"DO YOU HAVE THAT NEW CHURCH APP FOR YOUR IPHONE?" - MAKING THE CASE FOR A CLEARER AND BROADER DEFINITION OF CHURCH UNDER THE INTERNAL REVENUE CODE

JACOB E. DEAN†

ABSTRACT

What is a church? In the tax world, this seemingly innocuous question is not easily answered. Though churches have long enjoyed special privileges and benefits from the tax code, Congress has never directly answered the question; the presumptive reason for their silence being fear of violating the Establishment Clause of the First Amendment. Recent technological advances have further complicated the issue as new means of communicating and associating are available every day, calling into question the judicial constructs of what constitutes a "church" for federal income tax purposes.

Given that congressional action to clarify the definitional ambiguity is unlikely, and the effect of the distinction between churches and religious organizations is real, this Article argues that courts should adopt a clear standard of what constitutes a church. Specifically, such a definition should not preclude the possibility that electronic or virtual ministries could provide the same associational benefits that courts have long recognized help set a church apart from other religious organizations.

I. INTRODUCTION

The world has changed quite dramatically in the last forty years.¹ Many of these changes are quite obvious and easily recognizable. New fashions have emerged as preferences for clothing, music, art, litera-

† Attorney—Tax Analyst, The Procter & Gamble Company. An earlier draft of this paper won Second Prize (tie) in the 2011 Tannenwald Tax Writing Competition. The author would like to thank Professor Stephanie Hunter McMahon for her comments and insight throughout the drafting of this Article. The author would also like to thank his wife, Danielle, and his children, Luci, Elijah, and Mary Jane, for their support and patience. The views expressed by the author are his own, and in no way reflect those of his employer—The Procter & Gamble Company.

¹ The decision to use 40 years as the amount of time to illustrate the points made in the introduction was not made arbitrarily. The current Treasury Regulation that provides definitions of organizations under I.R.C. § 170(b)(1)(A) (2012) became effective 42 years ago on January 1, 1970. See Treas. Reg. § 1.170A-9(a) (as amended in 2011)
ture, and cinema have evolved. In the political arena, the world has seen the rise and fall of governments and conflicts. New inventions have broken down communication barriers and continue to redefine the way humans interact with each other. Beyond the readily observable changes in life and culture over the last forty years, the world has changed in other less apparent ways. These more discrete changes, which can be characterized as definitional expansion, result at least in part from technological advances breaking down age-old barriers of what things are. With barriers broken down, the world’s definition of certain staples has been broadened to include concepts never before conceived.

For example, in 1970, a bank was a brick and mortar institution where an individual could deposit money, cash checks, and receive a home loan. Today, those banks still exist, but the definition of “bank” has extended to include institutions such as ING Direct—which does business exclusively online, by mail, and over the phone. Forty years ago a phone was a stationary unit in one’s home that had a cord extending to its receiver. Today, the definition of a “phone” has expanded to the point where ninety-one percent of Americans can slip their phones in their pockets, and many can use their “phones” to program their home satellite dish or deposit checks in their cyber bank account.

While most would not quarrel with the notion that the definitions of the two cited—banks and phones—have evolved, people disagree whether other definitions should be expanded to reflect recent technological-based changes. Not surprisingly the debate about the prudence of expanding certain definitions has found its way into

(Stating that the definitions are effective for taxable years beginning after December 31, 1969).


federal courtrooms. What may be surprising is the subject matter of one such disagreement—what is a “church”?

This question may seem laughably simplistic at first blush, but courts, as well as the public at large, have long-struggled to define the term. One dictionary defines “church” as “a building for public and especially Christian worship,” or “a body or organization of religious believers.” Contrast that with Thomas Paine’s definition, “[m]y mind is my own church,” and that of theologian David Tracy, who stated, “[e]ssentially, a church is a community that keeps alive the dangerous memories of its classics,” and one can see that the notion of a church conjures up different ideas in individuals. In the tax world, the definitional difficulty is caused by the dearth of congressional guidance and has resulted in courts trying to determine where the line between a “church” and a “religious organization” lies. Such a line is important because the courts have determined that all churches are religious organizations, but not all religious organizations are churches. This distinction has real world significance, because while religious organizations are favored by the Internal Revenue Code (the “IRC”), the IRC treats a religious organization that attains church status with even more favor, providing it benefits that no other organization receives under the IRC, and without any increased obligations on the part of the church.11

(2010) (arguing that the definition of “broadcasting” under Federal Rule of Criminal Procedure 53 should not be expanded to preclude tweeting from federal courtrooms).


9. For purposes of this Article, the term “religious organization” will be used to describe an organization that is organized and operated exclusively for a religious purpose, and is therefore a tax-exempt entity under I.R.C. § 501(c)(3) (2012).

10. See, e.g., Found. of Human Understanding v. United States, 614 F.3d 1383, 1388 (Fed. Cir. 2010) (quoting Church of the Visible Intelligence that Governs the Universe v. United States, 4 Cl. Ct. 55, 64 (1983)) (stating that courts that have addressed the issue largely agree that Congress intended the definition of a church to be more restrictive than for a religious organization), cert. denied, 131 S. Ct. 1676 (2011); De La Salle Inst. v. United States, 195 F. Supp. 891, 901-02 (N.D. Cal. 1961) (determining that the plaintiff’s religious activities were not sufficient to elevate the plaintiff to the level of a church, which would have exempted plaintiff’s income).

11. See infra notes 55-61 and accompanying text. However, as one scholar cautions, “[i]t should not be inferred that churches and their closely related institutions are the most preferred class of exempt organizations under the federal tax laws. Given the complexity of the [IRC], it would be very difficult to determine what the most preferred class is.” Charles M. Whelan, “Church” in the Internal Revenue Code: The Definitional Problems, 45 FORDHAM L. REV. 885, 886 n.8 (1977).
A recent decision by the United States Court of Appeals for the Federal Circuit illustrates the latest judicial attempt to find consensus amongst the federal courts as to a definition of church for purposes of the IRC. In addition, the case addresses the additional layer of complexity added to the church definition debate by discussing technological advances. The case involved a religious organization—The Foundation of Human Understanding (the "Foundation")—challenging the revocation of its church status by the Internal Revenue Service (the "IRS"). The Federal Circuit upheld the United States Court of Federal Claims' determination that the Foundation failed to qualify as a church because the organization failed to meet the "associational test," which evaluates whether the organization holds meetings that provide members the opportunity of fellowship and association. The court found that the Foundation failed the associational test because it failed to hold regular meetings with a regular congregation. In addition, the court addressed the Foundation's argument that it created a virtual congregation that regularly assembled together. The court held that the Foundation's electronic ministry failed the associational test because the Foundation failed to show that its internet sermons and call-in show allowed members the opportunity to associate with each other in worship, which is necessary to distinguish a church from a religious organization.

The idea of a religious organization utilizing technological advances to spread its message electronically is not new or novel. Though courts have not generally disparaged such activities, no court has determined that a religious organization is a church based solely on the organization's electronic or online ministry. Given recent technological advances and the additional advances made daily, one may reasonably assume that these issues at the intersection of tax law, religion, and technology will only be more prevalent as time moves forward. This Article addresses two issues central to the debate. First, what is a church for tax purposes? Second, should that defini-
tion include organizations that connect their followers solely by technological means?

II. THE INTERNAL REVENUE CODE

The starting point for answering the two questions is the Internal Revenue Code (the “IRC”), the relevant statutory authority. An understanding of the Code’s provisions is important for a couple of reasons: it helps one to understand the range of benefits afforded churches and it helps one to understand that Congress has given no guidance as to the definition of a church in the body of the IRC. This Part first outlines the general statutory scheme providing tax exemptions for nonprofit organizations, the additional benefits afforded organizations exempted under section 501(c)(3) of the IRC, the further distinction between private foundations and public charities, and finally, the more preferred status of an organization being deemed a church. These IRC provisions that provide benefits to specified organizations are vitally important because the IRC is structured in such a way that all income, from whatever source derived, is assumed to be taxable unless Congress explicitly provides otherwise. 19

The following discussion of the treatment of churches in the IRC is intended to provide a high level overview of the benefits afforded churches in order to give context to the cases where organizations fight for such status; it does not purport to be a detailed analysis of nonprofit organizations generally or section 501(c)(3) organizations specifically. 20

A. PREFERENTIAL TREATMENT OF NONPROFIT ORGANIZATIONS

The IRC confers a number of preferential characterizations on churches, the first being that of nonprofit organization. 21 When Ben Franklin penned his famous words that nothing is certain but death and taxes, he must not have been thinking about nonprofit organizations. Nonprofit organizations have received tax benefits since the beginning of recorded history, 22 and such traditions have continued.

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19. See I.R.C. § 61(a) (2012) (“Except as otherwise provided in this subtitle, gross income means all income from whatever source derived . . . .”).


21. State law regulates nonprofit organizations, and what constitutes a nonprofit organization in one state may not be considered a nonprofit organization in another. For purposes of this Article, “nonprofit organization” will be used generically to describe organizations exempted from federal income tax under I.R.C. § 501(c) (2012).

22. JAMES J. FISHMAN & STEPHEN SCHWARZ, NONPROFIT ORGANIZATIONS: CASES AND MATERIALS 294 (4th ed. 2010) (citing Joseph in Egypt’s exemption of the priests’ land
throughout much of time and into American law. The first U.S. corporate income tax exempted corporations and other organizations organized solely for charitable, religious, or educational purposes; and though originally rejected by Congress in 1913, Congress enacted the deduction for charitable contributions in 1917 in response to fears that higher tax rates would negatively impact philanthropy. However, in the early days of U.S. nonprofit tax law, “all nonprofit organizations were lumped together and exempted from tax as though fungible members of an undifferentiated mass.” Over time, however, Congress used the IRS to begin distinguishing between different types of nonprofit organizations, and one need only glance at section 501(c) of the IRC to see that the days of an undifferentiated mass are long past.

The starting point for the IRC’s current treatment of nonprofit organizations is section 501(a). Section 501(a) provides that subject to some limitations, which are beyond the scope of this Article, an organization described in section 501(c) is exempt from taxation. Section 501(c) details the many different types of organizations exempt from taxation, which includes what many would consider to be traditional nonprofits (religious, scientific, and education organizations), as well from the 20% tax over the land found in Genesis 47:26). The authors go on to note that studies reported ancient civilizations did not tax religious institutions because such institutions were “thought to be owned by the gods themselves and thus beyond the reach of mortal taxing authorities.” Id.


25. Id. (quoting Boris I. Bittker & Lawrence Lokken, 4A FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS ¶ 100.1.1 (3d ed. 2003)).

26. See I.R.C. § 501(c) (outlining the treatment of civic leagues, labor organizations, recreational clubs, and cemetery companies, amongst many others); see also Tax Information for Charities & Other Nonprofits, IRS, http://www.irs.gov/charities/index.html (last visited Nov. 19, 2012) (providing links to information for charitable organizations, churches, political organizations, private foundations, and other nonprofits).

27. I.R.C. § 501(a). The limitations provide that organizations operated primarily for the purpose of carrying on a trade or business, or organizations that engage in prohibited transactions, will not be exempt from taxation. See I.R.C. § 502(a) (2012) (“An organization operated for the primary purpose of carrying on a trade or business for profit shall not be exempt from taxation under section 501 . . . .”); I.R.C. § 503(a) (2012) (stating that organizations that engage in prohibited transactions are not exempt under section 501(a)).
as a couple that may surprise some people (e.g., the National Football League and credit unions). Some question the wisdom or necessity of providing tax exemptions to organizations, while scholars have asserted a number of theories ranging from public benefit subsidy theories to the income measure theory to explain the rationale behind the favored treatment.

Within section 501(c), nonprofit organizations are categorized as either public benefit or mutual benefit organizations depending on the type of benefit they provide to society. Mutual benefit nonprofit organizations, which are beyond the scope of this Article, generally serve a smaller or limited class of people and include establishments such as trade associations, chambers of commerce, or social clubs. Public benefit organizations serve a much wider segment of the population and are broadly termed “charities.” Another term used synonymously with public benefit organizations or charities, is “501(c)(3) organizations.” Many use this short-hand reference because virtually all public benefit organizations, including religious organizations, derive their tax-exempt status from section 501(c)(3).

B. Charities—Section 501(c)(3)

Section 501(c)(3) is a broad provision exempting from taxation “[c]orporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition.” In addition to the federal tax exemption received by all nonprofit organizations,

28. Id. § 501(c)(3), (6), (14)(A).
29. See Fishman & Schwarz, supra note 22, at 297-313 (discussing the rationales for charitable tax exemptions).
30. See I.R.C. § 501(c)(6)-(7) (enumerating many additional nonprofit organizations not discussed in this Article).
31. People often use the words “charity” and “charitable” in a generic sense, which can lead to confusion when discussing the technical definitions under the IRC. Admittedly, the confusion is not unfounded given the various uses of the terms in the IRC. Compare I.R.C. § 501(c)(3) (discussing organizations organized and operated exclusively for charitable purposes), with I.R.C. § 170(a), (c) (2012) (allowing a deduction for a contribution to a “charitable organization,” which is a broader class that includes all the organizations listed in I.R.C. § 501(c)(3)). To avoid ambiguity, when referencing a charity, the author is referring to all organizations exempted under I.R.C. § 501(c)(3).
32. Fishman & Schwarz, supra note 22, at 297.
34. I.R.C. § 501(c)(3). The provision continues:

(but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in
organizations that derive their exemption status from section 501(c)(3) receive an array of other benefits. Those benefits include: possible eligibility to finance the organization through tax-exempt bonds, exemption from federal unemployment taxes, preferential postal rates, and others. Perhaps of greatest significance is that charitable organizations can receive contributions from individuals that are deductible for purposes of income, estate, and gift tax.

While most organizations must seek recognition as a section 501(c)(3) organization by filing Form 1023—Application for Recognition of Exemption—with the Internal Revenue Service (the “IRS”) and then wait for a determination that could take months or years, churches do not need to apply for section 501(c)(3) recognition in order to realize its benefits. The presumed reason that churches are not required to file Form 1023 is fear by the Treasury Department that such a requirement would be seen as excessive regulatory entanglement by the government with churches and would run afoul of the First Amendment’s guarantees that Congress will make no laws regarding the establishment of religion.

Though churches do not need to wait for a determination by the IRS to realize the benefits of being a 501(c)(3) organization, claiming that one’s organization is a church does not immunize the organization from scrutiny by the IRS. Many cases have addressed situations where a church’s tax-exempt status was revoked because the organization failed to meet the requirements to be considered a 501(c)(3) organization. A Joint Committee Report prepared by the Staff of the Joint Committee on Taxation concisely outlines the requirements that

35. Fishman & Schwarz, supra note 22, at 297; see also I.R.C. §§ 145, 3306(c)(8) (2012); 39 C.F.R. § 111.1 (2012). The characterization for federal income tax purposes may also have an effect on exemption status for state or local tax purposes, such as exemption from property taxes. Fishman & Schwarz, supra note 22, at 313-14.


38. U.S. Const. amend. I; Mertens, supra note 37, § 34:16.

organizations must meet in order to attain and retain tax-exempt status under section 501(c)(3):

(1) the organization must be organized and operated exclusively for certain purposes; (2) there must not be private inurement to organization insiders; (3) there must be no more than an incidental private benefit to private persons who are not organization insiders; (4) no substantial part of the organization's activities may be lobbying; and (5) the organization may not participate or intervene in political activities.

The Treasury Regulations (the "Regulations") go to great lengths to explain the intricacies of each of these requirements. For example, in addressing the first requirement, the Regulations state that to be organized exclusively for tax-exempt purposes, the organization must limit the purposes of the organization in its articles of organization, which is akin to a for-profit corporation's bylaws, to one or more exempt purposes. In addition, the articles of organization must not expressly empower an organization to participate in other activities not in furtherance of its exempt purposes, other than in an insubstantial amount. An organization must engage primarily in activities to accomplish its exempt purposes in order to meet the operational portion of the first requirement; the organization must limit its participation in non-furthering activities to only an "insubstantial part." The wealth of detail provided in the Regulations defining a section 501(c)(3) organization stands in stark contrast to the silence given the definition of a church.

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40. Substantively, the burden on the organization trying to prove that it is a tax-exempt organization is no different in an initial determination case than it is in a revocation case. However, the applicable scope of review in revocation cases differs from the scope of review in initial determination cases. Specifically, the IRS's determination of a taxpayer's initial qualification for tax-exempt status is based solely upon the administrative record that contains factual assertions made by the taxpayer in its petition for exempt status. Accordingly, the scope of review in initial classification cases, brought pursuant to I.R.C. § 7428 (2012), is generally limited to the administrative record generated before the IRS. However, in a case involving the revocation of exempt status, the IRS need not rely on the factual assertions made by the taxpayer in its petition, but may make an independent evaluation of the facts after an audit, and the parties may supplement the administrative record. See MERTENS, supra note 37, § 34:16.


43. Id. § 1.501(c)(3)-1(b)(1)(i)(b).
44. Id. § 1.501(c)(3)-1(c)(1).
45. Compare Treas. Reg. § 1.501(c)(3)-1 (describing the organizational and operations tests), with Treas. Reg. § 1.170A-9(a) (as amended in 2011) (providing no helpful detail for a taxpayer to use to determine church status).
C. **Private Foundation v. Public Charity**

Once an organization is deemed to qualify under section 501(c)(3), the taxonomic inquiry is not yet complete. Up to this point in the discussion, the only distinction between a church and a non-church religious organization was that a religious organization needed to apply for 501(c)(3) recognition from the IRS, while a church did not. Thus, the previously addressed substantive benefits afforded to churches and recognized 501(c)(3) religious organizations, have been indistinguishable. However, the IRC further characterizes 501(c)(3) organizations as either private foundations or public charities. In the division of private foundations versus public charities, the substantive benefits between churches and religious organizations potentially diverge for the first time.

By virtue of the IRC, churches are *per se* public charities, but not all religious organizations are considered to be public charities. Mechanically, the default position that Congress took when drafting the IRC is that all section 501(c)(3) organizations are private foundations, unless excepted by statutory provision. While some organizations, like churches, are expressly referenced as being public charities,

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47. See IRS Form 1023: Application for Recognition of Exemption Under Section 501(c)(3) of the Internal Revenue Code 10 (Rev. 2006), available at http://www.irs.gov/pub/irs-pdf/f1023.pdf (“Part X is designed to classify you as an organization that is either a private foundation or a public charity.”); see also STAFF OF JOINT COMMITTEE ON TAXATION, supra note 41, at 46 (footnote omitted) (“If an organization satisfies each of the requirements, there is a further question of what type of charitable organization it is. A section 501(c)(3) organization is either a public charity or a private foundation. In general, the basis for distinguishing between public charities and private foundations is the level of public support an organization receives over time. Organizations with widespread public support tend to qualify as public charities; organizations funded by just a few donors tend to be classified as private foundations. There is a substantial body of law detailing how to determine whether an organization is publicly supported. Certain organizations also may qualify as public charities as a matter of law (e.g., churches, hospitals). The classification matters because private foundations generally are subject to more restrictions on their activities than are public charities, are subject to tax on their net investment income, and contributions to private foundations generally do not receive as favorable treatment as do contributions to public charities for purposes of the charitable contribution deduction.”).
49. I.R.C. § 509(a); see also Found. of Human Understanding v. United States, 88 Fed. Cl. 203, 209 (2009) (citing I.R.C. § 509(a); Church of the Visible Intelligence that Governs the Universe v. United States, 4 Cl. Ct. 55, 64 (1983) (“Section 509(a) of the [IRC] provides that organizations exempt under I.R.C. § 501(c)(3) are private foundations unless the organization fits within certain classes of public charities described in section 509(a)(1)-(4) and thereby qualifies for non-private foundation status.”); Church of the Visible Intelligence, 4 Cl. Ct. at 64 (“Under the statutory scheme, an organization which satisfies the section 501(c)(3) criteria is considered a private foundation unless it establishes that it comes within four specified exceptions.”).
other organizations, such as religious organizations can be considered public charities if they can show that "it is likely to be 'responsive to the general public' because it serves the public, is supported by the public, or is a subsidiary or affiliate of another section 501(c)(3) organization that serves or is supported by the public."50 Thus, the divergence between the benefits is only potential, as many religious organizations are able to show that they serve and are supported by the general public.

As to the benefit of being recognized as a public charity, the IRS bluntly states on Form 1023 that “[p]ublic charity status is a more favorable tax status than private foundation status.”51 For example, the IRC limits the deduction allowable for individuals who contribute to public charities to fifty percent of their adjusted gross income per year, while the IRC reduces that amount to thirty percent for gifts to private foundations.52 Another benefit is an individual’s ability to deduct the fair market value of assets donated to a public charity, while that same individual can only deduct his or her cost basis in the asset if he or she donates it to a private foundation.53 In addition, public charities avoid excise taxes that can be levied against private foundations.54

D. CHURCHES—SECTION 170(b)(1)(A)(i)

Finally, in section 170(b)(1)(A)(i),55 a clear break between the benefits afforded to churches and those afforded to non-church religious organizations emerges. Section 170(b)(1)(A)(i) permits individuals a deduction for charitable contributions made within a taxable year to “a church or a convention or association of churches.”56 At first glance, this provision seems rather innocuous, as individuals can deduct contributions to a variety of charitable institutions, as has been discussed. However, the potency of section 170(b)(1)(A)(i) lies not in the text of that particular provision, but in other provisions of the IRC that reference it when granting important tax benefits to organizations.

Two of the most important benefits have previously been mentioned. First, churches are not required to apply and wait for IRS rec-

50. BITTKER & LOKKEN, supra note 25, ¶ 101.2.
51. IRS Form 1023, supra note 47, at 10.
54. Id.
ognition of section 501(c)(3) tax-exempt status. Second, churches—as organizations described in section 170(b)(1)(A)(i)—are statutorily exempt from the presumption that the organization is a private foundation. Though the substantive benefits a church receives from the IRC under these two provisions do not differ from a bona fide religious organization that achieves public charity status, the benefit of being a church lies in the saved costs of paying attorneys to draft and file the required documents with the IRS and to communicate with the IRS on any issues that arise. Also, a church need not wait for the IRS's determination before becoming a tax-exempt organization.

In addition, the IRC exempts churches from filing organizational section 6033 returns with the IRS, which saves churches money in accounting and legal costs. The section 6033 returns require nonprofits to “file an annual return, stating specifically the items of gross income, receipts, and disbursements, and such other information for the purpose of carrying out the internal revenue laws as the Secretary may by forms or regulations prescribe.”

Michael S. Williams, an attorney at Taft Stettinius & Hollister in Cincinnati who practices in the nonprofit area, estimated that the cost savings churches could realize by not needing to file a Form 1023 or subsequent 6033 returns could be up to $10,000 on the front end and thousands of dollars a year in subsequent years, depending on the size of the organization. As a recent Wall Street Journal article pointed out in a discussion of tax credit compliance, “[i]n some cases, the cost of obtaining the tax benefit is greater than the benefit itself.” One would not have to stretch the imagination too far to extrapolate that comment to describe compliance with the IRC generally.

Another benefit is that the statutory guidelines for an investigation of a church by the IRS are very strict. The IRS may initiate a church tax inquiry only after proper notice is given, and a high-level

61. Id. § 6033(a)(1).
62. Interview with Michael S. Williams, Assoc., Taft Stettinius & Hollister, in Cincinnati, Ohio (Apr. 29, 2011).
64. See I.R.C. § 7611 (2012); Church of Spiritual Tech. v. United States, 26 Cl. Ct. 713, 731 n.37 (1992) (“The distinction [between church and religious organization] matters because churches receive more favorable treatment under the [IRC] than do religious organizations. For example, churches may be investigated by the IRS only in accordance with strict and specific procedures specified in I.R.C. § 7611.”).
Treasury Department representative reasonably believes that the church may not be exempt or is carrying on an unrelated trade or business, whereas there are no restrictions on the audit of a religious organization. As the benefits outlined are not exhaustive, see Professor Wendy Gerzog Shaller’s article, Churches and their Enviable Tax Status for an excellent discussion of additional benefits afforded to churches.

Given the well-recognized benefits churches receive under the IRC, the lack of definitional clarity and guidance about what constitutes a church provided by Congress may strike one as somewhat surprising. However, as one Revenue Ruling tersely states, “neither the IRC nor the regulations thereunder define what constitutes a convention or association of churches.” Rather, the regulation gives the circular definition of: “[a]n organization is described in section 170(b)(1)(A)(i) if it is a church or a convention or association of churches.” In other words, an organization is a church or a convention or association of churches if it is a church or a convention or association of churches.

The legislative history contains no further enlightenment, because as one scholar described, “Congress has never squarely faced the range of problems connected with the church distinctions in the IRC,” so “the legislative history of these distinctions is little more than a series of anecdotes.” Though a general acceptance among the

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65. I.R.C. § 7611(a).
66. Shaller, supra note 57, at 355 n.64.
67. While the benefits are clear, the reasons supporting the benefits afforded specifically to churches are not; no other organization receives the same benefits under the tax code.
70. Whelan, supra note 11, at 902.
courts exists that Congress intended a more confined definition for a church as compared to a religious organization, courts also seem to agree that Congress is too concerned about First Amendment issues to give much guidance as to a definition.\textsuperscript{71}

III. THE INTERNAL REVENUE SERVICE

As a consequence of the definitional ambiguity of a church, the Internal Revenue Service (the "IRS") takes the position that no single definition of a church exists due to the variance of beliefs and practices.\textsuperscript{72} Though the IRS does not draft or enact the Internal Revenue Code (the "IRC"), it is the governmental agency charged with carrying out the responsibilities of the Secretary of the Treasury, who is given full authority to administer and enforce the IRC.\textsuperscript{73} That alone makes the IRS's opinion on the matter valuable, but this Part discusses the IRS's position on the definition of a church for an additional reason: the IRS's definition has had a significant effect on federal court decisions trying to define a church.\textsuperscript{74}

According to the IRS, it "considers the facts and circumstances of each organization applying for church status."\textsuperscript{75} The facts and circumstances the IRS currently considers has its genesis in a 1978 speech delivered by then-IRS Tax Commissioner Jerome Kurtz.\textsuperscript{76} In the speech, Commissioner Kurtz outlined fourteen criteria the IRS would consider when determining whether an organization is a church for federal tax purposes:

\begin{itemize}
\item [(1)] a distinct legal existence;
\item [(2)] a recognized creed and form of worship;
\item [(3)] a definite and distinct ecclesiastical government;
\item [(4)] a formal code of doctrine and discipline;
\item [(5)] a distinct religious history;
\item [(6)] a membership not associated with any other church or denomination;
\item [(7)] an organization of ordained ministers;
\item [(8)] ordained ministers selected after completing prescribed studies;
\item [(9)] a literature of its own;
\end{itemize}

\textsuperscript{71} Spiritual Outreach Soc'y v. Comm'r, 927 F.2d 335, 338 (8th Cir. 1991) (quoting Church of the Visible Intelligence that Governs the Universe v. United States, 4 Cl. Ct. 55, 64 (1983)).


\textsuperscript{74} See infra Part IV.B.

\textsuperscript{75} IRS, supra note 72, at 31.

\textsuperscript{76} Spiritual Outreach Soc'y v. Comm'r, 927 F.2d 335, 338 (8th Cir. 1991).
(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.77

After the speech was given, the IRS agreed that these church criteria would be published in the Internal Revenue Handbook, though the handbook made clear that the factors were not exclusive and were not to be mechanically applied.78

Though the IRS does not explicitly refer to it as Commissioner Kurtz’s fourteen factors, one can see that the IRS continues to rely heavily on the fourteen-factor approach in its determinations of church status. For example, after listing the fourteen factors verbatim, the IRS states in its Tax Guide for Churches and Religious Organizations that it generally uses a combination of those factors, together with the facts and circumstances, to determine if an organization is a church for federal tax purposes.79 Additionally, one can observe the close connectedness between those factors and the questions asked on Schedule A of Form 1023.80 The questions on Schedule A mirror those first presented in Commissioner Kurtz’s address and ask organizations seventeen questions that provide the basis for its facts and circumstances determination, ranging from “Do you have a written creed?” to “How many members do you have?”81

IV. COMMON LAW ATTEMPTS TO DEFINE A CHURCH

The dearth of statutory aid in defining a church has left the job of defining a church for purposes of section 170(b)(1)(A)(i)82 with the federal courts. Specifically, the lower federal courts because the United States Supreme Court has refused to weigh in on the issue of what constitutes a church.83 Furthermore, the Internal Revenue Service’s

79. IRS, supra note 37, at 27.
80. IRS Form 1023, supra note 47, at sched. A. Form 1023 is the Application for Recognition as an Exempt Organization. See supra Part II.B.
81. IRS Form 1023, supra note 47, at sched. A.
83. St. Martin Evangelical Lutheran Church v. South Dakota, 451 U.S. 772, 784 n.15 (1981) (citing Riker v. Comm’r, 244 F.2d 220 (9th Cir. 1957); Am. Guidance Found., Inc. v. United States, 490 F. Supp. 304 (D.D.C. 1980); De La Salle Inst. v. United States, 195 F. Supp. 891 (N.D. Cal. 1961); Chapman v. Comm’r, 48 T.C. 358 (1967)) (“Although we hold today that the word ‘church’ in § 3309(b) must be considered as the ‘employer,’ and not as a building that is a house of worship, we disavow any intimations in this case defining or limiting what constitutes a church under FUTA or under any other provision of the Internal Revenue Code.”).
(the "IRS") position does not bind any court, so the answer to the question originally posed—what is a church—depends on the federal jurisdiction in which the religious entity in question is subject.84 Even then, the evolution of case law has not presented a clear and concise definition.

A. EARLY ATTEMPTS TO DEFINE A CHURCH

Early decisions by federal courts struggling to define a church for tax purposes provide little guidance as to what factors a court should consider when defining a church. In De La Salle Institute v. United States,85 one of the earliest reported cases addressing the issue at hand, the United States District Court for the Northern District of California determined that, in the absence of congressional direction, the definition of a church “must be interpreted in the light of the common understanding of the word.”86 Though cited or discussed by many subsequent decisions, other courts have not adopted this “common understanding” approach. As one court noted, the approach is difficult for at least two reasons: “There is no bright line beyond which certain organized activities undertaken for religious purposes coalesce into a ‘church’ structure. And the range of ‘church’ structures extant in the United States is enormously diverse and confusing.”87

A few years later the United States Tax Court held in Chapman v. Commissioner88 that an organization was not a church because it was not a denomination or sect.89 The Tax Court held that though an organization did not need to meet in a building, it did need to fit the definition of a denomination or a sect to be considered a church.90 In Judge Theodore Tannenwald’s concurrence, he agreed with the outcome that the organization in question was not a church, but he disagreed with the reasoning. He argued for a more common sense approach to the definition of the word in the context that Congress intended a more restrictive definition of church.91 Rather than limiting the definition to an organization that is an official denomination or

84. An important point to note is that the question of what constitutes a church reaches federal courts in two forms: an initial qualification case and a revocation case. While the scope of the judiciary’s review will differ in those two cases, the analytical framework of what is a church does not need to differ. See supra note 40 and accompanying text. Accordingly, no distinction will be made between initial qualification and revocation cases.

88. 48 T.C. 358 (1967).
91. Id. at 367 (Tannenwald, J., concurring).
sect, Judge Tannenwald stated, “[i]n my opinion, the word ‘church’ implies that an otherwise qualified organization bring[s] people together as the principal means of accomplishing its purpose.” He noted that the emphasis he placed on spiritual togetherness may present constitutional issues if the court were to look at the “philosophical, theological, or ecclesiastical refinements” of the word church. However, he viewed the question the court was dealing with, as a very narrow and even prosaic question: Was the petitioner entitled to an extra tax deduction for contributing to a church? Judge Tannenwald’s concurrence, while not carrying the day in the case it was expressed, has nevertheless proved to be extremely influential in shaping this area of law.

Thirteen years later, the United States District Court for the District of Columbia became the first court to refer to the IRS’s fourteen criteria in a church status decision in American Guidance Foundation, Inc. v. United States. The plaintiff in American Guidance was a non-stock, nonprofit organization seeking a declaration that it was a church. For three years prior to the judgment, the only members of the organization were a Mr. Seyfried, the organization’s founder, his spouse, and their minor child. At no time did the organization have more than six members—Mr. Seyfried and five individuals of his immediate family.

In determining that the plaintiff in American Guidance did not meet the requirements of being a church, the court did not clearly outline a rule for determining what constitutes a church. Rather, it cited the IRS’s fourteen criteria, and noted that while some of the criteria are minor, others, such as “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.” In addition, the court cited with approval Judge Tannenwald’s assertion that the means by which a religious purpose is accomplished distinguishes a church from other types of religious organizations. Then, the court determined

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92. Id.
93. Id. at 368.
94. Id. Due to subsequent changes in the IRC, the exact issue addressed in Chapman no longer exists. However, the IRC still provides the benefits discussed above, and the analysis given to the issues is the same.
98. Id.
99. Id. at 306.
100. Id. (citing Chapman, 48 T.C. at 367 (Tannenwald, J., concurring)).
that at a minimum, a church must include “a body of believers or communicants that assembles regularly in order to worship.” By failing to do so, the plaintiff failed the associational role required of churches. 

Though the American Guidance decision is not a model of clarity and fails to lay out a clear test for deciding when an organization is a church, the case is nonetheless important because of the principles it introduces. In the court’s decision, the roots of the two primary approaches, or at least tools, are employed by federal courts in determining if an organization should be considered a church for federal income tax purposes—using the IRS’s fourteen criteria and requiring an associational role.

B. Using the Fourteen Criteria

Following Commissioner Kurtz’s speech in 1978 first introducing the fourteen criteria, and the use of the criteria by the court in American Guidance Foundation, Inc. v. United States, other courts began to reference the criteria within their decisions. Though courts have been reluctant to use the fourteen factors as a per se test, many have relied on the factors as a guide. 

For example, the United States Court of Appeals for the Eighth Circuit has used the fourteen factors on multiple occasions. In Lutheran Social Service of Minnesota v. United States, the Eighth Circuit determined that Lutheran Social Service (“LSS”), a tax-exempt nonprofit social service agency, was not a church. LSS affiliated with various branches of the Lutheran Church and provided a broad

101. Id.
102. Id.
103. See supra Part III.
105. See, e.g., Williams Home, Inc. v. United States, 540 F. Supp. 310, 317 (W.D. Va. 1982) (stating that “[w]hile it is clear that not all of these factors need be present in an organization seeking status as a ‘church’ for Federal tax purposes, it is equally clear that neither plaintiff constitutes a ‘church’ when assessed in light of these factors”).
106. See, e.g., First Church of In Theo v. Comm’r, 56 T.C.M. (CCH) 1045 (1989) (stating that “[w]hile we do not adopt such criteria as a test . . . they are helpful in understanding respondent’s determination that petitioner is not a church”); Found. of Human Understanding v. Comm’r, 88 T.C. 1341, 1358-60 (1987) (finding that the petitioner did possess most of the criteria to some degree, the court concluded that the organization was a church; specifically, the court determined that “[a]lthough . . . helpful in deciding what is essentially a fact question, whether petitioner is a church, we do not adopt [the criteria] as a test”); Church of the Visible Intelligence that Governs the Universe v. United States, 4 Cl. Ct. 55, 64 (1983) (“To receive a favorable determination [of church status], one must satisfy at least several of these [fourteen] criteria . . . .”).
107. 758 F.2d 1283 (8th Cir. 1985).
108. Lutheran Soc. Serv. of Minn. v. United States, 758 F.2d 1283, 1287 (8th Cir. 1985).
range of social services such as adoption and child care services, individual and family counseling services, and community counseling programs. In addition, the Minnesota representatives of the three major national Lutheran sects elected LSS’s board. Relying on the fourteen factors, as well Judge Tannenwald’s concurrence cited with approval in American Guidance, the Eighth Circuit established that the district court was correct in finding that LSS was not a church. The Eighth Circuit determined that the services provided by LSS were secular in nature and could not be transformed into “ministrations of sacerdotal functions” just because a religiously-affiliated organization like LSS performed them.

Again in Spiritual Outreach Society v. Commissioner, the Eighth Circuit used the fourteen criteria in upholding the Tax Court’s determination that the religious organization in question was not a church for purposes of the Internal Revenue Code (the “IRC”). Though the court did not expressly do so in the Lutheran Social Services decision, in Spiritual Outreach, the Eighth Circuit explicitly stated that it viewed the fourteen criteria as helpful in determining what constituted a church. The court noted that not every factor needed to be met, but that some criteria such as the existence of an established congregation, the provision of religious services and education for the young, and the dissemination of doctrinal code are of central importance.

The Eighth Circuit has not been alone in its use of the fourteen factors. In a decision by the United States Court of Appeals for the Seventh Circuit affirming the criminal conviction of an individual claiming to be a one-man church, the court looked to the fourteen factors for guidance. Following the lead of the court in American Guidance, the Seventh Circuit found some of the criteria to be minor, while others were particularly helpful. The Seventh Circuit found import in the fact that the organization had no organized ministry that served a congregation, no consistent religious services, and no dissemination of any type of doctrinal code. On the whole, the

109. Lutheran Soc. Serv. of Minn., 758 F.2d at 1284-85.
110. Id. at 1284.
111. Id. at 1287.
112. Id.
113. 927 F.2d 335 (8th Cir. 1991).
115. Spiritual Outreach Soc'y, 927 F.2d at 339.
116. Id. (quoting Lutheran Soc. Serv. of Minn., 758 F.2d at 1287).
118. Jeffries, 854 F.2d at 258.
119. Id.
court found that those criteria distinguished a church from some other religious organization.120

C. Requiring an Associational Role

While courts began citing more frequently the fourteen criteria approach after the American Guidance Foundation, Inc. v. United States121 decision, they also began to latch on to the language provided in American Guidance that a minimal requirement of a church is a body of believers that assembles regularly for worship.122 For example, after citing favorably the fourteen criteria found in the IRS's guidelines, the United States Claims Court in Church of the Visible Intelligence that Governs the Universe v. United States,123 stated that the organization seeking church status failed to meet the minimal burden set out in American Guidance that "a church must include a body of believers which assembles regularly together to worship."124 In another decision, the Tax Court, citing Judge Tannenwald's concurrence in Chapman v. Commissioner125 and the majority opinion in American Guidance held that, "[t]o qualify as a church an organization must serve an associational role in accomplishing its religious purposes."126

Courts continued to build on these lines of thought and require some "associational role," though it was often cited in conjunction with the fourteen criteria, rather than as a standalone requirement. As a result, when one reads church status decisions it can be difficult to determine exactly what test the court was using in its determination. Take the example of First Church of In Theo v. Commissioner,127 where the court made its decision "based on the record" only after citing both the IRS's fourteen factors and the associational language derived from the Chapman concurrence and American Guidance decision.128

Thus, breaking down the discussion into courts using the fourteen criteria and courts requiring an associational role could create the false impression that most courts have explicitly employed one ap-

123. 4 Cl. Ct. 55 (1983).
125. 48 T.C. 358, 364 (1967).
127. 56 T.C.M. (CCH) 1045 (1989).
proach or the other. Quite the contrary, most courts cite both the fourteen criteria and associational language in determining whether an organization is a church, while some of those courts deem the associational factor critical. A good example of the two approaches working together, as well as the resultant ambiguity, is in VIA v. Commissioner. In VIA, the Tax Court stated that the fourteen criteria are a helpful guide and that the court would look at the means a religious organization uses to accomplish its religious purposes, but at a minimum, a church must include a body of believers who gather regularly for worship. The associational requirement has not created a bright-line test that courts employ; rather it is another tool that courts employ in determining whether an organization is a church.

D. Foundation of Human Understanding v. United States

After an active period in the 1980s and early 1990s, when federal courts faced many determinations of whether organizations were churches, the issue of what constituted a church sat dormant for almost fifteen years before the recent reemergence of the Foundation of Human Understanding (the "Foundation") litigation of the church status issue. Due to its importance as the most recent case attempting to define a church for purposes of the IRC, as well as introducing the issue of the effect of technological changes on an organization's church status, the court's decision in Foundation of Human Understanding v. United States is analyzed more closely below.

1. Background

The Foundation is an organization that describes itself as "based upon Judeo-Christian beliefs and the doctrine and teachings of its founder, Roy Masters." The Foundation was first incorporated in 129. Discussing the two approaches separately was meant to help the reader understand the different concepts, but the author understands how this approach could lead to some confusion.

130. Spiritual Outreach Soc'y v. Comm'r, 58 T.C.M. (CCH) 1284 (1990), aff'd, 927 F.2d 335 (8th Cir. 1991).

131. 68 T.C.M. (CCH) 212 (1994).


133. Found. of Human Understanding v. United States, 614 F.3d 1383 (Fed. Cir. 2010), cert. denied, 131 S. Ct. 1676 (2011). The Foundation is reemerging on the scene, because its efforts to attain church status are well documented in this arena. See Found. of Human Understanding v. Comm'r, 88 T.C. 1341 (1987).

134. 614 F.3d 1383 (Fed. Cir. 2010), cert. denied, 131 S. Ct. 1676 (2011).

1963, recognized as a tax-exempt organization in 1965, and finally received recognition as a church in 1987. Due to changes in the organization, the IRS initiated a church tax inquiry in 2001 and revoked the organization's church status, but preserved its status as a 501(c)(3) religious organization. The Foundation then brought suit in federal court, pursuant to 26 U.S.C. § 7428, seeking a declaratory judgment that it was a church. The trial court granted the government's motion for summary judgment.

Specifically, the trial court relied on what it termed to be the "associational test"—a name it used to describe the idea stemming from American Guidance Foundation, Inc. v. United States, that the means in which a religious purpose is accomplished separates a church from a religious organization and that, "[a]t a minimum, a church includes a body of believers or communicants that assembles regularly in order to worship." After expressing some concern with relying wholly on the fourteen criteria approach, the trial court nonetheless looked at the criteria as a guide and found that the Foundation met some, but not all, of the IRS's fourteen criteria. Having met some but not all of the criteria, the trial court viewed the issue of whether the organization was or was not a church as a close call by

136. Found. of Human Understanding, 614 F.3d at 1386 (citing Found. of Human Understanding, 88 T.C. at 1347-49) (noting that the Tax Court decided the matter of church status in 1987).
140. Found. of Human Understanding, 614 F.3d at 1387. Though not backed by any empirical evidence, the lengths that the Foundation went through to litigate and fight for its church status bolster, at least anecdotally, the assertion that the designation provides a valuable benefit to an organization above and beyond that of a tax-exempt 501(c)(3) organization.
141. Id.
144. Found. of Human Understanding, 88 Fed. Cl. at 232. The court described its worry in this way:

The criteria used by the IRS to determine church status for tax purposes... bear a striking similarity to the topics of the questions contained in the 1906 Census of Religious Bodies. This resemblance strongly suggests that defendant's 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 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.

Id. at 217.
looking merely at the criteria.\textsuperscript{145} However, by turning to the associational role churches should fill, the trial court found that the Foundation—as a non-membership organization that mainly published and distributed religious literature rather than bringing people together—failed to exhibit the associational requirements that were critical in convincing the Tax Court to give the Foundation church status originally.\textsuperscript{146} In doing so, the trial court declined to characterize the organization’s radio and internet broadcasts as religious services, because those activities lacked the critical associational aspects of religious services and were merely broadcasting and publishing services furnished by the Foundation.\textsuperscript{147}

2. Federal Circuit’s Decision

On appeal, the United States Court of Appeals for the Federal Circuit upheld the trial court’s decision granting the government’s motion for summary judgment; therefore, denying the Foundation’s request for a declaratory judgment. After summarizing the trial court’s decision, the Federal Circuit discussed the ambiguity in the definition of a church and pulled out what it termed to be three principles of consensus amongst courts.\textsuperscript{148} First, courts that have addressed the church issue agree that “Congress intended a more restricted definition for a church than for a religious organization.”\textsuperscript{149} Second, the means by which the religious purpose is accomplished is what separates churches from other religious organizations.\textsuperscript{150} Third, courts have mainly used the IRS’s fourteen criteria approach and the associational test when looking at the distinction between a church and a religious organization.\textsuperscript{151}

After sharing the same concerns the trial court had about the fourteen criteria, the Federal Circuit reasoned that courts have been more receptive to the associational test and determined that it is the appropriate test in determining church status under section 170 of the IRC.\textsuperscript{152} Utilizing the test with the shorthand term first coined by the

\textsuperscript{145} Id. at 232.
\textsuperscript{146} Id. at 233-34 (citing Church of Eternal Life & Liberty, Inc. v. Comm’r, 86 T.C. 916, 921 (1986)).
\textsuperscript{147} Id. at 232.
\textsuperscript{148} Found. of Human Understanding, 614 F.3d at 1388.
\textsuperscript{149} Id. (quoting Church of the Visible Intelligence that Governs the Universe v. United States, 4 Cl. Ct. 55, 64 (1983) (internal quotation marks omitted)).
\textsuperscript{150} Id. (citing Spiritual Outreach Soc’y v. Comm’r, 927 F.2d 335, 339 (8th Cir. 1991); Am. Guidance Found., 490 F. Supp. at 306; First Church of In Theo v. Comm’r, 56 T.C.M. (CCH) 1045 (1989)).
\textsuperscript{151} Id.
\textsuperscript{152} Id. at 1389.
trial court, the associational test, the Federal Circuit affirmed the trial court's decision against both of the Foundation's challenges.

The Foundation first challenged the trial court's finding that the Foundation failed to satisfy its burden of proving that the revocation of its exemption status was erroneous because the Foundation did not show that it held regular services with a consistent congregation during the years in question. The Federal Circuit agreed with the trial court that the Foundation failed to provide "gatherings that, by virtue of their nature and frequency, provide the opportunity for members [of the organization] to form a religious fellowship through communal worship." Though the Foundation did hold sporadic meetings, the irregularity of the meetings and location lacked the cohesiveness factor for what constitutes a church.

The Foundation next challenged the ruling that its electronic ministry, which the Foundation argued created a "virtual congregation" by having its members listen to sermons broadcast over the internet and radio at set times, failed to reach the church threshold. The Federal Circuit upheld the trial court's decision, however, finding that the Foundation presented no evidence that the members of the Foundation found their experience of listening to the broadcasts to be a "shared experience with other . . . followers, or as a communal experience in any way." Though the broadcasts included a call-in show, those communications with clergy were not enough to create the associational role necessary for a church, because it did not give the congregants opportunity to "associate with each other in worship." Accordingly, the Federal Circuit affirmed the trial court's decision that the Foundation failed to establish that it qualified as a church for the years in question.

V. AN UNCERTAIN PAST, A CLEAR WAY FORWARD

The questions after Foundation of Human Understanding v. United States mirror those posed initially by this Article: what is a church? What test is appropriate, and given the rapid speed of technological advances, can the definition of a church include organiza-
tions that connect their members solely by technological means? In addition to addressing those questions, this Part also addresses a threshold question that has not been addressed: should the judiciary be the branch of government that determines the definition?

A. **Treasury Should Act, Congress Could Act, Courts Will Act**

The main focus of this Article has been on the benefits afforded churches under the Internal Revenue Code (the "IRC") and the struggle that courts have faced in defining a church. An issue that has not been addressed, but is important to consider, is whether the judicial branch of the federal government is best suited to provide clarity to this definitional ambiguity. The short and seemingly obvious answer to that query is no; both the Executive and Legislative branches have much more explicit responsibilities to provide clarity.

1. **Executive Branch**

The branch with the clearest responsibility to act is the Executive. The Treasury Department, by virtue of delegation received from Congress, is tasked with providing rules and regulations for the IRC passed by Congress.\(^{161}\) At first glance, one could easily be dismissive of assigning the responsibility of defining a church to the Executive Branch if for no other reason than that most people do not like the idea of having that sensitive task fall into the hands of a seemingly very politicized and politically sensitive branch.\(^{162}\) However, a discussion about the wisdom of delegating such an important task to the Executive Branch is outside of the scope of this Article as the statute is very plain.\(^{163}\) Specifically, section 7805 of the IRC states that except as otherwise provided, "the [Treasury] Secretary shall prescribe all needful rules and regulations for the enforcement of this title, including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue."\(^{164}\) The injunction in section 7805 is clear—the Treasury Department is to prescribe the

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161. In practice, the rules are prescribed by the IRS with the approval of the Treasury Secretary. See Treas. Reg. § 301.7805-1(a) (1967).


163. There are very good arguments for the contrary position as well. See, e.g., IRM 32.1.1.2.4 (Aug. 11, 2004) (stating that having the definition determined through the Treasury Regulation process is desirable because Treasury Regulations receive public comment before being finalized).

necessary rules to enforce the IRC—and one cannot reasonably argue that the definition of a church is settled and clear.\textsuperscript{165}

Though the lucidity of section 7805 stands in stark contrast to the uncertainty of the church definition, the Treasury Department has failed to provide the necessary guidance. No regulation has been passed to this point beyond the aforementioned, "[a]n organization is described in section 170(b)(1)(A)(i) if it is a church or a convention or association of churches."\textsuperscript{166} As any tax practitioner can attest given the thousands of pages of IRC and Treasury Regulations occupying a large portion of their desk, bookshelf, or hard drive, the absolute regulatory silence on an IRC provision providing such a large benefit to taxpayers is unique. The reasons behind the Treasury Department's sin of omission are not explicit, but likely mirror those imputed to Congress's fear of violating the Establishment Clause,\textsuperscript{167} as well as undoubtedly the political risk of taking on such a polarizing issue.\textsuperscript{168} Whatever the true reason, it does not excuse the Treasury Department's inaction to this point. While Congress undoubtedly could have done more to provide statutory direction, that does not abrogate the Treasury Department's duty.

2. Legislative Branch

Though Congress delegated a large responsibility to the Treasury Department by means of section 7805 of the IRC, Congress could likewise resolve much of the confusion by passing additional statutory guidance. Congress retains its constitutional authority to "lay and collect Taxes"\textsuperscript{169} and "[t]o make all Laws which shall be necessary and proper for carrying into Execution the [taxing] Powers."\textsuperscript{170} Thus, Congress could address the issue by drafting a statutory definition of a church.

Given that the genesis of the church definitional confusion is statutory, not regulatory, Congress not only could, but should take responsibility and draft clarifying statutes. Congress has not found it difficult in many other instances to use defined terms in the IRC when trying to ensure that the law crafted has the appropriate scope.\textsuperscript{171} However, Congress has found it difficult, or politically imprudent, to try to define a church statutorily. It is true that Congress has delegated the rulemaking for the enforcement of the IRC to the Treasury

\begin{itemize}
\item \textsuperscript{165} MERTENS, supra note 37, § 34:16.
\item \textsuperscript{166} See Treas. Reg. § 1.170A-9(b) (as amended in 2011).
\item \textsuperscript{167} U.S. CONST. amend. I.
\item \textsuperscript{168} MERTENS, supra note 37, § 34:16.
\item \textsuperscript{169} U.S. CONST. art. I, § 8, cl. 1.
\item \textsuperscript{170} U.S. CONST. art. I, § 8, cl. 18.
\item \textsuperscript{171} See, e.g., I.R.C. §§ 2, 351(g)(3), 1221 (2012).
\end{itemize}
Department, but if the statute itself fails to provide any direction or guidance, Congress should recognize the shortcomings in the statute and work to remedy the situation.

3. Judicial Branch

As fundamental as the actions encouraged by both Congress and the Treasury Department sound, any action by either branch of government seems unlikely. Congressional approval has sunk to a new low and one can hardly contemplate a more politically unpopular issue than trying to define a church. In the same vein, the Executive Branch is likewise not insulated from political pressures and will unlikely act going forward. However, given the current economic challenges facing both the United States and global economies, it is plausible that some action on the definition could be taken as part of a broader effort to overhaul or even eliminate charitable deductions. Considering, however, the history of inaction by both the Legislative and Executive Branches, nothing in the political forecast seems to point to any imminent change.

Thus, the judiciary is left holding the bag and must grapple with not only applying, but creating a definition of a church. Given the pragmatic reality of the situation, the answer to the question—is the judiciary best suited to define a church—changes. The answer to the question is now, yes, the judiciary is best suited for the job. This designation is not the result of what our Founding Fathers seemed to envision when they drafted the Constitution, but is nonetheless the reality handed to the courts. Congress passed a law giving tax benefits to churches. The Treasury Department has failed to draft regulations providing definitional guidance. Thus, when disputes arise between organizations claiming church status and the government, the courts are the only ones standing. The courts cannot enjoin Congress or the Treasury Department to craft the definition, so courts must define a church to apply the law.

Lest any confusion arise, the advocacy for the judicial branch to create and apply a definition of a church for tax purposes is not intended as advocacy for judicial activism in this, or any other situation. As noted, the other branches of government have both the right and

opportunity to address the issue, but have failed to do so. Given the reality of the situation, courts should continue to do what courts have done—grapple with the definition of a “church”—and fulfill their commission “to say what the law is.”

B. AN UNCERTAIN PAST

Given that courts must continue to press forward toward definitional clarity in the wake of statutory and regulatory inaction, the question remains as to what test courts should employ when trying to define a church. Though the case law surrounding this issue goes back a number of decades, the definitional ambiguity of what a church is persists even after the most recent case—Foundation of Human Understanding v. United States.175

The ambiguity is not the result of a singular factor. Rather, it is the result of multiple factors working together. One obvious factor is a lack of binding precedent. The United States Supreme Court has not ruled on the issue and not all the federal circuits have addressed the issue. Unlike many contentious issues, this is not one where a clear “circuit split” exists. Rather, various federal district and appellate courts have addressed the issue over the last several decades without any clear relationship between the rulings. The issue is one of federal law, so the lack of a clear picture of the landscape in the Second Circuit versus the Sixth Circuit versus the Eighth Circuit breeds obvious uncertainty among churches.

Another important factor is that courts have failed to outline clear standards for determining what a church is in their decisions. For example, one unfamiliar with the challenge of defining a church and the attendant issues may feel like he or she has a general grasp of the topic after reading the Foundation cases, but one is still left to wonder what the “associational test” is after a reading of the opinion. The United States Court of Appeals for the Federal Circuit cites the popular Chapman v. Commissioner176 concurring opinion and its progeny, that bringing people together is the principal means by which a church accomplishes its purpose.177 The court also states when it recounts the history at the trial level, that the trial court applied the associational test, “which defines a church as an organization that includes a body of believers who assemble regularly for communal wor-

174. Marbury v. Madison, 5 U.S. 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret the rule.”).
175. 614 F.3d 1383 (Fed. Cir. 2010), cert. denied, 131 S. Ct. 1676 (2011).
176. 48 T.C. 358 (1967).
ship."178 This test seems straightforward enough, but the court fails to explicitly state the test it is using and to point out a very important point that adds to the confusion—the trial court was the first court to use the term "associational test."179

True, previous decisions by other courts had discussed the need for churches to provide an associational role to their congregants, but no previous court had called it an associational test. By simply referring to their approach as the associational test, the circuit court does not accurately portray the tensions that each preceding court dealt with, and it oversimplifies those courts' generally unclear holdings. While it is true that many courts have cited the reasoning and even the language behind the test with authority, by failing to acknowledge that it was adopting a specific test for determining church status and giving a clear statement as to what that test is, the court in *Foundation of Human Understanding* needlessly confuses the reader searching for direction in the church status area.

C. A CLEAR WAY FORWARD

While courts cannot compel Congress or the Treasury Department to action, or determine which cases are brought before them, they can provide greater clarity as to what the definition of a church is in their judicial decisions. Adopting a clear standard that both courts and organizations can consistently use is important in this arena, because as "in most matters it is more important that the applicable rule of law be settled than that it be settled right."180 The uncertainty, though the judiciary should not shoulder the blame for it, can be settled by the courts and help organizations that Congress has granted favor to better navigate the waters of the IRC. This assertion that a clear rule is needed to alleviate confusion is a penetrating glimpse into the obvious. The more probing question is what that test should be.

On one level, it does not matter what the test is if Justice Brandeis' words are to be believed. All that is needed is settled law. Applying to the issue at hand, that assertion is persuasive as the various tests employed by courts over the years have much overlap and similarity. However, in order to come to settled law, absent drawing from a hat or throwing darts at a board, some additional intellectual inquiry is needed. In undertaking that additional inquiry, the words of

178. *Foundation of Human Understanding*, 614 F.3d at 1387.
every mother ring true, “if you’re going to do something, you should do it right.”

Though the analysis is needlessly confusing, the right answer is found within the pages of the Foundation of Human Understanding v. United States\textsuperscript{181} decision. In summarizing the trial court’s application of what it terms the “associational test,”\textsuperscript{182} the United States Court of Appeals for the Federal Circuit stated that the test “defines a church as an organization that includes a body of believers who assemble regularly for communal worship.”\textsuperscript{183} This statement represents something that has been lacking in the church definition case law—a clear, plain statement of a test to be applied.\textsuperscript{184} Thus, courts should adopt this associational test, as summarized by the Federal Circuit, as the definition of a church for three reasons.

First, the associational test is flexible in its ability to recognize the fluidity and diversity of American religions. The test distinguishes between religious organizations and churches at an organizational level, in that it relates to the structure and function of different types of religious organizations. Such organizational distinctions are a necessary and sound way to distinguish between organizations, because a distinction based on the content of religious belief would be unconstitutional.\textsuperscript{185} Contrast that with the fourteen criteria employed by many courts that focus more squarely on traditional concepts of churches and are arguably outdated and unconstitutional.\textsuperscript{186}

A second, related point is that the associational test distinguishes between churches and religious organizations based on the means by which an organization accomplishes its objectives. This principle may seem like an arbitrary and subjective one to base an argument that the associational test should be adopted, but it is one point amidst the varying approaches and tests utilized that courts seemed to have latched onto with some consensus.\textsuperscript{187} This point of differentiation is logical given the aforementioned inability to distinguish between a church and religious organization based on the content, coupled with fact that a \textit{bona fide} religious organization will have a similar relig-

\textsuperscript{181} 614 F.3d 1383 (Fed. Cir. 2010), \textit{cert. denied}, 131 S. Ct. 1676 (2011).

\textsuperscript{182} See supra Part IV.A (noting that the term “associational test” is first used by the circuit court).

\textsuperscript{183} Found. of Human Understanding v. United States, 614 F.3d 1383, 1387 (Fed. Cir. 2010), \textit{cert. denied}, 131 S. Ct. 1676 (2011).

\textsuperscript{184} The trouble with the Federal Circuit’s opinion in the Foundation case is its delivery, not the substance of what it tries to deliver.

\textsuperscript{185} Whelan, \textit{supra} note 11, at 885.


\textsuperscript{187} Found. of Human Understanding, 614 F.3d at 1388; see supra Part IV.A (discussing Judge Tannenwald’s concurrence in Chapman v. Comm’r, 48 T.C. 358 (1967)).
ious end to that of a church. Thus, the means by which the religious end is reached necessarily must distinguish the two types of organizations. The associational test provides courts a clear way to distinguish between organizations based on the means, namely assembly together for communal worship, employed to accomplish its religious end.

Third, the associational test is a simple, straightforward test. While this factor alone would not carry the day, when coupled with the other reasons, it bolsters the argument that the associational test should be utilized over other approaches, such as the fourteen criteria approach. Keeping in mind that the objective of having a clear definition of a church for tax purposes is to distinguish between a church and a religious organization, the associational test provides a way to accomplish that objective; Occam's razor cuts in favor of choosing the simpler approach.

At first blush, such a simplistic test seems ripe for abuse, but one must remember that the distinction to be made is between a bona fide religious organization that has already achieved section 501(c)(3) status and a church entitled to the additional benefits under the IRC. If an organization is a sham religion or church, then it will fail the threshold organizational and operational tests of section 501(c)(3), and the determination of whether it receives the favored church status will never become an issue. On multiple occasions, courts have held that an organization seeking church status failed the threshold criteria of being a 501(c)(3) organization, thus the courts did not need to reach the church issue. Ironically, though the Treasury Department has not offered guidance on what constitutes a church, it has not shied away from defining a religious organization under section 501(c)(3). Thus the associational test is no more subject to abuse than any definition that could be crafted.

D. THE ASSOCIATIONAL TEST ENCOMPASSES ELECTRONIC MINISTRIES

Finding a utilitarian definition of a church, the final question remains: should the associational test include electronic ministries or organizations that connect their members solely by electronic means?

Given the technology available in the world today, it does not take a large stretch of the imagination to envision an organization conducting a completely virtual service. Multinational corporations con-
nect their employees by videoconferencing capabilities and anyone with a Google account can create a “hangout” with multiple friends. In both examples, individuals carry on face-to-face communication in a similar manner as they would in person. The end product of their conversations would likely be the same, the difference being the means that connects them.192

Utilizing that same technology to replicate the “real thing,” a church could form that would allow its members or congregants the opportunity to connect and participate in communal worship, which is the issue at the heart of courts’ concerns and is addressed by the associational test. The word commune means to “share one’s intimate thoughts or feelings with (someone or something), especially when the exchange is on a spiritual level.”193 While communing with more than one person may not have been possible ten or twenty years ago without being physically present, barriers have been broken down and will continue to fall that limit the way that we interact with one another. Knowing that such advances will only become more sophisticated and make communication more effective, courts, in applying the associational test should not preclude organizations that meet the objectives of the associational test—interaction, connection, and communion—because they do so solely by electronic means.

Though the details of the structure of an electronic ministry could vary greatly, virtually any brick and mortar church structure could be replicated from a high level in electronic form. Of course the partaking of ordinances, sacraments, communion, baptisms and so forth would be difficult or impossible to do online,194 but an electronic church could still provide that basic foundation of interaction that sets a church apart from a religious organization.195

In many ways, given the world’s affinity for social networking and connecting online, one can imagine the congregants of a virtual church potentially being more connected to each other than in a “traditional” church. However, one must not be careful not to confuse the association required by the associational test with connectedness. The level of connectedness should not be the measure of whether an organization fulfills its mission as a church. Courts cannot force people to interact with each other in an electronic church any more than they can

192. The psychological benefits or detriments of in-person versus technological communication are outside of the scope of this Article.
194. Depending on the religious tenets of the organization and whether a person can administer those religious acts themselves.
195. Though a religious paper would greatly differ as to the benefits provided by physical communion and worship, this discussion is focused solely on defining a church for tax purposes.
in a 14,000 person mega church or the twenty-five member neighborhood church. The most important thing that a church must provide in its communal worship is the opportunity for individuals to interact and connect with one another, differentiating them from more general religious organizations that broadcast to a wide audience and provide no means to identify and commune with fellow believers or followers.

A close reading of the *Foundation of Human Understanding v. United States* 196 case shows that the idea of an electronic church, which initially seems to be looked at with disfavor, may have passed muster given different facts. At a minimum, neither court gave a blanket condemnation of electronic ministries. At the trial level, the court determined that the radio and internet broadcasts the *Foundation of Human Understanding* (the “Foundation”) disseminated lacked the associational aspects of religious services and were insufficient to help the organization qualify as a church. 197 The appellate court likewise determined that the Foundation’s electronic ministry failed the associational test because it did not provide the opportunity for individual congregants to interact and associate with each other. 198 In both instances, the courts did not seem to be concerned with the electronic nature of the ministries. Rather, the courts were concerned that the ministries failed to connect individuals; that is, the means were not those of a church.

The idea of a completely virtual church may raise eyebrows for fear of tax abuse. However, the same principles apply that were discussed when talking about the associational test. 199 If an organization is a sham and is created for the inurement of an individual or individuals, or if it is not organized for a non-exempt purpose, then it will fail the initial section 501(c)(3) 200 test and the court would never have to reach the issue of whether the organization is a church. Thus, an online church provides no more potential for tax abuse than does any other type of church. It may be easier to set-up an online church, but that does not diminish the fact that if an organization fails the requirements to be considered a section 501(c)(3) organization, it cannot be a church.

While an electronic church should be allowed under an application of the associational test, some public policy concerns also push in

199. See *supra* Part IV.C.
favor of allowing a new form of church. For example, allowing religious organizations that connect solely through electronic means to be considered churches gives organizations the opportunity to help people connect with one another who otherwise may not be able to attend a traditional church. A church that held its services online and gave its members the opportunity to associate—whether in person or online—could reach and minister to individuals who are homebound with physical or emotional disabilities or other limiting factors. Such a church would undoubtedly have skeptics, doubters, and detractors, but what church is devoid of those? The issue is that if a church fulfills the associational requirement, then its electronic nature should not diminish its viability as a church.

VI. CONCLUSION

Congress, the Treasury Department, and courts have been hesitant to articulate a definitive definition of a church, leading to much confusion by all parties involved as to the requirements to attain church status. Though its opinion is not a model of clarity, the associational test used by the United States Court of Appeals for the Federal Circuit in Foundation of Human Understanding v. United States201 presents a simple way to distinguish between a church and a religious organization. Such a test is not, and should not be, limited to traditional definitions of a church. Technological advances allow people to connect and associate in ways undreamed of forty years ago. Forty years ago, one could not associate with fellow church members without entering a structure known as a church. But times have changed, and so should our understanding of a church.

201. 614 F.3d 1383 (Fed. Cir. 2010), cert. denied, 131 S. Ct. 1676 (2011).