congress offers virtually no guidance regarding the meaning of "church."³ To fill the void left by Congress, the Service and courts have attempted to define the seemingly indefinable. The Service developed fourteen criteria typically associated with churches to determine whether an organization would qualify for the tax benefits available only to churches.⁴ Skeptical about the constitutionality of the Service's fourteen criteria, some

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1. I.R.C. § 6033(a)(3) (2012) (exempting churches from filing Form 990).

2. I.R.C. § 7611 (2012) (providing procedural safeguards to churches with respect to IRS examinations and inquiries).

3. *Am. Guidance Found., Inc. v. United States*, 490 F. Supp. 304, 306 (D.D.C. 1980) (noting that "Congress has offered virtually no guidance as to precisely what is meant [by the term 'church' in section 170]"). The rationale for Congress's caution in the area of religion is the Religion Clauses of the First Amendment, which state that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." U.S. CONST. amend. I; *see also Church of the Visible Intelligence That Governs the Universe v. United States*, 4 Cl. Ct. 55, 64 (1983) (noting that Congress has provided no guidance on the meaning of "church" because of First Amendment considerations).

4. *Am. Guidance Found.*, 490 F. Supp. at 306 n.2.

courts apply the associational test,⁵ which focuses on the associational aspects of an organization.⁶ These tests are applied on a case-by-case basis to determine whether an organization may receive the benefits Congress intended for churches.⁷

The aforementioned tests seek to provide consistency in this otherwise undefined area of law. Nevertheless, with the advance in technology, the application of these tests will lead to inconsistent results. The court's decision in *Foundation of Human Understanding v. United States*⁸ ("*Foundation III*") highlights this inconsistency and the need for reform regarding tax benefits available to churches. The *Foundation III* court held that an organization that disseminates its message through an "electronic ministry" to a "virtual congregation" would not be recognized as a church for tax purposes.⁹ In the wake of the *Foundation III* court's decision, two problems with respect to virtual churches are raised.

The first problem is that the respective tests of the Service and the courts are overly narrow in relation to virtual churches.¹⁰ The *Foundation III* court, relying on the associational test, held that at a minimum a church must include "a body of believers who assemble regularly for communal worship."¹¹ Additionally, the court in *Foundation of Human Understanding v. Commissioner of Internal Revenue (Foundation I)*¹² held that an organization must bring its members together as a means of accomplishing its purpose.¹³ If the above statements are read literally, organizations that embrace technology and primarily rely on Internet broadcasting to a

5. *Church of Eternal Life v. Comm'r*, 86 T.C. 916, 924 (1984) (holding that "a church's principal means of accomplishing its religious purposes must be to assemble regularly a group of individuals related by common worship and faith"); see also *Am. Guidance Found.*, 490 F. Supp. at 306 (holding that "[t]he means by which an avowedly religious purpose is accomplished separates a 'church' from other forms of religious enterprise").

6. *Found. of Human Understanding v. United States*, 614 F.3d 1383, 1389 (Fed. Cir. 2010) (upholding the U.S. Court of Federal Claims decision that the associational test is the proper test for determining church status).

7. *VIA v. Comm'r*, 68 T.C.M. (CCH) 212, *4 (1994).

8. *Found. of Human Understanding*, 614 F.3d at 1383.

9. *Id.* at 1391.

10. The Author does not believe that stand-alone virtual churches are churches according to biblical standards, but, rather, is more narrowly arguing that in light of America's legal history with respect to churches, the virtual church—not organized for "sham" purposes—can provide benefits to society and, thus, should be recognized as church for tax purposes.

11. *Found. of Human Understanding*, 614 F.3d at 1387.

12. *Found. of Human Understanding v. Comm'r*, 88 T.C. 1341 (1987).

13. *Id.* at 1367.

“virtual congregation”¹⁴ cannot pass the current tests used to determine whether an organization is a church. The Service’s and courts’ narrow interpretation of association ignores changes in society. Individuals create and develop relationships over the Internet. Businesses take advantage of the Internet to interact with their remote branches. Schools and universities use the Internet to educate students. Churches use the Internet to supplement or conduct their ministries. Accordingly, the Service and courts must recognize this technological shift as they apply their respective tests.

The second problem is that the Service’s fourteen criteria are ambiguous and inconsistently applied. A “regular congregation” and “regular services” are considered criteria of central importance when determining whether an organization is a church; however, both criteria fail to provide meaningful guidance to an organization seeking church status.¹⁵ Moreover, online universities must meet similar requirements to those of churches to be granted tax-exempt status. I.R.C. § 170(b)(1)(A)(ii) defines educational organizations eligible for tax-exemption as those “which normally maintain[] a regular faculty and curriculum and normally [have] a regularly enrolled body of pupils or students in attendance at the place where its educational activities are regularly carried on.”¹⁶ Traditional universities meet these requirements, while online universities almost always cannot.¹⁷ Nevertheless, many online universities are receiving the benefits of tax exemption.¹⁸ Students of online universities are considered in attendance from their home computer, while members of virtual churches are not. This interpretation is inconsistent and should be taken into account as the Service examines an organization’s church status.

This Note begins with a background discussion of tax exemption for religious organizations, including historical and constitutional concerns,

14. Legally speaking, this term was first used by the IRS in its response to the Foundation’s brief in *Found. of Human Understanding*, 614 F.3d at 1383. See Brief for Defendant-Appellee at 57, *Found. of Human Understanding v. United States*, 614 F.3d 1383 (2009) (No. 04-1441) 2010 WL 893605, at *47.

15. *Found. of Human Understanding*, 614 F.3d at 1387.

16. I.R.C. § 170(b)(1)(A)(ii) (2012).

17. Students of online universities are not in attendance in a traditional classroom but through an Internet forum. If the IRS considers the activities of online universities to be carried on through the Internet, then certainly an Internet church should also be able to conduct its services through the Internet.

18. LIBERTY UNIVERSITY ONLINE, <http://www.onlineatliberty.com/> (last visited Feb. 29, 2012). Liberty University Online is an example of a university that offers online classes. Currently, Liberty University Online has over 62,000 students enrolled in its online program and offers over 45 degree programs and 150 specializations.

along with a brief discussion of the rationale for tax-exempt organizations.¹⁹ This Note then discusses the distinctions between religious organizations and churches.²⁰ Next, this Note presents the problem with the Service's and courts' application of their respective tests with respect to the Foundation of Human Understanding.²¹ Finally, this Note proposes (1) that the Service and courts abandon their respective tests for determining church status; and (2) that the United States Department of Treasury (the "Treasury") provide guidance to the meaning of church through Treasury regulations.²²

II. BACKGROUND

When dealing with tax exemption for religious organizations, both historical and constitutional concerns are always lurking.²³ Accordingly, the following Section provides a historical and constitutional background of tax exemption for religious organizations, including a brief discussion of the rationale for tax-exempt organizations. This Section concludes by addressing the differences between religious organizations and churches in relation to the Internal Revenue Code.

A. *Historical and Constitutional Background of Tax Exemption*

The roots of America's tax exemption for religious organization can be traced back to its parent/child relationship with England.²⁴ As early as 1601, England exempted religious practices from taxation, and in 1639, the English legislature formally added "religious uses" to describe one of its

19. See *infra* Part II.A.

20. See *infra* Part II.B.

21. See *infra* Part III.

22. See *infra* Part IV.

23. DARRYL K. JONES, STEVEN J. WILLIS, DAVID A. BRENNEN & BEVERLY I. MORAN, *THE TAX LAW OF CHARITIES AND OTHER EXEMPT ORGANIZATIONS: CASES, MATERIALS, QUESTIONS, AND ACTIVITIES* 47 (2d ed. 2007).

24. Elizabeth A. Livingston, Note, *A Bright Line Points Towards Legal Compromise: IRS Condoned Lobbying Activities for Religious Entities and Non-Profits*, 9 *RUTGERS J. L. & RELIGION* 1, 3 (2008); see also JONES ET AL., *supra* note 23, at 17 n.4 (stating that the draftsmen of America's first statute which included a charitable exemption provision "relied heavily on English concepts of taxation; and the list of exempt organizations appears to have been patterned upon English income tax statutes"). Tax exemption dates back even further as the Old Testament provides examples of priests and temples receiving exemption from taxes. See Genesis 47:26 (exempting the Israelite priests from paying taxes to Pharaoh); see also Ezra 7:24 (noting the decree of Artaxerxes prohibiting the imposition of taxes on the servants of the "house of God").

“four principal divisions in English charity law.”²⁵ Through a series of statutes beginning in 1802, American draftsmen followed the pattern set by England and formally exempted religious organizations from taxes.²⁶ Subsequently, with the passage of the Sixteenth Amendment,²⁷ federal income tax acts have consistently exempted institutions organized for religious purposes from taxes.²⁸ As it stands today, I.R.C. § 501(c)(3) grants religious organizations an exemption from federal income taxes.²⁹ Additionally, all fifty states provide tax exemption to religious organizations—the majority by means of their respective constitutions.³⁰

The government’s rationale in granting tax exemption is unsettled.³¹ While many theories are proposed to explain the allowance of tax-exempt organizations, there is no consensus.³² One popular theory proposed by the Supreme Court is the public-benefit theory.³³ According to this theory,

25. Livingston, *supra* note 24, at 3-4 (citing Chris Kemmitt, *RFRA Churches and the IRS: Reconsidering the Legal Boundaries of Church Activity In the Political Sphere*, 43 HARV. J. ON LEGIS. 145, 149 n.31 (2006)).

26. Vaughn E. James, *Reaping Where They Have Not Sowed: Have American Churches Failed to Satisfy the Requirements for the Religious Tax Exemption*, 43 CATH. LAW 29, 41-42 (2004). In 1894 America’s draftsmen passed the Wilson Tariff Act, which was the first statute exempting charitable organizations from taxes. While this statute was ultimately found to be unconstitutional, this statute served as the precursor for the Payne-Aldrich Tariff Act of 1909, which also exempted religious organizations from taxes, and more importantly each subsequent edition of the Internal Revenue Code. See Livingston, *supra* note 24, at 6-7.

27. “The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.” U.S. CONST. amend. XVI.

28. *Walz v. Tax Comm’n*, 397 U.S. 664, 676 (1970).

29. I.R.C. § 501(c)(3) (2012) (granting tax exemption to organizations that conduct the following activities: religious, charitable, scientific, public safety testing, literary, educational, the fostering of national or international amateur sports competition, and preventing cruelty to children or animals). To receive the benefits of tax exemption under I.R.C. § 501(c)(3) organizations must pass four tests. These tests are extracted from § 501(c)(3) and have been named the organizational, operational, private inurement, and political activities tests. See NICHOLAS P. CAFARDI & JACLYN FABEAN CHERRY, UNDERSTANDING NONPROFIT AND TAX EXEMPT ORGANIZATIONS 63-83 (2006). Each test must be met for an organization to qualify for tax-exempt status. The details of the aforementioned tests, however, are beyond the scope of this Note.

30. *Walz*, 397 U.S. at 676.

31. CAFARDI & CHERRY, *supra* note 29, at 51.

32. *Id.*

33. *Bob Jones Univ. v. United States*, 461 U.S. 574, 589 (1983) (supporting the theory that “charities were to be given preferential treatment because they provide a benefit to society” and that “Congress deemed the specified organizations entitled to tax benefits because they served desirable public purposes” (footnote omitted)); see also *Walz*, 397 U.S. at

organizations are tax-exempt because they relieve the "Government . . . of the burden of meeting public needs which in the absence of charitable activity would fall on the shoulders of the Government."³⁴ The government offers tax exemption to encourage these organizations to continue their conduct that benefits the community.³⁵ In other words, "[t]he Government is compensated for its loss of revenue by its relief from financial burdens which would otherwise have to be met by appropriations from public funds."³⁶

Another theory proposed by some Supreme Court Justices is the pluralism theory.³⁷ This theory holds that a religious organization may be granted tax exemption because of its contribution to a pluralistic society.³⁸ Essentially, tax-exempt organizations balance an encroaching government by promoting freedom of expression among the American people.³⁹ Additional theories that receive less support are the subsidy theory,⁴⁰ capital subsidy theory,⁴¹ and donative theory.⁴²

674 (explaining the Court's rationale for the public benefit theory); *Trinidad v. Sagrada Orden de Predicadores*, 263 U.S. 578, 581 (1924) ("Evidently the exemption [to religious organizations] is made in recognition of the benefit which the public derives, . . . and is intended to aid them when not conducted for private gain.").

34. *McGlotten v. Connally*, 338 F. Supp. 448, 456 (D.D.C. 1972).

35. *Walz*, 397 U.S. at 672.

36. *McGlotten*, 338 F. Supp. at 456 (quoting H.R. REP. NO. 1860-75, at 19 (3rd Sess. 1938)).

37. *Walz*, 397 U.S. at 689 (Brennan, J., concurring) (stating that religious organizations "uniquely contribute to the pluralism of American society by their religious activities"); see also *Bob Jones Univ.*, 461 U.S. at 609-10 (Powell, J., concurring in part and concurring in the judgment); CAFARDI & CHERRY, *supra* note 29, at 53-54.

38. *Walz*, 397 U.S. at 689.

39. *Bob Jones Univ.*, 461 U.S. at 609.

40. See CAFARDI & CHERRY, *supra* note 29, at 54. The subsidy theory proposes that tax exemption is a form of grant or subsidy to the organization from the government. *Id.*; see also *Walz*, 397 U.S. at 709 (Douglas, J., dissenting) ("Tax exemption, no matter what its form, is essentially a government grant or subsidy." (footnote omitted) (internal quotation marks omitted)).

41. See CAFARDI & CHERRY, *supra* note 29, at 56. The capital subsidy theory proposes that tax exemption is granted to a nonprofit organization because it is restrained from raising capital like other businesses. *Id.* Tax exemption allows these organizations to build capital reserves. *Id.*

42. *Id.* at 57-58. "[T]he donative theory reasons that donative institutions deserve a tax subsidy because the willingness of the public to contribute demonstrates both worthiness and neediness." *Id.* at 57 (internal quotation marks omitted). These organizations deserve public support; however, because donations do not meet all of an organization's needs, a subsidy must be granted in the form of tax exemption. *Id.*

Notwithstanding the long-established history of tax exemption for religious organizations, this privilege has been challenged as an unconstitutional establishment of religion under the First Amendment. The United States Supreme Court addressed this issue in *Walz v. Tax Commission of the City of New York*.⁴³ The Court stated that “[t]he general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion.”⁴⁴ Relying on America’s well-established religious heritage, the Court held “that federal or state grants of tax exemption to churches were not a violation of the Religion Clauses of the First Amendment.”⁴⁵ In contrast, the “[e]limination of exemption would tend to expand the involvement of government” with religious organizations.⁴⁶

Although the Court affirmed the constitutionality of tax exemptions for religious organizations, the administration of such exemptions is not free from controversy. Jerome Kurtz, former Commissioner of the Internal Revenue Service, noted that when dealing with religious organizations and churches “[a]ll of government—including the IRS—is constrained in the largest context by the First Amendment’s Free Exercise and Establishment Clauses.”⁴⁷ Accordingly—and as this Note demonstrates—constitutional concerns are always a factor in the Service’s and courts’ analysis of whether an organization constitutes a religious organization or church for tax purposes.

B. *Religious Organization v. Church*

As noted above, Congress through the Internal Revenue Code grants tax exemptions to both religious organizations and churches.⁴⁸ Churches, however, receive greater benefits than religious organizations; therefore,

43. *Walz*, 397 U.S. at 678. Although the issue before the Court was whether a New York statute exempting religious organizations from local property taxes was constitutional, the same analysis would apply to federal income tax exemption. See JONES ET AL., *supra* note 23, at 47 (discussing *Walz*, 397 U.S. at 676).

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

45. *Id.* at 680.

46. *Id.* at 674.

47. Jerome Kurtz, *Difficult Definitional Problems in Tax Administration: Religion and Race*, 23 CATH. LAW. 301 (1978) (noting that “[o]f all the interpretative judgments the Internal Revenue Service must make in administering the tax laws, probably none is more difficult and none demands more sensitivity than those concerning tax consequences affected by questions of religion . . .”).

48. I.R.C. §§ 501(c)(3), 170(b)(1)(A)(i).

churches must meet more stringent requirements.⁴⁹ The following section examines the benefits and requirements of both religious organizations and churches.

The Internal Revenue Code in Section 501(c)(3) grants tax-exempt status to institutions that are organized and operated exclusively for religious purposes.⁵⁰ The core issue with respect to religious organizations is determining the meaning of religion.⁵¹ Throughout history, the Service and courts have varied in their approaches to defining religion. In 1890, the Supreme Court defined religion as the “reference to one’s view of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will.”⁵² In modern times, however, the Service and courts have avoided bright-line definitions of religion because of constitutional concerns.⁵³ Rather than examining an organization’s religious views, the Supreme Court has adopted a “content-neutral” approach to defining religion.⁵⁴ This modern definition tests “‘whether the beliefs . . . are sincerely held’ and whether they are, according to the possessor’s own way of thinking, ‘religious.’”⁵⁵

Because both the Service and lower courts have adopted the Supreme Court’s content-neutral test, an organization must meet two prongs to qualify as a tax-exempt institution that operates for religious purposes

49. See *Chapman v. Comm’r*, 48 T.C. 358, 363 (1967).

50. I.R.C. § 501(c)(3).

51. Religion, as set forth in the First Amendment, is undefined. U.S. CONST. amend. I. One theory regarding this absence of a definition is that the meaning was obvious. Jeffrey L. Oldham, *Constitutional “Religion” A Survey of First Amendment Definitions of Religion*, 6 TEX. F. ON C.L. & C.R. 117, 120-21 (2001). The religious views of the nation at the time the First Amendment was drafted were consistently theistic. *Id.* at 121.

52. *Davis v. Beason*, 133 U.S. 333, 342 (1890); see also *United States v. MacIntosh*, 283 U.S. 605, 633-34 (1931) (concluding that “[t]he essence of religion is belief in a relation to God involving duties superior to those arising from any other human relation”); *Everson v. Bd. of Educ. of Ewing Tp.*, 330 U.S. 1, app. at 64 (1947) (noting in its appendix that religion, as defined by James Madison, is “the duty which we owe to our Creator”).

53. I.R.S. Gen. Couns. Mem. 36,993 (Feb. 3, 1977) (acknowledging that “[t]he First Amendment to the United States Constitution provides that Congress is forbidden from enacting any ‘law respecting an establishment of religion, or prohibiting the free exercise thereof . . .’”).

54. *JONES ET AL.*, *supra* note 23, at 58; see also *United States v. Seeger*, 380 U.S. 163, 184 (1965) (holding that the truth of an individual’s belief is not open to question); *Teterud v. Burns*, 522 F.2d 357, 360 (8th Cir. 1975) (holding “[i]t is not the province of government officials or court to determine religious orthodoxy”).

55. *Seeger*, 380 U.S. at 185; see also *JONES ET AL.*, *supra* note 23, at 58-59 (quoting *Seeger*, 380 U.S. at 185).

under § 501(c)(3).⁵⁶ An initial inquiry is whether the members of the organization sincerely hold the organization's proposed beliefs.⁵⁷ Rather than placing subjective criteria on each group of members, the Service and courts have examined whether each group sincerely holds its beliefs objectively, namely, "[D]o the beliefs inform the lives of those professing them?"⁵⁸ This inquiry is rather limited as well as tilted in favor of the applicant.⁵⁹ Thus, an organization has a high likelihood that its religious beliefs will pass the low threshold for determining sincerity under the first prong.⁶⁰

In addition to meeting the first prong, an organization must prove its beliefs are religious in nature under the more stringent second prong.⁶¹ In tax cases, the Service and courts have used a three-part test to determine whether the beliefs are religious in nature.⁶² This test asks (1) whether the beliefs address fundamental and ultimate questions concerning the human condition; (2) whether the beliefs are comprehensive in nature and constitute an entire system of belief instead of merely an isolated teaching; and (3) whether the beliefs are manifested in external forms.⁶³ If an organization meets these three elements, the organization will pass the second prong of the two-pronged test.

Organizations that pass both prongs of the above test receive the benefits granted to tax-exempt organizations. Religious organizations are exempted from income taxes on their income earned while performing exempt activities.⁶⁴ Additionally, donors to religious organizations are entitled to

56. CAFARDI & CHERRY, *supra* note 29, at 101-02.

57. Kurtz, *supra* note 47, at 303 (noting that "the Court [has held] that to enjoy a benefit based on a religious belief, the belief must be truly and sincerely held"); *see also* Church of the Chosen People v. United States, 548 F. Supp. 1247, 1252 (D. Minn. 1982) (citing *Seeger*, 380 U.S. at 185).

58. CAFARDI & CHERRY, *supra* note 29, at 102.

59. Kurtz, *supra* note 47, at 302-03.

60. *Id.* at 303 ("In the absence of a clear showing that the beliefs or doctrines under consideration are not sincerely held by those professing them, the Service will not question the religious nature of those beliefs.").

61. *Church of the Chosen People*, 548 F. Supp. at 1252.

62. *Id.* at 1252-53 (citing *Africa v. Pennsylvania*, 662 F.2d 1025, 1032 (3d Cir. 1981)).

63. *Africa*, 662 F.2d at 1032.

64. I.R.C. 501(a) (2012). In addition to federal income tax exemption, a religious organization may receive further benefits if it is not a "private foundation" under I.R.C. § 509(a). Section 501(c)(3) organizations are split into two categories: private and non-private. *See* I.R.C. § 509(a). Because private foundations are traditionally controlled by a smaller group of donors, they are subject to a stricter statutory regimen than non-private organizations. *See* I.R.C. §§ 4940-4945; *see also* CAFARDI & CHERRY, *supra* note 29, at 309-27.

income tax deductions up to the permitted statutory allowance on their contributions.⁶⁵

Closely associated with the determination of whether an organization serves a religious purpose is whether an organization is a church. The distinction between religious organizations and churches is that Congress through the Internal Revenue Code intended for churches to receive additional advantages. Nevertheless, Congress has not proposed a definition for the term "church." This silence is largely due to the constitutional concerns under the First Amendment of establishing or infringing on the free exercise of religion.⁶⁶ In relation to the additional benefits⁶⁷ churches receive, Congress has offered the limited guidance that the term "church" should be more narrowly defined than "religious organization."⁶⁸ Accordingly, every church may be classified as a religious organization, but not every religious organization may be classified as a church.⁶⁹

The Service—tasked with administering the tax code, including determinations of whether an organization is a church⁷⁰—promulgated a test based on fourteen criteria typically associated with churches.⁷¹ These fourteen criteria consider whether the organization has

- (1) a distinct legal existence; (2) a recognized creed and form of worship; (3) a definite and distinct ecclesiastical government; (4) a formal code of doctrine and discipline; (5) a distinct religious history; (6) a membership not associated with any other church or denomination; (7) an organization of ordained ministers; (8)

I.R.C. § 508(b) places the burden on each 501(c)(3) organization to prove that it is not a private foundation. If an organization can prove that it fits within the categories under I.R.C. § 509(a), it will receive the benefits available to non-private organizations. Churches are automatically presumed to be non-private organizations. See I.R.C. §§ 509(a)(1), 170(b)(1)(A)(i), 508(c)(1)(A) (2012).

65. I.R.C. § 170(a) (2012).

66. See *supra* notes 44-47 and accompanying text.

67. The benefits available to churches can be summarized as follows: (1) churches are automatically not a private foundation under I.R.C. § 509(a)(1); (2) donors may receive greater income tax deductions for their contributions under I.R.C. § 170(b)(1)(A); and (3) churches are subject to lesser reporting requirements. See JONES ET AL., *supra* note 23, at 63.

68. See *Chapman v. Comm'r*, 48 T.C. 358, 363 (1967).

69. *Id.*

70. Jerome Kurtz, former Commissioner of the IRS, described the process of making church determinations as "a difficult and thankless task, but one that we cannot avoid because of the significant tax implications that follow when an organization qualifies as a church." Kurtz, *supra* note 47, at 303.

71. *Am. Guidance Found., Inc. v. United States*, 490 F. Supp. 304, 306 n.2. (D.D.C. 1980).

ordained ministers selected after completing prescribed studies; (9) a literature of its own; (10) established places of worship; (11) regular congregations; (12) regular religious services; (13) Sunday schools for religious instruction of the young; and (14) schools for the preparation of its ministers.⁷²

To avoid the mechanical application of the Service's fourteen criteria, certain criteria are given greater import than others.⁷³ For example, the court in *American Guidance Foundation v. United States* stated that "an established congregation served by an organized ministry, the provision of regular religious services and religious education for the young, and the dissemination of a doctrinal code, are of central importance."⁷⁴ Although some courts have adopted outright the Service's fourteen criteria, it strongly favors traditional churches, which has led to its rejection by other courts.⁷⁵ Most recently, the court in *Foundation of Human Understanding v. United States*,⁷⁶ in response to the concerns of lower courts, found that the associational test is a proper test for determining whether an organization is a church.⁷⁷

In *Church of Eternal Life and Liberty v. Commissioner*,⁷⁸ the United States Tax Court⁷⁹ set the contours of the associational test by requiring "an organization [to] serve an associational role in accomplishing its religious purpose."⁸⁰ Thus, "a church's principal means of accomplishing its religious

72. *Found. of Human Understanding v. United States*, 88 Fed. Cl. 203, 220 (2008); see also Kurtz, *supra* note 47, at 301 (noting that "our tax law places the IRS near the forefront in making delicate decisions involving definitions of 'religion' and 'church'").

73. *Found. of Human Understanding*, 88 Fed. Cl. at 220; see also Kurtz, *supra* note 47, at 304 (noting that the IRS does "not give controlling weight to any single factor").

74. *Found. of Human Understanding*, 88 Fed. Cl. at 220 (citing *Am. Guidance Found.*, 490 F. Supp. at 306); see also *Spiritual Outreach Soc'y v. Comm'r*, 927 F.2d 335, 339 (1991) (stating that "[e]ach criterion need not be met for an organization to be a church").

75. See JONES ET AL., *supra* note 23, at 63-64.

76. *Found. of Human Understanding v. United States*, 614 F.3d 1383, 1388-89 (Fed. Cir. 2010).

77. The United States Court of Federal Claims was concerned that because of the striking resemblance between the Service's fourteen criteria and the United States Census of Religious Bodies from 1906, the fourteen criteria may give greater preference to traditional ministries, thus impinging on the free exercise of religion. Thus, the court adopted the associational test. See *Found. of Human Understanding*, 88 Fed. Cl. at 217.

78. *Church of Eternal Life & Liberty v. Comm'r*, 86 T.C. 916 (1986).

79. The United States Tax Court is a court of limited jurisdiction created by Congress pursuant to Article I, Section 8 of the United States Constitution, which gives Congress the power to "constitute Tribunals inferior to the supreme Court."

80. *Church of Eternal Life & Liberty*, 86 T.C. at 924 (alteration in original).

purposes must be to assemble regularly a group of individuals related by common worship and faith.”⁸¹ “Unless the organization is reasonably available to the public in its conduct of worship, its educational instruction, and its promulgation of doctrine, it cannot fulfill this associational role.”⁸² Moreover, if a religious organization’s associational aspects are merely incidental, it will not be recognized as a church.⁸³

If an organization is determined to be a church qua church according to the Service or courts, it is automatically recognized as a non-private organization under I.R.C. § 509(a)(1) and as a church under I.R.C. § 170(b)(1)(A)(i).⁸⁴ As a result, a church will enjoy the relaxed statutory regimen granted to non-private organizations.⁸⁵ In addition, churches receive advantages not available to other tax-exempt organizations. Churches are automatically exempt from income taxes and, thus, need not perform the time consuming task of filing Form 1023 or paying the fees associated with filing for tax exemption.⁸⁶ Additionally, churches are subject to less stringent reporting requirements.⁸⁷ Churches are not required to file

81. *Id.*

82. *Am. Guidance Found., Inc. v. United States*, 490 F. Supp. 304, 306 (D.D.C. 1980).

83. *Found. of Human Understanding v. Comm’r*, 88 T.C. 1341, 1357 (1987).

84. *See* I.R.C. §§ 509(a)(1), 170(b)(1)(A)(i).

85. *See* I.R.C. §§ 4940–4945 (subjecting private organizations to the stricter statutory regimen by requiring them to pay a two percent excise tax on their net investment income; avoid self-dealing; give away annually five percent of their net investment assets; avoid business holdings in any business enterprise; avoid jeopardizing investments; and refrain from any expenditures for political activities or grants). Churches as non-private organizations are not subject to the aforementioned requirements.

86. DAN BUSBY & JOHN VAN DRUNEN, *CHURCH AND NONPROFIT TAX & FINANCIAL GUIDE FOR 2010 TAX RETURNS 28* (2011). *But see* INTERNAL REVENUE SERVICE, *Tax Guide for Churches and Religious Organizations: Benefits and Responsibilities Under the Federal Tax Law 3* (2009), available at <http://www.irs.gov/pub/irs-pdf/p1828.pdf> (noting that “[a]lthough there is no requirement to do so, many churches seek recognition of tax-exempt status from the IRS because such recognition assures church leaders, members, and contributors that the church is recognized as exempt and qualifies for related tax benefits”). Additionally, state and local tax authorities may automatically waive income and property taxes by virtue of the IRS recognizing the organization’s Form 1023. H. WAYNE HOUSE, *CHRISTIAN MINISTRIES AND THE LAW 131* (rev. ed. 1999).

87. Private organizations must file Form 990 with the IRS to report the information required in I.R.C. § 6033. Section 6033 requires that private organizations annually furnish the following information to the IRS:

(1) its gross income for the year, (2) its expenses attributable to such income and incurred within the year, (3) its disbursements within the year for the purposes for which it is exempt, (4) a balance sheet showing its assets, liabilities, and net worth as of the beginning of such year, (5) the total of the contributions and gifts received by it during the year, and the names and

returns relating to their liquidation, dissolution, or termination.⁸⁸ Churches have looser requirements than non-church organizations regarding qualified retirement plans.⁸⁹ Donors to churches are entitled to deduct up to fifty percent of the donor's contribution base (usually the donor's adjusted gross income), as opposed to thirty percent for religious organizations.⁹⁰ Finally, certain ministers may be exempt from self-employment taxes,⁹¹ and qualified churches may be exempt from unemployment taxes.⁹²

Along with the aforementioned benefits, Congress passed the Church Audit Procedures Act (CAPA) to prevent the Service from intruding on a church's operations.⁹³ Under CAPA, churches are subject to audits only when a high-ranking Service official has reasonable grounds to believe an audit is necessary.⁹⁴ Additionally, the Service is required to give notice and statutorily-established periods of time to resolve any issues with respect to the proposed audit.⁹⁵ As a final layer of protection, the Service will only

addresses of all substantial contributors, (6) the names and addresses of its foundation managers, . . . (7) the compensation and other payments made during the year to each individual described in paragraph (6)

I.R.C. § 6033(b)(1)–(7) (2012).

Along with the aforementioned information, a private organization must also include any expenses related to “lobbying” or “electioneering” activities. I.R.C. § 6033(b)(8)–(9). Churches benefit by being exempt from filing this complex, twelve-page form. See INTERNAL REVENUE SERVICE, *Form 990: Return of Organization Exempt from Income Tax*, <http://www.irs.gov/pub/irs-pdf/f990.pdf>. (last visited Mar. 3, 2012).

88. I.R.C. § 6043(b) (2012) (exempting churches from filing Form 990 for dissolution, liquidation, or substantial contract). *But see* I.R.C. § 507 (requiring private organizations to notify the “Secretary (at such time and in such manner as the Secretary may by regulations prescribe)”); *see also* INTERNAL REVENUE SERVICE, *supra* note 86.

89. *See* I.R.C. §§ 410(c)(1)(B) (2012), 411(e)(1)(B) (2012), 414(e) (2012).

90. I.R.C. §§ 170(b)(1)(A)–(B).

91. *See* I.R.C. § 1402(e) (2012).

92. *See* I.R.C. §§ 3121(b)(8), 3401(a)(9) (2012).

93. Church Audit Procedures Act, 26 U.S.C. § 7611 (1998). Aware of First Amendment implications, Congress passed the Church Audit Procedures Act to cover each “step of the procedural and substantive religious tax exemption process.” *See* BUSBY & DRUNEN, *supra* note 86, at 73; *see also* INTERNAL REVENUE SERVICE, *Internal Revenue Manual- 4.76.7 Church Tax Inquiries and Examinations*, http://www.irs.gov/irm/part4/irm_04-076-007.html (last visited Mar. 3, 2012). This provision does not apply to churches that are not paying payroll taxes, to criminal investigations, separately incorporated private schools, and actions or investigations brought against ministers or clerical workers. BUSBY & DRUNEN, *supra* note 86, at 28.

94. BUSBY & DRUNEN, *supra* note 86, at 28.

95. I.R.C. § 7611(a)(3) (2012); *see also* CAFARDI & CHERRY, *supra* note 29, at 119-20.

have two years to conduct its investigation, once initial notice has been given.⁹⁶

In summary, churches receive several advantages not available to religious organizations. Thus, organizations that are a church qua church with respect to the Service's fourteen criteria or the courts' associational test are encouraged to take advantage of the additional benefits. If, however, a group organized and operating for a religious purpose does not meet the requirements of a church, it may still meet the requirements of a tax-exempt religious organization.⁹⁷ In today's diverse society, however, there are some organizations that are not content with tax-exempt status only. Such organizations seek to stretch the definition of church to the limit and receive the additional advantages available to churches.⁹⁸ Accordingly, the Service and courts are faced with competing interests with respect to such organizations. On the one hand, Congress intends for the Service to administer whether organizations are entitled to receive the advantages available to churches. While on the other hand, "[a]ll of government—including the IRS—is constrained . . . by the First Amendment's Free Exercise and Establishment Clauses."⁹⁹ The following sections address this tension, along with the Service's and courts' response to such organizations.

III. PROBLEM

In 2007, the number of people using the Internet exceeded one billion.¹⁰⁰ To correctly understand this societal change, it should not be seen as a technological shift, but rather a paradigm shift in "the way the world interacts on a fundamental level."¹⁰¹ This shift is changing the way

96. I.R.C. § 7611(c)(1)(A) (2012).

97. JONES ET AL., *supra* note 23, at 63.

98. See *Am. Guidance Found., Inc. v. United States*, 490 F. Supp. 304 (D.D.C. 1980) (holding that an organization composed of a family that conducted worship services in their apartment was not a church for tax purposes); see also *Found. of Human Understanding v. United States*, 614 F.3d 1383 (Fed. Cir. 2010) (holding that an organization that disseminates its message via electronic ministry to a virtual congregation is not a church for tax purposes); *VIA v. Comm'r*, 68 T.C.M. (CCH) 212 (1994) (holding that an organization whose ministry was the promotion of wellness and nutrition in its members was not a church for tax purposes).

99. Kurtz, *supra* note 47, at 301-02 (noting that "[o]f all the interpretative judgments the Internal Revenue Service must make in administering the tax laws, probably none is more difficult and none demands more sensitivity than those concerning tax consequences affected by questions of religion . . .").

100. DOUGLAS ESTES, *SIMCHURCH: BEING THE CHURCH IN THE VIRTUAL WORLD* 18 (2009).

101. *Id.* at 19.

relationships are defined in society, business, education, and the church.¹⁰² Individuals are building and maintaining relationships over the Internet.¹⁰³ Businesses are taking advantage of Internet video conferencing to interact with remote branches.¹⁰⁴ Students are electing to attend high school and college through “virtual classrooms.”¹⁰⁵ Finally, somewhat behind the trend is the church.¹⁰⁶

Many churches are beginning to use the Internet to expand their ministries.¹⁰⁷ Churches commonly use the Internet for websites, podcasts, prayer rooms, blogs, and other discussion fora.¹⁰⁸ The majority of churches, however, are using these ministries only as supplements to their traditional services and activities.¹⁰⁹ For example, most churches maintain a website and allow the live streaming of sermons over the Internet along with their regular services in a traditional church building. The Internet ministries of most churches at this point are static, lacking any form of association for visitors.¹¹⁰ While non-interactive Internet ministries are widespread, some churches have challenged this standard by offering an interactive worship experience through interactive “virtual ministries.”¹¹¹ One such ministry is the Foundation of Human Understanding (“the Foundation”). As discussed

102. *Id.* at 10.

103. One such example is Facebook, a social networking site, which currently has over 845 million active members who use the Internet to communicate with friends and family around the world. FACEBOOK, <http://newsroom.fb.com/content/default.aspx?NewsAreaId=22> (last visited Mar. 4, 2012).

104. In addition to video conferencing, Internet commerce has grown. In 2007, more than two trillion dollars was exchanged through E-commerce. ESTES, *supra* note 100, at 18 (2009). Businesses are using social networking sites to market their goods to customers over the Internet. *Id.* at 20.

105. *Id.* at 19 (noting that prestigious schools such as Harvard, who once shied away from online classes, are submitting to the trend).

106. WALTER P. WILSON, THE INTERNET CHURCH: THE LOCAL CHURCH CAN'T BE JUST LOCAL ANYMORE 67, 79 (2000) (noting that as with music and media, the church has generally been behind the technology trend).

107. See SECOND LIFE BIBLE CHURCH, <http://dokimos.org/secondlife/> (last visited Jan. 14, 2012) (conducting church services online through the Second Life); see also LIFECHURCH.TV, <http://lifechurch.tv> (last visited Jan. 14, 2012) (offering online church services in a virtual church within Second Life); VIRTUALCHURCH.COM, <http://virtualchurch.com> (last visited Jan. 14, 2012) (offering thousands of online streaming sermons).

108. AUBREY MALPHURS & MICHAEL MALPHURS, CHURCH NEXT: USING THE INTERNET TO MAXIMIZE YOUR MINISTRY 130-38 (2003).

109. ESTES, *supra* note 100, at 21.

110. *Id.*

111. *Id.* at 21, 25.

below, such organizations are challenged with proving their church status to the Service and courts.

A. *The Foundation Before the U.S. Tax Court (Foundation I)*

Incorporated in 1963, the Foundation is a nonprofit organization whose specific and primary purposes are “the promulgation of the religious, charitable, scientific, and literary and educational aspects of the theological concepts.”¹¹² In 1970, the Foundation notified the Service that it was a “church” and, thereby, a non-private organization described in the Internal Revenue Code.¹¹³ The Commissioner of the Internal Revenue Service (“Commissioner”) responded with an adverse determination letter, informing the Foundation that it was not a church under the Internal Revenue Code.¹¹⁴ Again, in 1979, the Foundation notified the Service that it was a church for tax purposes.¹¹⁵ In response to this notification, the Commissioner issued a final adverse determination letter, denying the Foundation’s request that it be recognized as a church.¹¹⁶ Exhausting all of its administrative remedies and receiving a final adverse determination letter from the Commissioner, the Foundation brought suit in the United

112. *Found. of Human Understanding v. Comm’r*, 88 T.C. 1341, 1344 (1987); *see also* Motion for Summary Judgment for Plaintiff at 5, *Found. of Human Understanding v. United States*, 88 Fed. Cl. 203 (2008) (No. 04-1441) 2008 Fed. Cl. Ct. Motions LEXIS 496 at *9-10 (describing that the Foundation’s “specific and primary purposes are the promulgation of the religious, charitable, scientific, literary, and educational aspects of mind over matter and spiritual health known as psychocatalysis”). “Psychocatalysis” is the form of meditation Roy Masters, Foundation of Human Understanding’s founder, teaches to his disciples. *Id.* He believes that man is a fallen being and must gain control of his emotions through discipline and meditation to avoid being controlled by the forces of evil and society. *Id.* When an individual has mastered this practice of meditation, becoming self-disciplined, he is then a true disciple of Christ. *Id.* These beliefs make the Foundation unique with respect to other religious organizations.

113. *Found. of Human Understanding*, 88 T.C. at 1343; *see also* I.R.C. §§ 170(b)(1)(A)(i) (2012) & 509(a)(1) (2012).

114. *Found. of Human Understanding*, 88 T.C. at 1343.

115. *Id.* at 1344; *see also* Motion for Summary Judgment for Plaintiff at 3, *Found. of Human Understanding v. United States*, 88 Fed. Cl. 203 (2008) (No. 04-1441) 2008 Fed. Cl. Ct. Motions LEXIS 496 at *6 (noting that the Foundation’s objective to qualify as a church was to ensure that each donor’s contributions would be deductible up to fifty percent of the donor’s contribution base for the tax year; the Foundation would be exempt from filing Form 990; and the Foundation would be somewhat protected by the Church Audit Procedures Act, which requires the IRS to go through additional steps before commencing an audit of the church); *see supra* text accompanying notes 93-96.

116. *Found. of Human Understanding*, 88 T.C. at 1344.

States Tax Court, seeking to be recognized as a church under I.R.C. § 170(b)(1)(A)(i).¹¹⁷

In *Foundation of Human Understanding v. Comm’r* (“*Foundation I*”), the United States Tax Court held that the Foundation was a church qua church under I.R.C. § 170(b)(1)(A)(i).¹¹⁸ The court began its analysis by applying the Service’s fourteen criteria to the Foundation’s facts.¹¹⁹ The court held that the organization had a distinct legal existence, a recognized creed, a distinct religious history, a literature of its own, regular services open to the public at an established place of worship, and ordained ministers with a course of prescribed studies.¹²⁰ The court determined that the organization did not have a discrete membership, a formal school for ministers, a formal code of doctrine and discipline, a Sunday school for the young, or a definite ecclesiastical government apart from the role and rule of its founding minister.¹²¹

Nevertheless, the court did not end its analysis with the fourteen criteria. The court stated that “[a]lthough the criteria developed by the IRS are helpful in deciding what is essentially a fact question, whether petitioner is a church, we do not adopt them as a test.”¹²² The court then proceeded with its analysis using the associational test.¹²³ Seemingly contradicting its rejection of the Service’s fourteen criteria, the court combined its analysis under the associational test with aspects of fourteen criteria and found that most of the factors of “central importance” were satisfied.¹²⁴ Ultimately, the court, relying on the associational test, held that because the associational aspects of the church were much more than incidental, the Foundation was a church under I.R.C. § 170(b)(1)(A)(i).¹²⁵ In response to the *Foundation I* court’s ruling, the Service issued a revised determination letter in January of

117. *Id.* at 1345, 1351-52 n.3 (noting that for the Foundation to have standing before the United States Tax Court, it must first exhaust all of its administrative remedies as required under I.R.C. § 7428).

118. *Id.* at 1361.

119. *Id.* at 1357-58.

120. *Id.* at 1359-60.

121. *Id.*

122. *Id.* at 1358.

123. For more information related to the associational test, see *supra* text accompanying notes 78-83.

124. *Found. of Human Understanding*, 88 T.C. at 1359-60.

125. *Id.* at 1360-61.

1988, confirming the Foundation's status as a church and thereby a non-private organization under the Internal Revenue Code.¹²⁶

In the years following the United States Tax Court's decision, the Foundation made several changes to its ministry. For instance, Brighton Academy, which had previously espoused the views of the Foundation's founder, Roy Masters, was separately incorporated and became non-denominational.¹²⁷ The church sold two of its church buildings.¹²⁸ Additionally, the Foundation failed to physically meet with any regularity during the period of 1998 through 2000.¹²⁹ These changes sparked the Service's suspicion, and in October of 2001, the Service notified the Foundation that it would be conducting an inquiry into its church status.¹³⁰ At the conclusion of its investigation, in June of 2004, the Service notified the Foundation that its church status was being revoked, but that it would retain its tax-exempt status under § 501(c)(3).¹³¹ In response to this revocation, the Foundation filed a claim with the United States Court of Federal Claims, seeking restoration of its church status.¹³²

*B. The Foundation Before the United States Court of Federal Claims
(Foundation II)*

In *Foundation of Human Understanding v. United States* ("Foundation II"), the United States Court of Federal Claims held that the Foundation did not meet its burden of proving that it was a church qua church under I.R.C. § 170(b)(1)(A)(i).¹³³ The court, although troubled with the constitutionality of the Service's fourteen criteria, began its analysis there.¹³⁴ Applying the Service's fourteen criteria, the court weighed the factors establishing that the Foundation was a church.¹³⁵ The court found that the organization had a distinct legal existence; a recognized creed; a definite and distinct ecclesiastical government; a formal code of doctrine and discipline; a

126. *Found. of Human Understanding v. United States*, 88 Fed. Cl. 203, 207 (2009); see also I.R.C. §§ 170(b)(1)(A)(i) & 509(a)(1) (2010).

127. *Found. of Human Understanding*, 88 Fed. Cl. at 227.

128. *Id.*

129. *Id.*

130. *Id.* at 207. Because the Foundation was a church under the Internal Revenue Code, the Service would be required to follow the Church Audit Procedure Act. See *supra* notes 93-96 and accompanying text.

131. *Found. of Human Understanding*, 88 Fed. Cl. at 207-08.

132. *Id.* at 208.

133. *Id.* at 234.

134. *Id.* at 217.

135. *Id.* at 223-32.

distinct religious history; a sufficient literature of its own; an established place of worship; and ordained ministers with a course of prescribed studies for them.¹³⁶ Although the Foundation met the majority of the Service's fourteen criteria, the criteria are not applied mechanically, as the court regards some factors as more significant than others.¹³⁷

The court continued its analysis of the remaining criteria and found that the Foundation was deficient in several areas of central importance.¹³⁸ For instance, the Foundation did not have a formal membership.¹³⁹ The court explained that although the Foundation has thousands of adherents, it did not keep formal membership records or require its followers to abandon affiliation with other churches or faiths.¹⁴⁰ Additionally, the Foundation did not have a school for the preparation of its ministers.¹⁴¹ Finally, the Foundation did not have schools providing religious instruction for the young.¹⁴² When the Foundation began, it was associated with Brighton Academy, which was founded to promote the religious views of the Foundation.¹⁴³ According to the school's updated religious statement, however, it does "not teach any specific religion . . . [because] it is the family's responsibility to establish and maintain it's [sic] own religious belief system."¹⁴⁴

The court, concluding its analysis under the Service's fourteen criteria, held that the lack of a regular congregation and regular services were most detrimental to the Foundation's argument.¹⁴⁵ The Foundation urged the court to rule retroactively based on the facts of *Foundation I*, when it had a regular congregation of 50 to 350 members.¹⁴⁶ The facts during the period in question, however, did not show any regularity in meetings of this

136. *Id.* at 223-36.

137. *Id.* at 220; *see also* *Am. Guidance Found., Inc. v. United States*, 490 F. Supp. 304, 306 (D.D.C. 1980) (noting that "[w]hile some of [the fourteen criteria applied by the IRS] are relatively minor, others, e.g., [the] existence of an established congregation served by an organized ministry, the provision of regular religious services and religious education for the young, and the dissemination of a doctrinal code, are of central importance").

138. *Found. of Human Understanding*, 88 Fed. Cl. at 223, 227-32.

139. *Id.* at 223.

140. *Id.*

141. *Id.* at 226.

142. *Id.* at 226-27.

143. *Id.* at 227.

144. *Id.*

145. *Id.* at 227-32.

146. *Id.* at 227; *see also* *Found. of Human Understanding v. Comm'r*, 88 T.C. 1341, 1348 (1987).

congregation.¹⁴⁷ The Foundation established that it had a group of followers through its radio and Internet broadcasts, but the court held that “[a] group of followers . . . is not synonymous with a ‘regular congregation.’”¹⁴⁸ The court stated that there was simply no evidence to show a regular congregation—“whether virtually or in one another’s physical presence.”¹⁴⁹ With regard to regular services, the court found the services conducted by the Foundation were not frequent enough to be considered regular.¹⁵⁰ Additionally, the court rejected the Foundation’s argument that its radio and call-in ministry constituted regular services, because key associational aspects were missing.¹⁵¹ The court concluded its application of the fourteen criteria, noting that “in light of the fourteen criteria alone,” the Foundation’s case “presents a close question.”¹⁵²

Applying the associational test as a “threshold” standard,¹⁵³ the court held that the Foundation no longer possessed the minimal associational aspects to qualify as a church.¹⁵⁴ The court focused its attention on prior cases, which presented similar issues before the United States Tax Court, including *Foundation I*.¹⁵⁵ By way of comparison, the Foundation’s associational aspects more closely resembled those organizations that were denied church status rather than the Foundation at the time of the Tax Court’s favorable ruling in *Foundation I*.¹⁵⁶ Because the extent to which the

147. *Found. of Human Understanding*, 88 Fed. Cl. at 227.

148. *Id.* at 230.

149. *Id.*

150. *Id.* at 231.

151. *Id.* at 232.

152. *Id.* (citing *Found. of Human Understanding v. Comm’r*, 88 T.C. 1341, 1361 (1987)).

153. *Id.* at 232; see also *Am. Guidance Found., Inc. v. United States*, 490 F. Supp. 304, 306 (D.D.C. 1980) (holding that “[a]t a minimum, a church includes a body of believers or communicants that assembles regularly in order to worship”).

154. *Found. of Human Understanding*, 88 Fed. Cl. at 232-34.

155. *Id.*; see also *Found. of Human Understanding*, 88 T.C. at 1341; *Spiritual Outreach Soc’y v. Comm’r*, 58 T.C.M. (CCH) 1284, 1287 (1990) (holding that the plaintiff organization’s “musical festivals and revivals . . . and gatherings for individual meditation and prayer” were not enough to pass the associational test); *VIA v. Comm’r*, 68 T.C.M. (CCH) 212 (1994) (holding that an organization whose ministry was the promotion of wellness and nutrition by means of mass media did not fulfill the associational aspects necessary to constitute a church); *Church of Eternal Life v. Comm’r*, 86 T.C. 916, 921 (1984) (holding that the organization’s activities including “the operation of a library containing about 4,000 items, bi-monthly meetings, the distribution of literature, the sale of merchandise and the publication of a newsletter” failed to satisfy the associational test); *First Church in Theo v. Comm’r*, 56 T.C.M. (CCH) 1045, 1049 (1989) (holding that plaintiff organization’s distribution of religious literature failed the associational test).

156. *Found. of Human Understanding*, 88 Fed. Cl. at 232-34.

Foundation brought people together was only incidental to its activities of “radio and Internet broadcasts, coupled with written publications,” the Foundation’s associational “activities [were] insufficient to label the entire organization as a church.”¹⁵⁷ Accordingly, the court affirmed the Service’s adverse ruling.¹⁵⁸

C. *The Foundation Before the U.S. Court of Appeals (Foundation III)*

Following the court’s adverse decision in *Foundation II*, the Foundation appealed its case to the United States Court of Appeals for the Federal Circuit.¹⁵⁹ On appeal, the Foundation persisted in its argument that it should be treated as a church.¹⁶⁰ The court rejected the Foundation’s argument and affirmed the *Foundation II* court’s decision although differing somewhat in its analysis.¹⁶¹

In contrast to the courts in *Foundation I* and *II*, the *Foundation III* court summarily dealt with the Service’s fourteen criteria and proceeded to analyze the Foundation’s case using the associational test, which it regarded to be the proper test for determining whether an organization was a church for tax purposes.¹⁶² Nonetheless, the court agreed that there was “substantial overlap” between the fourteen criteria and the associational test: “as courts have pointed out, among the most important of the [fourteen] criteria are the requirements of ‘regular congregations’ and ‘regular religious services.’”¹⁶³ In light of the Foundation’s in-person meetings, the court found that they were lacking in regularity, and therefore, “merely incidental to the Foundation’s primary purpose.”¹⁶⁴ Additionally, the court held that the “electronic ministry” disseminated by the Foundation to a “virtual congregation . . . did not fulfill the associational role required to qualify as a

157. *Id.* at 234.

158. *Id.*

159. *Found. of Human Understanding v. United States*, 614 F.3d 1383, *cert. denied*, 131 S. Ct. 1676 (2011).

160. *Id.* at 1386.

161. *Id.* at 1391.

162. *Id.* at 1388-89.

163. *Id.* at 1389 (citing *Spiritual Outreach Soc’y v. Comm’r*, 927 F.2d 335, 339 (1991)).

164. *Id.* at 1390 (noting that “[w]hile the associational test does not demand that religious gatherings be held with a particular frequency or on a particular schedule, it does require gatherings that, by virtue of their nature and frequency, provide the opportunity for members to form a religious fellowship through communal worship”).

'church'"¹⁶⁵ Accordingly, the court affirmed the holding in *Foundation II*.¹⁶⁶

D. Problems With the Court's Decision

The *Foundation III* decision seems to have provided temporary clarity with respect to the issue of determining whether an organization is a church for tax purposes. The decision seemingly stands for the notion that the Foundation and other like organizations that disseminate their message by means of "electronic ministry" to a "virtual congregation" may readily become tax-exempt § 501(c)(3) organizations¹⁶⁷ but will find it nearly impossible to receive the advantages uniquely available to churches. While the *Foundation III* decision may have been proper with respect to the Foundation,¹⁶⁸ the court failed to address valid points raised in the Foundation's brief. Moreover, the *Foundation III* decision has left the future of virtual churches unclear. The following Sections expand on these concerns.

1. When Is Association, Really Association?

In *Foundation III*, the Foundation raised several controversial issues regarding electronic ministries.¹⁶⁹ For example, as technology increases and churches begin to move away from traditional brick and mortar buildings and move towards "virtual congregations"—which is already happening¹⁷⁰—can meaningful associational aspects be preserved?¹⁷¹ Additionally, how "regular" must a regular congregation or regular service

165. *Id.* at 1391. For information related to the Foundation, see FOUNDATION OF HUMAN UNDERSTANDING, <http://fhu.com> (last visited Jan. 14, 2012).

166. *Found. of Human Understanding*, 614 F.3d at 1391.

167. *Found. of Human Understanding v. United States*, 88 Fed. Cl. 203, 207-08 (2008).

168. The Foundation could not produce evidence that its "adherents regard their experience while listening to [the Foundation's] broadcasts as a shared experience with other . . . followers, or as a communal experience in any way." *Found. of Human Understanding*, 614 F.3d at 1390 (citing *Found. of Human Understanding*, 88 Fed. Cl. at 232).

169. Brief for Plaintiff-Appellant, *Found. of Human Understanding v. United States*, 614 F.3d 1383 (2009) (No. 04-1441) 2009 WL 5241170.

170. See *Americans Are Exploring New Ways of Experiencing God*, BARNA GROUP (June 8, 2009) <http://www.barna.org/barna-update/article/12-faithspirituality/270-americans-are-exploring-new-ways-of-experiencing-god> (noting that "millions of adults are becoming increasingly reliant upon faith-based media—such as television, radio, and the Internet—for religious experience and expression" and that "this represents a massive realignment of religious behavior over the past decade").

171. Brief for the Plaintiff-Appellant, *supra* note 169, at 23-31.

be to pass muster under the associational test?¹⁷² This Section addresses the first issue: whether community can be achieved through an electronic ministry.

The *Foundation* courts rejected the ideas of “electronic ministry” and “virtual congregation” without considering technological shifts within the church.¹⁷³ This shift has been described as “a new gathering of believers . . . a church not in the real world of bricks and mortar but in the virtual world¹⁷⁴ of IP addresses and shared experiences.”¹⁷⁵ Today, there are hundreds of virtual churches.¹⁷⁶ For example, a solely virtual church exists within a virtual world called Second Life.¹⁷⁷ Within this virtual world, LifeChurch.tv bought real estate and developed a church for Internet users.¹⁷⁸ The church boasted an attendance of more than 1,400 people during its best weekend.¹⁷⁹ The relevant question with respect to the taxation of churches is whether the Service or courts would find that the

172. *Id.* at 44-49.

173. *Found. of Human Understanding*, 614 F.3d at 1391 (holding that “if an organization holds regular services with a regular congregation, it satisfies the associational test even if it also undertakes other activities, such as broadcasting, that would not qualify under the associational test if considered alone”). By regarding such ministries as only supplemental, the court avoids the issue of whether a stand-alone “electronic ministry,” which offers opportunities for individuals to interact, could pass the associational test.

174. “Technology experts define ‘virtual worlds’ as digitally constructed environments where peer-to-peer interaction can take place.” Maria Beatrice Bittarello, *Another Time, Another Space: Virtual Worlds, Myths and Imagination*, 1 J. OF VIRTUAL WORLDS RES. 2 (2008), available at <http://journals.tdl.org/jvwr/article/view/282/236>. A virtual world is characterized as “some form of computer-mediated communication” and “is in many ways more like virtual reality than email or blogging.” ESTES, *supra* note 100, at 22. “Virtual worlds must have two elements: indwelt created space and social interaction.” *Id.* In other words, “virtual world[s] [are] created space where people can interact as if in the real world, but through some type of technological medium.” *Id.*

175. ESTES, *supra* note 100, at 17-18.

176. *Id.* at 25; see also CHURCH OF FOOLS, <http://churchoffools.com> (last visited Jan. 14, 2012); THE ANGLICAN CATHEDRAL OF SECOND LIFE, <http://slangcath.wordpress.com> (last visited Jan. 14, 2012); LIFECHURCH.TV, <http://lifechurch.tv> (last visited Jan. 14, 2012); Sarah Loat, *The Goth Church in Cyberspace*, BBC (May 2008), http://www.bbc.co.uk/birmingham/content/articles/2008/05/22/ulfilas_goth_church_feature.shtml.

177. ESTES, *supra* note 100, at 21-23. Douglas Estes explains that “Second life is not a website per se; it’s a virtual world where an individual creates an avatar, becomes a resident, and tools around town accomplishing many of the same things a person in the real world is able to accomplish.” He goes on to say that, “[a]s of 2007, Second Life residents exchange more than one and a half million dollars in commerce every day in that virtual world.” *Id.* at 21.

178. *Id.* at 21-22; see LIFECHURCH.TV, *supra* note 176.

179. ESTES, *supra* note 100, at 22.

LifeChurch.tv attendees “associated with each other and worshipped communally.”¹⁸⁰

The attendees claim that services within this virtual church create a sense of community.¹⁸¹ One virtual church attendee explained his experience below:

That Sunday morning, as I walked to the church, I was a bit unsure how the visit would play out. The church belongs to a different denomination than mine . . . but even more than that, I just didn’t know what the experience would be like. You know what it’s like to go to a new church – big fear of the unknown.

As I walked down the street, I didn’t see the church at first, even though I now know it to be quite large and distinct. The building was modeled after a glorious European cathedral, though sized down a bit. Surprisingly, the grey stone walls didn’t make the building feel cold or unwelcoming.

As I got ready to enter the front door, I saw the pastor just inside and heard him greeting folks as they arrived . . . One of the information boards listed some of the church’s beliefs and purposes, which set me much more at ease.

I tooled around outside until the pastor left the greeting area and got ready to start the service. I finally went into the building; its atmosphere was welcoming and I had only once or twice before been in services in a cathedral-like setting . . .

Pews. Well, I hadn’t done that in awhile, so I found one near the back, of course. I realized after I had plopped down that I was awkwardly close to a young woman, and slightly embarrassed, I got up and shuffled down the pew a few more feet. Some other guy sat down next to me. The service began. The worship was way more liturgical than I was used to, but okay. The message by the pastor was way better than I had expected, though it was too brief, at least compared with what I was used to. It was orthodox, biblical, and meaningful. . . .

After the benediction, I said hi to a few people, and I saw the pastor make his way out the front of the building to greet everyone as they left. When I made it outside, I found that some of the attendees had stuck around and were joking about the

180. *Found. of Human Understanding v. United States*, 614 F.3d 1383, 1391 (Fed. Cir. 2010).

181. *ESTES*, *supra* note 100, at 56.

accents of people from different parts of the world. I joined in the conversation for about ten minutes, but realizing time was passing, I said my goodbyes and headed back out the front yard and down the road.¹⁸²

If one did not know otherwise, the above experience seems analogous to an individual's description of a visit to a traditional church. Nevertheless, the Service and courts would find deficiencies in such organizations under both the fourteen criteria and the associational test.¹⁸³

Comparing the above experience with an individual's experience in a traditional church highlights the Service's and courts' inconsistencies. In a traditional church, one may arrive just as the service begins. The congregation may sing a few songs and, shortly into the service, the congregation may spend a brief period of time greeting those in the seats around them. Next, some form of message is delivered from the pulpit. During the message, many in the congregation may become inattentive and ponder various unrelated topics. At the conclusion of the message, many will immediately head for their cars and drive home. This common experience highlights the lack of interaction occurring in many traditional churches.¹⁸⁴ Nevertheless, both the Service and courts are biased in favor of such churches for tax purposes. The above experiences highlight the inconsistencies with the Service's and courts' preconceived opinions of virtual churches.¹⁸⁵ Accordingly, the Service and courts should reevaluate

182. *Id.* at 31-32.

183. *Am. Guidance Found., Inc. v. United States*, 490 F. Supp. 304, 306 n.2 (D.D.C. 1980) (noting that three of the Service's fourteen criteria are "regular congregations" and "regular religious services" at "established places of worship"); *see also* *Found. of Human Understanding v. Comm'r*, 88 T.C. 1341, 1357 (1987) (holding that "[w]hen bringing people together for worship is only an incidental part of the activities of a religious organization, those limited activities are insufficient to label the entire organization a church").

184. James E. Maule, *The Internet, Virtual Meetings, and Taxation*, BNA BLOOMBERG (Sept. 13, 2010), <http://www.bna.com/internet-virtual-meetings-n2147485310> (noting that there are "many instances in which individuals arrive at a church, listen, and leave without speaking to anyone or at least without speaking to anyone concerning theological issues").

185. The Service's and courts' problem of accepting the possibility of association within a virtual world is rooted in our Western belief that one must be physically present to obtain a real experience. *ESTES*, *supra* note 100, at 60-64. Some common examples of real experiences but yet still genuine experiences include: an individual's "prayer life, telephone conversations, [e]xperience of watching astronauts in outerspace, or online gaming." *Id.* at 62. The relevant question is whether an individual can be present in a church service within a virtual world. In other words, adopting the *Foundation III* court's terminology, can an individual associate with others and worship communally in a virtual church? *See Found. of Human Understanding*, 614 F.3d at 1391.

their respective tests used for determining whether an organization is a church.

2. Ambiguity and Inconsistencies: Virtual Churches v. Virtual Universities

The Service's and courts' respective tests emphasize that an organization must have a "regular congregation" and "regular services" to qualify as a church for tax purposes. In *Foundation III*, the Foundation raised the question of "what level of frequency is sufficient to satisfy the test?" In other words, what is the minimum threshold the government, or the courts, would cite as sufficient to support a determination that the religious services in question are 'regular?'"¹⁸⁶ In relation to a regular congregation, the Foundation raised the question of "what is the minimum number [of congregants] required, and who establishes that standard?"¹⁸⁷ The *Foundation III* court failed to address these questions, leaving them open for future challenges.

The Service is faced with similar questions concerning virtual universities. I.R.C. § 170(b)(1)(A)(ii) defines educational organizations eligible for tax-exemption as those "which normally . . . [have] a regularly enrolled body of pupils or students in attendance at the place where its educational activities are regularly carried on."¹⁸⁸ Moreover, any student "who is a candidate for a degree at an educational organization described in [I.R.C. § 170(b)(1)(A)(ii)]" is entitled to an exclusion on their income taxes.¹⁸⁹ In relation to virtual universities, the question may be asked, where are the students regularly in attendance, and where are its educational activities regularly carried on?¹⁹⁰ If the place where a virtual university's activities are regularly carried on is a collection of several classrooms linked by the Internet—and this must be the case—then the Service has expanded its meaning of association.¹⁹¹ This inconsistent treatment of virtual churches in comparison to virtual universities further highlights the Service's

186. Brief of Appellant, *supra* note 169, at 49.

187. *Id.* at 45. The Foundation also contends that the Service "does not (and cannot) cite a minimum threshold, standard, or quantum that would suffice to convert an alleged 'virtual' congregation to a congregation satisfactory to the government's legal standard." Plaintiff-Appellant's Reply Brief at 25 *Found. of Human Understanding*, 614 F.3d at 1383 (No. 2009-5129) 2010 WL 1860996, at *25.

188. I.R.C. § 170(b)(1)(A)(ii) (2012).

189. I.R.C. § 117(a) (2012); Maule, *supra* note 184.

190. Maule, *supra* note 184.

191. *Id.*

preconceived opinions of virtual churches. The following Section offers a solution to the aforementioned problems.

IV. SOLUTION

As technology increases and churches continue to move away from traditional brick and mortar buildings towards “virtual congregations,” a case challenging the taxation of such churches is looming in the near future. As highlighted in this Note, the current tests used by the Service and courts are inept to handle these emerging issues. A solution to these problems raises several questions: (1) Who should be responsible for implementing changes with respect to the taxation of churches?; (2) To what extent should the current tests be abandoned or modified?; and (3) What test should be used and how should its contours be defined? The following Section provides answers to each of these questions and addresses concerns with respect to this new test.

A. *Who Should Be Responsible for Implementing Changes*

The obvious answer to the question “who should be responsible for implementing changes with respect to the taxation of churches” is Congress. The problem with this simple answer, however, is that Congress, through its silence, has demonstrated its desire to evade such issues.¹⁹² Rather, Congress has delegated its authority to the Service and the courts to determine whether an organization is a church under the Internal Revenue Code.¹⁹³ The result of such delegation has been the creation of two separate tests, which have provided relative consistency to this otherwise, undefined area of law. Nevertheless, as technology changes the way people within society and—more specifically—people within churches interact, the respective tests of the Service and courts have remained unchanged. The *Foundation III* court’s decision signals a time for change. Although the *Foundation* did not possess the necessary associational aspects of a “virtual

192. See *supra* note 3.

193. Whether Congress may delegate its power raises interesting Constitutional issues regarding the Separation of Powers, however, such issues are not within the scope of this Note. For additional reading on this subject, see generally Peter A. Aranson, Ernest Gellhorn & Glen O. Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1 (1982); George Bunn, Kathleen Irwin & F. Kyra Sido, *No Regulation Without Representation: Would Judicial Enforcement of a Stricter Nondelegation Doctrine Limit Administrative Lawmaking*, 1983 WIS. L. REV. 341 (1983). But see James W. Colliton, *Standards, Rules and the Decline of the Courts In the Law of Taxation*, 99 DICK. L. REV. 265, 272 n.31 (1995).

church,” such organizations not only exist but also are becoming more accepted. Moreover, the next case involving a virtual congregation will not be any less challenging.¹⁹⁴

As Congress remains silent regarding the definition of church for tax purposes, the task of providing clarity in this matter will fall on one of three groups: the courts, the Service, or the Treasury. An examination of the courts’ position reveals a disadvantage. In relation to unfavorable tax determinations, the courts are the secondary means of redress. I.R.C. § 7428 requires that taxpayers exhaust all administrative remedies before they have standing to bring a judicial proceeding.¹⁹⁵ This limits the amount of exposure the courts will have in cases involving virtual churches. Additionally, courts are not involved in initial determinations of whether an organization is a church. These factors place courts at a disadvantage in addressing the forthcoming issues regarding virtual churches and providing consistency to this area of law.

The Service may be in a better position than the courts due to its position near the forefront in administering the tax law; however, the effect of its guidance is too limited to provide uniformity.¹⁹⁶ As a matter of policy, the Service may offer guidance to a taxpayer through two methods: letter rulings and revenue rulings.¹⁹⁷ “A letter ruling is a written determination issued to a taxpayer . . . in response to a written inquiry from an individual or an organization about its status for tax purposes”¹⁹⁸ A disadvantage with such a ruling is that it may only be relied on by the taxpayer to whom it was issued.¹⁹⁹ In addition to letter rulings, the Service issues written revenue rulings interpreting a specific set of facts to provide taxpayers with clarity regarding tax issues.²⁰⁰ Although revenue rulings are applied more broadly than letter rulings, “the Service . . . cautions taxpayers and others who seek to rely on a revenue ruling ‘against reaching the same conclusion [as the ruling with regard to their transactions] unless the facts and

194. Maule, *supra* note 184.

195. I.R.C. § 7428(b)(2) (2012).

196. Kurtz, *supra* note 47, at 301. With its roots dating back to the Civil War, “[t]he IRS is a bureau of the Department of the Treasury and one of the world’s most efficient tax administrators. In fiscal year 2010, the IRS collected more than \$2.3 trillion in revenue and processed more than 230 million tax returns.” *The Agency, Its Mission, and Statutory Authority*, IRS.GOV (May 25, 2011) <http://www.irs.gov/irs/article/0,,id=98141,00.html>.

197. See Treas. Reg. § 601.201 (2002).

198. MICHAEL I. SALTZMAN & LESLIE BOOK, *IRS PRACTICE AND PROCEDURE* ¶ 3.03 at 2 (2011).

199. Rev. Proc. 2004-1, 2004-1 I.R.B. 6-7.

200. Rev. Proc. 2003-1, 2003-1 I.R.B. 8.

circumstances are substantially the same' as those in the ruling."²⁰¹ Because of the limited effect of its guidance, the Service, while in a better position than the courts, is not the ideal party to implement the necessary changes.

The Treasury is in the best position to address the forthcoming issue regarding virtual churches. I.R.C. § 7805 gives the Secretary of the Treasury general authority to promulgate regulations that "prescribe all needful rules and regulations for enforcement" of the Code.²⁰² While revenue rulings are binding on the Service only when a taxpayer's facts and circumstances are substantially the same as those in the ruling, Treasury regulations are binding on the Service in all circumstances.²⁰³ Moreover, the Service is responsible for the administration and enforcement of such regulations.²⁰⁴ Thus, notwithstanding legislation by Congress, the Treasury stands in the ideal position to provide clarity to the emerging issues with respect to churches.

B. *What to do with the Former Tests?*

The respective tests of the Service and courts are much more alike than they seem at first glance. The *Foundation III* court noted "substantial overlap" between the fourteen criteria²⁰⁵ and the associational test, explaining that the core of the analysis with respect to both tests concerns an organization's associational aspects—a regular congregation and regular religious services.²⁰⁶ The remaining twelve criteria promulgated by the Service seem to be superfluous in determining whether an organization is a church for tax purposes. The United States Tax Court in multiple decisions refused to adopt the Service's fourteen criteria.²⁰⁷ Moreover, the United States Court of Federal Claims observed in *Foundation II* that the

criteria are time-conditioned and reflect institutional characteristics that no longer capture the variety of American religions and religious institutions in the twenty-first century. The regime appears to favor some forms of religious expression

201. SALTZMAN, *supra* note 198, ¶ 3.03 (alteration in original).

202. I.R.C. § 7805(a) (2012); *see also* SALTZMAN, *supra* note 198, ¶ 3.03 at 3 (noting that the initial drafting of regulations has been delegated to the Commissioner of Internal Revenue and the Commissioner's legal advisers in the office of an Associate Chief Counsel).

203. SALTZMAN, *supra* note 198, ¶ 3.02(1).

204. *Id.* at ¶ 3.02(3)(b).

205. For a listing of the fourteen criteria, *see supra* text accompanying note 72.

206. *Found. of Human Understanding v. United States*, 614 F.3d 1383, 1389 (Fed. Cir. 2010).

207. JONES ET AL., *supra* note 23, at 64.

over others in a manner in which, if not inconsistent with the letter of the Constitution, the court finds troubling when considered in light of the constitutional protections of the Establishment and Free Exercise Clauses.²⁰⁸

Agreeing with the United States Court of Federal Claims, the *Foundation III* court held that the associational test is “an appropriate test for determining an organization’s church status”²⁰⁹ Additionally, the *Foundation III* court held that whether the associational test or fourteen criteria are applied for an organization to be recognized as a church for tax purposes, “a religious organization must create, as part of its religious activities, the opportunity for members to develop a fellowship by worshipping together.”²¹⁰ Thus, the courts essentially abandoned all but two of the Service’s fourteen criteria. Accordingly, the weight of authority supports the Service’s abandonment of its twelve criteria and the adoption of a threshold test focusing on the associational aspects of a regular congregation and regular services. Nevertheless, the associational test will require modifications to address the forthcoming issues with respect to virtual churches.

C. *The Proposed Treasury Regulations*

The Treasury has the option to structure its proposed Treasury regulations in numerous forms, bearing in mind countless policy considerations. This section provides the outer limits of a framework for drafting the proposed regulations, along with providing the ideal language for such proposed regulations.

208. *Found. of Human Understanding v. United States*, 88 Fed. Cl. 203, 217 (2008). The Foundation argued that

a strict application of several of the factors, such as the requirements of exclusive religious affiliation and regular religious services, would disqualify from church status religions such as Buddhism, Taoism, Confucianism, and Baha’i. The seventh factor—requiring an organization of ordained ministers—would not be satisfied by the Jehovah’s Witness church, which makes no distinction between minister and congregant. The thirteenth, Sunday schools for religious instruction of the young, would not be satisfied by the Jewish faith or by the Seventh Day Adventist Church.

Brief for the Plaintiff-Appellant, *supra* note 169, at 19-20.

209. *Found. of Human Understanding*, 614 F.3d at 1389.

210. *Id.* (citing *Church of Eternal Life & Liberty, Inc. v. Comm’r*, 86 T.C. 916, 924 (1984)).

The most controversial term to be defined concerning virtual churches is “association.”²¹¹ A broad legal definition of association appears in decisions related to free speech concerns. In such cases, courts hold association to encompass more than just in-person communication. For instance, the Supreme Court found that the use of contraceptives in marriage;²¹² the membership of an individual in an organization;²¹³ and the choice of close relationships are all forms of association protected by the First Amendment.²¹⁴ These broad interpretations of association, however, apply in a different context than issues affecting an organization’s tax status. Thus, to avoid an overly inclusive definition of “church”—which would contravene Congress’s intent—association needs a more narrow definition.²¹⁵

On the opposite end of the spectrum, a definition of association could use the current standard of the courts. For instance, the *Foundation II* court held that an organization must bring its members together as a means of accomplishing its purpose.²¹⁶ Moreover, the *Foundation III* court held that the electronic ministry disseminated by the Foundation to a “virtual congregation . . . does not fulfill the associational role required to qualify as a church”²¹⁷ A primary purpose of the proposed Treasury regulations, however, is to remove the narrow interpretation of association in light of the Service’s and courts’ respective tests, along with removing inconsistencies that such tests create. Accordingly, interpreting association more broadly than the current restrictive tests is vital.

While interpreting association is an important factor to the proposed Treasury regulations, it is crucial that the Service address two significant concerns before drafting such regulations. First, the proposed Treasury regulations must define “church” more narrowly than “religious organization” as Congress clearly delineated. Second, it must not be so narrowly defined as to violate constitutional concerns under the First Amendment.

211. Association is defined as “a gathering of people for a common purpose; the persons so joined.” BLACK’S LAW DICTIONARY 132 (8th ed. 2004).

212. *Griswold v. Connecticut*, 381 U.S. 479, 486-87 (1965).

213. *NAACP v. Alabama*, 357 U.S. 449, 462 (1958).

214. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617-18 (1984).

215. See *supra* note 68 and accompanying text.

216. *Found. of Human Understanding v. United States*, 88 Fed. Cl. 203, 230 (2008).

217. *Found. of Human Understanding v. United States*, 614 F.3d 1383, 1391 (Fed. Cir. 2010). For information related to the Foundation, see FOUNDATION OF HUMAN UNDERSTANDING WORLDWIDE, <http://fhu.com> (last visited Mar. 4, 2012).

In light of the aforementioned considerations, the proposed Treasury regulations should read as follows:

Treas. Reg. § 1.170:

(a) A church is a religious organization under I.R.C. § 501(c)(3) that possesses essential associational aspects. An organization possesses essential associational aspects if as a purpose of the promulgation of such organization's religious views it brings together a congregation of adherents whether in one another's proximity, or otherwise, to interact and participate with regular frequency as defined under 1.170(b) of this Section.

(b) An organization meets with regular frequency if its adherents' opportunities to participate in essential associational aspects are not insubstantial. In determining whether an organization provides its adherents opportunities that are not insubstantial the following factors may be taken into account:

- (1) the frequency of scheduled meetings providing opportunities for adherents to participate in essential associational aspects;
- (2) the frequency of opportunities for adherents to participate in essential associational aspects; and
- (3) the extent adherents regard such opportunities as shared experiences with their fellow adherents.

D. Justification of Proposed Treasury Regulations

Critics will certainly find fault with the above regulations. Some will argue that the definition is over-inclusive and makes the tax code irrelevant, while others will argue that it is under-inclusive and violates the First Amendment. The following Section addresses these competing concerns.

A concern of critics, who argue the proposed regulations are over-inclusive, is that such regulations will allow sham organizations to more readily exploit the tax code. Jerome Kurtz, former Commissioner of the Service, describes a typical scheme for a sham organization below:

[A]n individual taxpayer . . . obtain[s] minister's credentials and a charter for a church or religious order by mail for a fee from

churches that may or may not be recognized as exempt from federal income tax under I.R.C. § 501(c)(3). No profession of adherence to a creed, dogma, or moral code is required and no duties or fiduciary responsibilities are undertaken in order to receive and administer these charters or credentials.

The “plan” then calls for the individual to take a “vow of poverty” and to assign his assets . . . and the income earned from current employment to the purported church or order. A major portion of the income assigned to the church or order from this unrelated occupation is set aside for housing, food, clothing, and other items for the individual. Most of the remaining income is set aside for the upkeep of the premises in which he resides, the maintenance of the individual’s car which is provided for his unrestricted use, and for occasional “spiritual retreats” by the individual to traditional vacation areas. Under the “plan,” less than ten percent of the remaining assigned income is utilized for gifts to the poor, prayer books, bibles, and other church functions.

Typically, the solicitations conclude that a vow of poverty can make a person rich.²¹⁸

Such sham organizations are a concern under any test used to determine whether an organization is a *legitimate* church for tax purposes. Accordingly, the proposed regulations do not ignore the fact that such organizations exist by providing the Service with means to address such concerns.

While the Service cannot challenge a sham organization’s religious beliefs, it can challenge such organization’s financial dealings. A foundational requirement for all 501(c)(3) organizations is to comply with the private inurement test. Under this test, “an organization does not qualify as exempt if its net earnings inure, in whole or in part, to the benefit of private shareholders or individuals.”²¹⁹ Although churches, as non-private organizations, are not subject to financial reporting requirements, they must keep records of the money they receive and how it is spent.²²⁰ When an organization’s donations go straight to the minister’s pocket, without any intervening judgment, an organization violates the private

218. Kurtz, *supra* note 47, at 305.

219. Treas. Reg. § 1.501(c)(3)-1(c)(2); *see also* CAFARDI & CHERRY, *supra* note 29, at 70.

220. Treas. Reg. § 1.6033-2(g)(i), (h)(iv).

inurement test.²²¹ Such organizations are not free from either a church tax inquiry by the Service or, if records indicate self-dealing, a revocation of the organization's tax-exempt status.²²²

A broader concern of critics, who argue that the proposed regulations are over-inclusive, is that virtual churches fail to serve a purpose in society and should not receive tax exemption. This argument is valid with respect to some so-called virtual churches but not with respect to all. Virtual churches have the ability to serve individuals who are physically unable to attend a regular church service.²²³ Additionally, virtual churches can serve those who would not otherwise attend a traditional church.²²⁴ Finally, virtual churches can support the needy.

For those organizations that do not function as a church, the proposed regulations provide a means for the Service to revoke the organization's tax-exempt status. The proposed regulations require an organization to possess essential associational aspects. Admittedly, not every virtual church will possess essential associational aspects, but the same is true with respect to traditional brick and mortar churches.²²⁵ Thus, rather than prohibiting an exemption for virtual churches, the Service should punish wrongdoers by enforcing the tax laws that are in effect. Accordingly, a church, whether traditional or virtual, must possess essential associational aspects or risk forfeiting its tax-exempt status.

Other critics may argue that the proposed regulations are under-inclusive and violate the First Amendment. While this is certainly a concern, the proposed regulations neither infringe on nor establish the practice of religion. As with the current test for examining whether an organization operates for religious purposes, the proposed regulations are content-neutral.²²⁶ The beliefs of a particular organization are not of concern, but, rather, the concern focuses on the actions, or associational aspects, of the groups holding such beliefs. Moreover, the proposed

221. Additionally, such organizations may be taxed under I.R.C. § 4958 on any excess benefit transactions.

222. See *supra* notes 93-96 and accompanying text.

223. A few examples of such individuals include the elderly, the incarcerated, and deployed soldiers. See Brief for the Plaintiff-Appellant, *supra* note 169, at 23-24.

224. ESTES, see *supra* note 100, at 28 (noting that “[m]any individuals, such as those who come from either tech-oriented or nonmainstream backgrounds, will prefer to worship in the virtual world because of the flexibility, transparency, diversity, and other innate strengths found in most virtual churches” as well as “[s]eek out spiritual experiences and conversations in the virtual world . . .”).

225. *Id.* at 53.

226. See *supra* notes 56-62 and accompanying text.

regulations do not prohibit religious practices. At the time of the Supreme Court's decision in *Walz v. Tax Commissioner of the City of New York*, not every organization was eligible to receive the tax benefits of being a church.²²⁷ Nevertheless, the Supreme Court held that tax exemptions to religious organizations constituted neither the government establishment of religion nor the excessive entanglement of government with religion.²²⁸ Applying these principles to the proposed regulations should result in the same conclusion.

V. CONCLUSION

The Service and courts have struggled with the meaning of church since Congress first introduced the term into the Internal Revenue Code. Receiving little guidance from Congress, the Service and courts have borne the burden of administering and enforcing the tax laws with respect to churches. Diverging in respective analysis, the Service adopted fourteen criteria, while the courts proposed an associational aspect test. Nevertheless, while technology has changed how churches interact with the world, the respective tests of the Service and courts have remained fixed. The *Foundation of Human Understanding v. United States* decision sparked renewed interest in the debate over the definition of church for tax purposes by revealing inconsistencies with both the Service's and courts' respective tests. Can virtual churches provide associational aspects to their adherents? Moreover, why do virtual churches receive inconsistent treatment in relation to virtual universities? Such questions deserve answers.

Virtual churches are a growing reality in today's society. As individuals move away from traditional brick and mortar buildings, towards virtual churches, the next case challenging the current tests is on the horizon. A definition to address these emerging issues and provide uniformity is inevitable. Nevertheless, providing a definition for church is no small task because of competing concerns. The first concern is Congress's intent for the definition of "church" to be stricter than "religious organization," and the second concern is the ever-present religion clauses of the First Amendment. The Treasury regulations proposed by this Note address the aforementioned questions while being mindful of the competing concerns. Admittedly, the proposed regulations will neither end litigation that inquires into whether an organization is a church nor address the concerns of every critic. The proposed regulations simply provide a framework for

227. *Walz v. Tax Comm'n*, 397 U.S. 664, 679-80 (1970).

228. *Id.* at 680.

the Service and courts to fairly administer the tax code with respect to churches. While the future of this area of law is unclear, one thing is certain, virtual churches are here to stay.