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**RELIGION IN THE UNITED STATES TAX CODE:
DEFINING RELIGION IN THE AGE OF THE INTERNET**

Michael Degnan

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Courts have had little success in defining what constitutes a “church” for tax purpose. One issue that has arisen in recent case law is the relationship between electronic media and religion. Can a “virtual” community of believers fulfilling its religious purposes via the internet be considered a church for tax purposes? Must the congregation occupy a physical space in order to be considered a “church,” as is currently the case? And how would a change in the legal understanding away from a church as a physical community to churches as a virtual community affect the tax system? Churches benefit greatly from the filing exemption and from the severe limitation on audits of churches.

What is a “church” according to the government? While they have been struggling to find a precise definition, several blueprints and tests have been created, or adopted by the courts; recently many courts have been settling on sorting organizations by looking at a single criterion, which is whether or not there was an intentional coming together to establish a community or “congregation.” But some courts have also said that this community should have a physical location in real space, although few courts have reached this specific issue.¹ This paper will examine whether this criterion comports with modern day notions of community, which are still developing as we come to grips with our increased interconnectedness.

The courts have long struggled to define “religion” and “church”. This paper will discuss the evolution in how the courts have traditionally defined these concepts and the implications for religious organizations. Formulating clear, all-encompassing definitions for these amorphous

¹Chapman v. C.I.R., 48 T.C. 358, 459 (1967). Many courts have cited Judge Tannenwald’s concurring opinion in Chapman, where the Associational Test originated, which states that the associational aspect “may not be accomplished in physical solitude.”

concepts is difficult and few have gone as far as the Internal Revenue Service and the judiciary in this area. Religion often falls into the “I know it when I see it” category. Congress has never defined what the term “church” actually means and courts have struggled to find something approaching a bright line rule, or at the very least some guideline. This is a difficult challenge considering the diversity of religious beliefs, both traditional and modern.

This paper will discuss these issues in the context of the United States tax code. The First Amendment to the United States Constitution, which provides for the free exercise of religion and prohibits the establishment of religion, restrains the government in its interactions with religion. Over the years the courts have developed an expansive understanding of what constitutes a religious belief for the purposes of the First Amendment, abandoning the more traditional approach where religious beliefs are defined by membership in an organized faith to one which looks at the beliefs of the individual.

Courts have had less success in defining what constitutes a “church” for tax purpose. Recently, courts have begun adopting the Associational Test, saying that whatever else a church might be it must be a community with organized activities.² One issue that has arisen in recent case law is the relationship between electronic media and religion. Should a church fulfilling its religious purposes via the internet be considered a church for tax purposes? And how would a change away from the legal understanding of a church as a physical community to a virtual community affect the tax system?

² In Foundation of Human Understanding v. U.S., 88 Fed. Cl. 203 (2009) the court states that the definition of church must include “a coherent group of individuals and families that join together to accomplish the religious purposes of mutually held beliefs. In other words, 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.”(Citing Church of Eternal Life and Liberty v. Commissioner of Internal Revenue, 86 T.C. 916 (1986); Chapman v. C.I.R., 48 T.C. 358, 459 (1967)).

Section I will discuss the terms “church” and “religious organization” in legislation. Section II will discuss the definition of religion and what beliefs are considered “religious,” under the First Amendment. Section III will discuss the requirements that an “organized” religion must satisfy in order to receive tax-exempt status. Sections IV, V, and VI will discuss the definition of “church,” and its implications for televangelists and the emerging area of “virtual ministries.” Section VII will discuss the application of the First Amendment to modern religious practices.

I. RELIGION IN THE TAX CODE

For purposes of the U.S. Tax code Congress has distinguished two tax exempt religious entities: “Churches” and “Religious Organizations.”³ The question is what criteria should be used to determine whether an entity falls within the category of “church” or “religious organization”. Congress has not provided any legislation that specifically addresses this issue. The Courts have found that the term religious organization is meant to be less restrictive than “church”⁴. However, what it is beyond this has yet to be definitively settled. In the 1970’s the courts began to adopt a set of criteria, which had been adopted by the IRS in making their determination as to whether a religious organization qualifies as a “church.”⁵

Recently, courts have begun adopting what is known as the Associational Test, which notes that whatever else a church might be, it must be a community with organized activities. One issue that has arisen in recent case law is the relationship between electronic media and religion. Should a church fulfilling its religious purposes via the Internet be considered a church for tax purposes? And, how would such a change affect the tax code?

³ 26 U.S. Code § 170; 26 U.S. Code § 501.

⁴ Church of Spiritual Technology v. U.S., 26 Cl Cr 713 (1992) (Citing Parshall Christian Order v. Commissioner, 45 T.C.M. (CCH) 488, 491 (1983)).

⁵ 26 U.S.C. 7611 (h) - Restrictions on church tax inquiries and examinations; W. Cole Durham & Robert Smith, Religious Organizations and the Law §17:4 (2013).

While both “religious organizations” and “churches” are tax-exempt organizations, there are additional benefits to being classified as a “church.”⁶ An individual may deduct up to 50% of their adjusted gross income if the contribution is to “a church or a convention or association of churches.” This also applies to 501(c)(3) religious organization only after they register their status with the government.⁷ A “church” can be created without an IRS determination of this status. There are only two instances where the IRS may conduct an audit of a church: to determine whether its tax exempt status should be revoked and to determine whether the church has underpaid unrelated business tax on its regularly conducted non exempt activities.⁸ A church is not required to file any documents with the IRS as a matter of course; Religious Organizations must file form 990, if their income normally exceeds \$ 50,000 and there are fewer restrictions on when and under what circumstances an audit is warranted.⁹

II. THE FIRST AMENDMENT

Since Congress has not provided a definition of what constitutes a church, and given the financial advantages such recognition, it is largely left to the IRS and the Federal judiciary to categorize these various religious entities. The first item that must be addressed is what criteria the IRS may never review when analyzing a religious entity: it cannot examine the “truth” of an organization’s creed or theology.

In United States v. Ballard¹⁰, the Supreme Court addressed the issue of what questions are relevant when the subject is religious belief. In that case a number of the tenets of the “I AM” movement were scrutinized. Justice William Douglas wrote that certain questions as to truth or

⁶ In the tax code a religious organization is tax exempt, under 501(c) (3).

⁷ Id.

⁸ 26 U.S.C. 7611 (h) - Restrictions on church tax inquiries and examinations; W. Cole Durham & Robert Smith, Religious Organizations and the Law § 17:4 (2013).

⁹ <https://www.irs.gov/Charities-&-Non-Profits/Churches-&-Religious-Organizations>

¹⁰ 322 U.S. 78 (1944).

falsity of a belief should be excluded from the jury. He noted that there is a risk that these inquires can be made of any religious group, not only the minor new religious movement involved in this case. He concluded that theological questions are a forbidden domain for the courts. For example, the IRS or the Courts will not look into whether the Trinitarian formulation of God is correct or the sacramental rites of a particular group. However, the Court may examine the sincerity of the belief. ¹¹

A.WHAT IS “RELIGION”?

One rather obvious criterion for defining a tax-exempt religious organization, either a “church” or a “religious organization,” is that it must be religious. But what does this mean for the purposes of the law? This question arises in a host of first amendment jurisprudence, in the context of both the Establishment Clause and the Free Exercise Clause, and the result is substantially the same. The line between philosophy and religion is blurred in many instances. The Courts have been confronted with the question of what is meant by religion numerous times, often pushing the definition to the breaking point, but this is what the Courts must do in a pluralistic society. For purposes of the First Amendment atheism is considered a religion, along with many philosophical and moral positions. ¹²

This categorization may seem to be a modern innovation; religion is often one of those “ I know it when I see it” situations. But the delineation of these subjects is more a matter of self-definition and a desire to neatly categorize topics, and not a reflection of the place in human society. Humanity’s place in the cosmos and the nature and purpose of existence may be as old as sentience itself and religion is one of oldest institutions. This being the case, it is important to begin with a discussion of religion in the context of anthropology and sociology. Congress and the Courts

¹¹ Id. at 86-7.

¹² Kaufman v. McCaughtry, 419 F.3d 678, 681 (7th Cir. 2005).

are of much later derivation than religion and or philosophy, and being human, they often began with what was categorized under religion in the West. Later the Courts began to confront the issue of what religion really is; often they had to look past the institution of religion to and into the human condition. It then became not about an individuals place in religion and religions place in society, but rather religion's place in the individual's life.

Congress continued to recognize "religion" as distinct from "philosophy", or secular morality, which is seen in many conscientious objector cases from the Vietnam War era.¹³ In interpreting the federal statute, the Supreme Court rejected this distinction and allowed philosophical positions that occupied a position in a person's life that was parallel to the position occupied by God in a traditional religious person's life.¹⁴

To illustrate the question asked of the Courts in these cases it is helpful to look at the early history of the world's largest religion Christianity. At first glance one may say that Plato and Plotinus is philosophy, and Christianity is religion, but both deal with the ultimate question. In fact ancient Greek philosophers, amongst others, have had a profound impact on the Abrahamic religions. In Platonism the universe derives from a created of sorts, there is the Monad from which everything derives, the material world is largely evil and there are emanations from the divine. In the New Testament the Greek word "Logos" the word of God, is identified with Jesus Christ; but the term itself originates in Classical Philosophy and such a conception is absent in pre-Hellenistic Jewish thought. Many of the early Christian sects, referred to as "Gnostics", can be seen as primarily Greek philosophy with a Christian Patina.¹⁵

¹³ Welsh v. United States, 398 U.S. 333, 340 (1970); United States v. Seeger, 380 U.S. 163 (1965). Both case revolved on an issue of statutory interpretation (Congress allowed for conscientious objectors who based their decision on a strongly held religious belief; the statute specifically mentioned that "philosophical" or "moral" beliefs are not an acceptable basis to claim conscientious objector status).

¹⁴ Id.

¹⁵ Marian Hillar, FROM LOGOS TO TRINITY: THE EVOLUTION OF RELIGIOUS BELIEFS FROM PYTHAGORAS TO TERTULLIAN (2012).

The question of how to differentiate Religion from Philosophy may ultimately arise from revelation. One could say that God reveals religion to man often through prophets, while on the other hand philosophy derives from human reason. But even this definition ultimately fails when one considers south and East Asian religions, one example being Buddhism, which requires no belief in a Supreme Being (s). The presence of certain rituals may also be a popular criteria, but this raises the question of what kind of ritual and for what purpose, veneration of ancestors often takes on ritual significance even though it doesn't touch upon that ultimate question, and some groups that we would immediately recognize as "religions" such as Quakers have renounced any form of ritual. ¹⁶

Ultimately, we get a glimpse of what question must have been dwelling on the mind of the Courts. It is a question without an answer, "What is Religion?" In United States v. Seeger,¹⁷ the Court had to address whether or not Mr. Seeger would receive conscientious objector status. At the time the law allowed individuals to claim such status based on their religious beliefs, but not on philosophical or secular moral grounds. The Court ultimately found that his beliefs were religious in nature, even though he did not claim a belief in a personal god; he only acknowledged the existence of what could be described as a "prime mover". In his majority opinion in the case of Torasco v. Watkins,¹⁸ Justice Black included a footnote where he noted many religions in "this country" do not teach a belief in God, he then listed a few examples, but the most interesting is the inclusion of secular humanism among them. Humanists focus on the human reason and ethics, not on any divine force; in fact secular humanists seem to pride themselves on the philosophical, rather than transcendent, origins of their beliefs.

¹⁶ VICTORIA Harrison, The Pragmatics of Defining Religion in a Multi-Cultural World, THE INTERNATIONAL JOURNAL FOR PHILOSOPHY OF RELIGION 59, 133-152 (2006).

¹⁷ 380 U.S. at 184-88 (1965).

¹⁸ 367 U.S. 488, 492 (1961).

In later cases the Courts came to acknowledge that no belief in a higher power was necessary to qualify as a religion for purposes of the First Amendment. In Kaufman v. McCaughtry,¹⁹ the Court of Appeals of the 7th Circuit, had to determine whether or not Atheism is a religion in the context of the free exercise clause. It acknowledged that a belief in a Supreme Being(s) is not required and that both atheism and theistic religion assert an answer to the ultimate question.²⁰ If a person's sincerely held beliefs occupy a position parallel to that of God in traditional religious persons, then it will be recognized as a "religion" for the specialized purposes of the First Amendment.²¹ For First Amendment purposes the Court recognizes what is traditionally termed religion, and similarly situated non-religious beliefs practices. As the Supreme Court noted in Thomas v. Review Board²², "*religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.*"

In summary, theistic or nontheistic belief system may qualify as a religion for the specialized purposes of the First Amendment. The question is whether the impact on the person parallels that of traditional religion. But of course there may be limits in some court decisions, for instance, the Supreme Court has said that religion is distinct from a "Way of life" even one inspired by philosophical beliefs or other secular concerns.²³

B.SINCERITY

The organization or individual claiming religious beliefs, must be able to demonstrate that the beliefs are sincere; the inquiry does not end simply because an individual says "god told me"

¹⁹ Kaufman v. McCaughtry, 419 F.3d 678 (7th Cir. 2005).

²⁰ "If we think of religion as taking a position on divinity, then atheism is indeed a form of religion" Id. (Citing Reed v. Great Lakes Cos., 330 F.3d 931, 934 (7th Cir. 2003)).

²¹ Citing to Fleischfresser v. Dirs. Of Sch. Dist 200, 15 F. 3d 680, 688 n. 5 (7th Cir. 1994).

²² Thomas v. Review Board of Indiana Employment SEC., 101 S. Ct. 1425; 450 U.S. 713, 714 (1981) (emphasis supplied).

²³ Wisconsin v. Yoder, 406 U.S. 205, 215-216 (1972).

or “I believe”. In United States v. Ballard,²⁴ the Supreme Court addressed the issue of what questions are relevant when the subject is religious belief. Justice William Douglas noted that courts are not entitled to examine the veracity of the belief. However, the court is not precluded from inquiring into the sincerity of the belief.

This issue has often arisen in the context of prison, where an inmate may claim to have had a religious conversion, and makes commensurate demands for special accommodations.²⁵ The person claiming such beliefs may be asked to elaborate upon their place in his life, and the philosophy underlying them. Based on his answers the Court may then decide whether there beliefs are sincere.

C. THE TEXT OF THE FIRST AMENDMENT

The First Amendment contains two doctrines pertaining to religion.²⁶ The Establishment Clause prohibits the government from establishing a religion and from discriminating among religions, without a legitimate secular purpose. The Free Exercise Clause prohibits the government from interfering with an individual’s religious beliefs; however the government may regulate religious practices if there is a compelling interest, or if the law is neutral and generally applicable. In the present case the IRS is bound by the principles laid down in the First Amendment; they must treat all religions equally.

1. *The Establishment Clause*

The government is prohibited from treating one religious denomination or sect differently from another without a compelling governmental interest. The government may not establish a

²⁴ United States v. Ballard, 322 U.S. 78 (1944).

²⁵ Burwell v. Hobby Lobby Stores, Inc., 573 U.S. ___, 29-30 (2014).

²⁶ “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” United States Constitution, Amendment I.

religion, and that cannot treat a particular denomination worse than another, for example by giving preferable tax treatment to one entity.

In Larson v. Valente,²⁷ the Supreme Court examined a provision which had a disproportionately negative impact on new religious movements, in that case the Unification Church, while more mainstream religions were left unaffected; specifically certain organizations had to issue a financial disclosure while others did not. The Court concluded that the rule requiring a disclosure from organizations receiving over fifty percent of their contributions from non-members violated the Establishment Clause, by disadvantaging certain religious movements. The government also cannot discriminate between religion and irreligion. In Kaufman,²⁸ the 7th Circuit Court of Appeals found that the Defendant (prison) had violated the Establishment Clause by disallowing the formation of an atheist study group, which did not apply to other, *more traditional*, religious gatherings.

In an Establishment Clause case the Court will look to the utility test outlined by the Supreme Court in Lemon v. Kurtzman.²⁹ A policy violates the Establishment Clause if it (1) has no secular purpose, (2) has a primary effect that advances or prohibits religion, or (3) fosters an excessive entanglement with religion.

2. Free Exercise Clause

Under the Free Exercise Clause a law is constitutional if it is neutral and is made generally applicable regardless of religion or the lack thereof.³⁰ If a law is not neutral or not generally

²⁷ Larson v. Valente, 102, S. Ct. 1673 (1982).

²⁸ In Kaufman v. McCaughtry, 419 F.3d 678 (7th Cir. 2005), the district court rejected the Plaintiff's claim that a prison had violated the Establishment Clause. The Plaintiff, an atheist, wanted to start a group, which would study "freedom of thought, religious beliefs, creeds, dogmas, tenets, rituals, and practices. The reasoning of the district court was that this would not be a religious group. The 7th Circuit Court of Appeals overturned the lower court's ruling, finding that the Defendant's did not have a legitimate secular reason for opposing the group, while allowing other, mostly theistic groups.

²⁹ Lemon v. Kurtzman, 403 U.S. 602 (1971).

³⁰ Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990).

applicable it will be found unconstitutional unless the government can present a compelling state interest and is narrowly tailored to advance that interest.

A law is unconstitutional under the Free Exercise Clause if the law discriminates against some, or all, religious beliefs. It also protects conduct undertaken for religious reasons. If there is a legitimate government interest in prohibiting certain conduct, the law should be facially neutral, in that it applies to all members of the community equally and that the behavior is prohibited in religious or secular contexts. A law will not stand if it is created for the purpose to restrict the practice of a certain religion.³¹

In Lukumi,³² the Court examined a number of ordinances³³ passed by the City of Hialeah, Florida; prohibiting the sacrifice of animals³⁴, which was defined as animals, which were “sacrificed” in a ritual, regardless if they were intended for consumption. The slaughter³⁵ of animals was likewise prohibited outside of designated zone.³⁶

The Supreme Court found that the ordinances were not neutral and were designed to suppress animal sacrifices, a central element of Santeria. They found that the laws were targeted at the practice of Santeria, and excluded most other animal killings. In his majority opinion Justice Kennedy outlined various other remedies, which would address the government interest in health and the prevention of cruelty to animals, without eliminating the religious practice of animal

³¹ Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).

³² Id.

³³ The first ordinance at issue is 87-40: which punishes those who unnecessarily or cruelly slaughter an animal, interpreted as applying to killing for religious reasons.

³⁴ Ordinance 87-71, 87-52: Sacrifice defined as “ to unnecessarily kill... an animal in... a ritual... not primarily for the purpose of food consumption” and prohibits the possession, sacrifice of slaughter of an animal if it is killed in “any type of ritual” and there is the intent to use it for food.

³⁵ Ordinance 87-72: defines slaughter as “ the killing of animals for food.”

³⁶ Prohibited outside of areas zoned for slaughterhouses, there is a state law carving out an exception for small numbers of hogs and/or cattle.

sacrifices. It was also found that one of the ordinances was under-inclusive.³⁷ The Court found all four of the regulations either overbroad or under-inclusive, and they were discriminatory.

III. RELIGIOUS ENTITIES AND THE IRS

In order to receive a Federal income tax exemption as a religious organization, the entity must meet three requirements: (1) it must be organized and operated exclusively for an exempt purpose;³⁸ (2) no part of the net earnings can inure to the benefit of any private shareholder or individual;³⁹ and (3) no substantial part of the activities of the organization includes carrying on propaganda, otherwise attempting to influence legislation or participating or intervening in any political campaign.⁴⁰

In cases where an organization brings an action challenging the Internal Revenue Service's determination of its status, the courts will look into the structure of a religious organization applying for tax-exempt status, and the nature and depths of its contacts with other entities. Where there is no meaningful separation between relevant organizations, the Court can at a minimum consider such information on the merits of the application for tax-exempt status.⁴¹ This issue has appeared in a number of Scientology related cases, where there is a large and complex hierarchy of churches with different responsibilities and a separate legal identity, while under the nominal control of the head church. Also, permeating this structure is an organization known as the sea org, which operates in all official Scientology corporations and functions as a sort of clergy.⁴²

³⁷ Ordinance 87-72 did not regulate the non religious slaughter of food in a similar manner.

³⁸ In this context a religious purpose. 26 U.S.C.A. § 501 (c)(3).

³⁹ 26 U.S.C.A. § 501(c)(3).

⁴⁰ Christian Echoes National Ministry, Inc. v. US, 470 F.2d 849 (1972); 26 U.S.C.A. § 501(a).

⁴¹ Church of Spiritual Technology v. US, 26 Cl. Ct. 713, 731 (1992).

⁴² Id.

A. Exempt Purpose

The organization in question has the burden to show that it operates exclusively for tax-exempt purposes. An organization may have a tax-exempt purpose, but that does not necessarily mean that the organization doesn't also have a purpose or activity which is non-exempt. Any substantial non-exempt purpose will preclude an organization from federal income tax exemption.

43

In Church of Spiritual Technology v. U.S. the Court found that CST had failed to show that it was operated for a tax-exempt purpose. CST's primary purpose was to archive and preserve the works of L. Ron Hubbard. The Court found that such an activity is not inherently exempt. The Court then reiterated that "the operational test focuses on the purpose and not on the nature of the activity"⁴⁴ and the inquiry focus on whether the primary purpose solely for a non-exempt purpose. The Court found that the primary purpose of CST was tax planning, since it would control the trademark and publishing rights to the works of L. Ron Hubbard. The Court found that the Commissioners decision was not clearly erroneous.⁴⁵

B. Inurement

In order to receive and maintain tax-exempt status, an organization's income must not be used to inure to the benefit of a private individual.⁴⁶ This criterion is closely related to sincerity, so the Court will examine the organizational structure of the church to determine if its primary reason for existing is to benefit an individual or small group.

⁴³ Id. at 730.

⁴⁴ Id. (Quoting Goldsboro Art League v. Commissioner, 75 T.C. 337, 343 (1980)).

⁴⁵ Id.

⁴⁶ Bubbling Well Church of Universal Love v. C.I.R., 670 F.2d 104 (1981).

If the IRS raises the issue, the organization must be able to show that salaries, and other income, paid are reasonable. In Bubbling Well Church of Universal Love v. C.I.R.,⁴⁷ the Court found that the Appellee had failed to meet its burden of showing that church income had not inured to the benefit of the Appellee. In that case the Church had a mixed record, with the Church claiming to have participated in ministry, and undertaking various religious activities. The Court noted the structure of the organization in support of the inquiry in to inurement; the Church's board of directors was three members of the same family, who were also the Church's sole employees. Inurement is suggested where an individual, or a small group, is the principle contributor and recipient of distributions, and has exclusive control of the organization's management.

III. Political Activities

In order to maintain tax-exempt status a religious organization or church must refrain from interfering in electoral politics, as well as in engaging in lobbying, as a substantial part of its activities. In Branch Ministries v. Rossetti,⁴⁸ a Church had its tax-exempt status revoked after distributing newsletters encouraging members to not vote for Bill Clinton, citing his stances on certain moral issues, which directly contravened church teachings. The IRS brought a successful action to revoke the church's tax-exempt status. The church presented several arguments, including a free exercise challenge. The Court held that the provision was viewpoint neutral because all tax exempt organizations are prohibited from any political campaigning. The Court also noted that there are other avenues available to the church for expressing its political opinions.

49

IV. DEFINING "CHURCH"

⁴⁷ Id.

⁴⁸ Branch Ministries v. Rossetti, 211 F.3d 137 (2000).

⁴⁹ The Court says that a Church may carry on political activities by incorporating a separate non-profit entity (political action committee).

As seen in the preceding section, to qualify as a “religious organization” the entity must operate for an exempt purpose, must not be allowed to inure to the benefit of a private individual, and must refrain from political campaigning. There are tax benefits to being recognized as a “church” as opposed to a “religious organization.” “Church” status further insulates an organization from the IRS; churches are rarely required to produce documentation of their finances. There are only two instances where the IRS can audit a church: (1) to determine whether its tax exempt status should be revoked; (2) and if the church has underpaid unrelated business tax on its regularly conducted non exempt activities.⁵⁰ There is also a deduction up to 50% of adjusted gross income on contributions to a church.⁵¹

The Courts have recognized that the term “church” is more restrictive than “religious organization”. But there are no separate criteria that firmly define a church. Since Congress has not provided any guidance for determining what organizations qualify as a “church” for the purpose of the charitable contributions to a “church or a convention of churches,”⁵² the Courts and the IRS have created their own tests to guide their decision, although no criteria are controlling.

The Courts have been struggling with how to define “church”. The Courts have been guided by the intent of Congress that the category of “church” is more restrictive than that of a religious organization. In some cases a particular group that does not qualify as a “church” may still qualify as a “religious organization”.

A. The De La Salle Approach

⁵⁰ 26 U.S.C. 7611 (h) - Restrictions on church tax inquiries and examinations ; W. Cole Durham & Robert Smith, Religious Organizations and the Law § 17:4 (2013).

⁵¹ 26 U.S.C.A. § 170(b)(1)(B).

⁵² 26 U.S.C.A. § 170(b)(1)(A)(i).

The approach was articulated in De La Salle Institute v. U.S.,⁵³ where the Court reasoned that since Congress has not defined the term “church,” courts must look to the “common meaning and usage of the word of the term.”⁵⁴ The case involved a Catholic religious order, which ran several schools and also operated a winery; the case analyzed the tax liability of the order on the proceeds of this operation. The order claimed that they were a “church” and should be exempt; the court found that the order was not a “church,” as that term is commonly understood. The court held that the order was not exempt from the unrelated business income tax.

This approach did little to provide an answer to the question of what a church is. Given the huge diversity among religious groups in the United States and the ever-changing religious landscape, courts had a difficult time applying this test, as there is no clear definition to be had of what constitutes a “church.”⁵⁵

Chapman v. C.I.R., was another early case, which looked to the intent of Congress, through the legislative history of the provision, and the plain meaning of the word. In that case the Chapmans made contributions to Missionary Dentist Inc., which was an organization which was created to provide for the dental health of “missionaries, religious workers, and all others in the Mission Fields of the United States and foreign countries in need of dental care, to supply dentists, dental technicians and hygienists for Missionary Boards of various denominations and for independent missionary boards.”⁵⁶ The statute exempts donations made to a “church or convention of churches.” The Chapmans claimed that Missionary Dentists Inc. is a “church” and such contributions should be exempt. The organization limited membership to members of an accredited Christian community, who have gone to an accredited dental school, and also have some

⁵³ De La Salle Institute v. U.S., 195 F. Supp. 891 (Fed. Cl. 1961).

⁵⁴ Id. at 903.

⁵⁵ American Guidance Foundation, Inc. v. United States, 490 F. Supp. 304 (Fed. Cl. 1980).

⁵⁶ Chapman v. C.I.R., 48 T.C. 358, 459 (1967).

satisfactory spiritual preparation and personal experience. All of the organization's members were trained in the bible; some of them were ordained ministers.

As in *De La Salle* the court looked to the plain meaning of the word; specifically it examined the statute on personal deductions on charitable contribution made to a "church or a convention or association of churches". The court noted that while the House version of the bill included the term "religious institutions," however the term was deleted in the Senate version, which was later passed by both houses. The Court found that Congress did not intend "church" to be used "in a generic or universal sense" and that Congress intended for it "to be synonymous with terms like denomination or sect"; the Court also noted an organization does not require church buildings or an organizational hierarchy to qualify as a Church.⁵⁷ In rejecting the argument that *Missionary Dentist, Inc.* is a church, the court focused on the fact that members or drawn from different protestant denominations and remain in full communion with those communities. Further, although the group conducts religious services, the court noted that preaching and conducting church services are only one element, which is not by itself conclusive. The court found that the organization did not qualify as a "church," noting that even though many of its members were ministers, and conducted religious services, they belonged to different denominations there would be no exclusivity of membership, as they remained in full communion with their home congregations.

B. The IRS 14 Criteria

⁵⁷ *Id.* at 363.

In 1978 the Commissioner of the IRS gave a speech which provided a list of 14 criteria to guide their decisions on defining a “church”: (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) 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.⁵⁸ The IRS and some courts have adopted the use of these criteria in their analysis. According to the IRS no single factor in the test is controlling. The IRS uses a combination of these factors and also the particular facts and circumstance of each individual case.⁵⁹

This test provides an adequate framework for analyzing the issue presented but it is still far from a bright line defining “church”. Many organizations would fail to meet all 14 criteria. Almost all religious organizations would meet criteria 1, 3, and possibly 11, but many of the criteria would not be applicable to new religious movements or many older religions outside of the Abrahamic religions. Some religions such as those in the Quaker tradition lack many of these criteria: they do not ordain ministers, there is no creed, code of doctrine or discipline, many lack established places of worship; they do not provide for the instruction of the young; and some do not require exclusive membership in the congregation. Traditional religions appear to benefit more from these criteria than some new religions, in that they have a distinct history and have had time to fully develop a literature of their own. Overall the criteria may be the closest the legal system can come to a list of criteria, encompassing at least some aspects of all in a religiously diverse landscape.

⁵⁸ <https://www.irs.gov/Charities-&-Non-Profits/Churches-&-Religious-Organizations/Churches--Defined>

⁵⁹ W. Cole Durham & Robert Smith, Religious Organizations and the Law § 17:4 (2013).

C. The Associational Test

In recent years the courts have increasingly adopted the Associational Test. In order to satisfy this test an entity must serve an associational role when engaged in its religious purpose.⁶⁰ The Associational test appears in Justice Tannenwald's concurring opinion in Chapman: the word "church" implies that an otherwise qualified organization *bring people together as the principal means* of accomplishing its purpose.⁶¹ The objects of such gatherings need not be conversion to a particular faith or segment of a faith nor the propagation of the views of a particular denomination or sect. The permissible purpose may be accomplished individually and privately in the sense that oral manifestation is not necessary, but it may not be accomplished in physical solitude. A man may, of course, pray alone, but, in such a case, though his house may be a castle, it is not a "church."⁶² "Similarly, in my opinion, an organization engaged in evangelical activity exclusively through the mails would not be a "church."⁶³

Today courts tend to use the IRS 14 criteria and the associational test, but have become more heavily reliant on the associational test. In Foundation of Human Understanding,⁶⁴ the court first analyzed the group based on the fourteen criteria and found that it met all but four: exclusivity of membership, education of youth, regular religious services, and regular congregations. The court then proceeded to the association test, which makes the congregation criteria controlling; the court ultimately found that the Foundation was not a 'church' based on this single element. The test itself overlaps to some extent with the 14 criteria, while none of the IRS criteria is dispositive; the associational test is generally taken to be the minimum requirement for a church.

⁶⁰ Foundation of Human Understanding v. U.S., 88 Fed. Cl. 203 (2009); Church of Eternal Life and Liberty v. Commissioner of Internal Revenue, 86 T.C. 916 (1986).

⁶¹ Chapman, at 367.

⁶² Id.

⁶³ Id.

⁶⁴ Foundation of Human Understanding v. U.S., 88 Fed. Cl. 203 (2009).

A church body must include a body of believers that assembles regularly to worship. The organization must also be reasonably available to the public in its activities; otherwise it will fail to fulfill the associational role.⁶⁵ According to the Court in Church of Eternal Life and Liberty, Inc. v. C.I.R.,⁶⁶ a definition of church would be a “coherent group of individuals and families that join together to accomplish the religious purposes of mutually held beliefs. Part of this associational role is openness to new members and the propagation of its beliefs.” In Eternal Life and Liberty, the organization in question had only two members since its formation in 1976. The Court notes that while a church may have only two or three members at the time of its formation, it is expected that membership number will increase over time, and the fact that the membership stayed confined to a small group suggests that they were operating the organization, for insincere reasons.

V. APPLICATION OF ASSOCIATIONAL TEST IN MEDIA MINISTRIES AND ELECTRONIC MEDIA

Courts have been reluctant to find that an organization is a “church” for tax purposes, if broadcast media and publishing are the primary means by which it disseminates information. The Associational Test requires that there be an organized congregation. The issue of whether televangelist organizations qualify as “churches” for the purpose of the tax code has been raised more recently. Churches benefit greatly from the generous personal deduction on contributions and from the severe limitation on audits of churches.

A. Media Ministries

In the past such programs and organizations would often arise out of an existing physical congregation, but in recent years many of these programs have taken place on a closed set, with

⁶⁵ American Guidance Foundation, Inc. v. U.S., 490 F. Supp. 304 (1980).

⁶⁶ Eternal Life and Liberty Inc. v. C.I.R., 86 T.C. No. 54 (1986).

only technicians⁶⁷ and perhaps a few “congregants” present. In order to be classified as a church the organizations primary means of propagation must be through a physical congregation. If the organization accomplishes its goals primarily through the use of media then it is not classified as a “church” for tax purposes.⁶⁸

In Foundation of Human Understanding v. Commissioner⁶⁹, the court had to analyze a church which had about 50-350 members at a physical congregation in Los Angeles while its media ministries would reach about 30,000; it regularly conducted services three or four times a week; maintained a school that provided religious instruction to students; purchased a ranch in Selma, Oregon for seminars and a church building in Grants Pass Oregon, where it conducted services. The Court was concerned by the size of the media ministry relative to the physical congregation. The Court nevertheless found that this did not overshadow the other indicators that the Foundation was a “church.”

B. Electronic Ministry

In 2001 the IRS and the Foundation became involved in another dispute over the Foundation’s tax-exempt status and determined that between January 1, 1998 and December 31, 2000 the organization failed to qualify as a church. In the early 1990’s the Foundation’s school had become a non-denominational Christian schools. It sold the church buildings in Los Angeles and Oregon; and its seminars at the Selma, Oregon ranch became more and more infrequent.

The Foundation challenged the IRS decision in Federal Claims Court, which upheld the IRS decision; the Foundation then brought an appeal to Federal Circuit Court of Appeals. During the years at issue the Foundation conducted 21 seminars at different locations across the United

⁶⁷ Not considered congregants for purposes of the Associational Test.

⁶⁸ Robert Louthian & Thomas Miller, *Defining ‘Church’- The Concept of a Congregation, Exempt Organizations Continuing Professional Education Technical Instruction Program* (1994).

⁶⁹ Foundation of Human Understanding v. Commissioner, 88 T.C. 1341 (1987).

States, but did not hold any regular worship services.⁷⁰ The Foundation presented several letters from individuals who claimed the Foundation as their *church*. The Court concluded that these seminars were incidental to the primary purpose of the Foundation, which was to evangelize through the use of media.

The Court then analyzed electronic ministry, which the Foundation asserted to be a “virtual congregation.” Sermons were broadcast via radio and the Internet at set times. The Court found that the evidence was lacking to show that the congregation considered this to be communal worship, even though they received the messages simultaneously. The Foundation claimed that its ministry fulfilled an associational role by way of its call-in program, which allowed participants to speak with the clergy, which were broadcast over the air and also transcribed and distributed. The Court concluded that the call-in program, like other broadcast media, failed the Associational Test.⁷¹

In my opinion the Foundation should be considered a “church” and should be entitled to the same treatment that other “churches” receive, it does vary from the norm in its methods (broadcast media); however these practices are intertwined with their religious beliefs and the government should not be determining what is a church and what isn’t on the basis of physical location. The court notes that there is no particular timetable for how often a group must meet, in this case there were several seminars, over the period in question; but the court was not persuaded. In this case the Foundation would benefit from the favorable tax treatment given to “churches;” but there is also a sociological element in that to be recognized by the government as a church, or being denied, creates an air of illegitimacy around a group and may stigmatize them.

⁷⁰ Five of the seminars were hosted at the Tall Timber Ranch in Selma, Oregon. Foundation of human Understanding, 88 Fed. Cl. 203, 231-234 (2009).

⁷¹ Id. at 231-234.

VI. SHOULD A CONGREGATION BE AN ESSENTIAL ELEMENT?

The Courts have yet to address a case in which the congregation interacts via chat rooms and message boards. The Foundation case involved facts from the period of 1998-2001, when the internet was still in its infancy; but what about an internet-based ministry in 2015? Also, how has society changed in the intervening years? The courts have placed great weight on the physical interactions of people in a congregation, but as society evolves and social media proliferates, our sense of what constitutes a community also changes. Many younger people may find an electronic ministry just as fulfilling as a physical meeting, and may prefer this. But in the Foundation's case the fact that several members declared that the Foundation was their "church," did not establish that there was the intent to belong to a community.

As one aspect of the discussion of whether a "church" exists, the associational test is useful, but some courts have made this congregational element controlling. At a minimum, the associational role is fulfilled by facilitating interactions between members of the congregation. Although courts do not specifically require a physical location it is given great weight, and a core fellowship is also given weight as attendance at religious services. Regular services are required but there is not requirement as to how frequently they should be conducted. While it provides more of a bright line rule than the IRS's 14 criteria, the Associational Test is far more restrictive; the IRS criteria contain similar elements, but like any of the other criteria it is not dispositive. As the courts have recognized in the "religion" cases, the religious landscape of the country is diverse and confusing. The courts should consider bringing the principles of Seeger and Welsh⁷² to this current issue and ask whether the organization occupies a position in the person life, parallel to that of a "church" in a person attending "traditional" services. In the Foundation's case, many

⁷² Welsh v. United States, 398 US 333, (1970); United States v. Seeger, 380 U.S. 163 (1965).

people wrote letters claiming the Foundation as *their* “church.” The landscape of organized religion can be as complex as that of belief. Many Eastern Religions have shrines and temples, which lack clergy or any form of organized worship. Some groups such as Quakers lack any type of creed, have no establish physical location, no rituals, and no ecclesiastical governance. Why should courts favor groups with a physical location, while condemning a group that meets in a virtual environment, like a chatroom?

Tannenwald’s concurring opinion in Chapman, which is the origin of the Associational Test, says “the word ‘church’ implies an otherwise qualified organization which brings people together as the principal means of accomplishing its purpose. The objects of such gatherings need not be conversion to a particular faith nor the propagation of the views of a particular denomination or sect. The permissible purpose may be accomplished individually and privately but it may not be accomplished in physical solitude.”⁷³ In Foundation of Human Understanding, the trial court, along with many other courts,⁷⁴ defined a church body as an organization, which includes a body of believers who assemble regularly for communal worship. The Court found that the Foundation “did not provide regular religious services to an established congregation” and that “the extent to which the Foundation brings people together to worship are incidental to its main function.”⁷⁵

In the Foundation’s case, the congregation interacted with clergy via telephone, which was then broadcast to listeners. A chat room or message board would be similar but could allow individual congregants the opportunities to directly communicate with one another; in the case of the radio broadcast they could raise questions and possibly respond to concerns and comments raised by another, but through the mediation of the clergy and not instantaneously. Is this any

⁷³ Chapman, 48 T.C. at 367 (1967).

⁷⁴ American Guidance Foundation, Inc. v. U.S., 490 F. Supp. 304 (D.D.C. 1980); Church of Eternal Life and Liberty v. Commissioner of Internal Revenue, 86 T.C. 916 (1986).

⁷⁵ Foundation of Human Understanding, 614 F.3d 1383, 1387 (2010).

different from most church services? A Catholic Mass or Orthodox Liturgy is a communal service but there are no real interactions between individuals, although it is a collective experience. In some ways it is similar to the Foundation's radio broadcasts, where the "congregants" absorb the message just as well through the Internet as they would in person. If the Foundation conducted its services in the same manner at a physical location, it likely would be considered a church, just as it was in the late 1980's and early 1990's. Maybe instead of proceeding with attempting to define a "church" the Courts should adopt an approach similar to the one used in defining a religion. If they identify collectively as members of a church, they should fulfill the requirement of an associational role by virtue of voluntarily join together to serve a common religious purpose.

In Foundation of Human Understanding, the Court also discusses the IRS's 14 criteria; it notes that some courts have opposed the test, believing that it favors some religious groups over others.⁷⁶ The Court shared these concerns and adopted the Associational Test, which they felt was more equal between religions. However, none of the 14 criteria in the IRS approach is controlling and it requires a combination of several of the factors along with recognition of the unique facts and circumstances in each individual case. The Associational Test on the other hand overlaps with some of the 14 criteria and becomes the central factor in what organizations qualify will qualify as churches. The Associational Test by its nature appears to favor larger and older religious movements. With so many groups taking to the Internet to evangelize, a religious group could have a fairly large following, but be spread thin geographically making regular meetings between the individual members rare. In the Foundation case the Court notes that members did meet at

⁷⁶ Id., at 1387.

seminars, which took place across the country⁷⁷, but the Court found that this did not meet the associational requirement as there was not regular services were conducted with a congregation.

However, in Foundation of Human Understanding the organization did meet several of the 14 criteria such as legal existence and a recognized creed, maintaining some form of ecclesiastical government, it has its own ministers, and a literature of its own. Before proceeding to the Associational test the court found that the foundation provided sufficient evidence to satisfy 10 criteria.⁷⁸ Since none of the 14 are controlling it would be left to the court to determine whether or not would qualify as a “church” using some combination of the 14 criteria and the facts and circumstances of this particular case. If these criteria were applied to the Missionary Dentist, Inc. case the organization would meet only a few of the criteria and the court would also look to the facts of that case including the purposes for which the organization was formed.

VII. CONSTITUTIONAL ANALYSIS: FREE EXERCISE AND THE ESTABLISHMENT CLAUSE

The Associational Test, if allowed to be controlling, conflicts with the Establishment and Free Exercise principles. In order to prevail in a constitutional challenge government would have a compelling interest in maintaining a sound tax policy. The IRS cannot monitor churches to the same extent as “religious organizations” and there are tax benefits to being classified as a church, such as claiming deductions for contributions to religious entities. There would also be social benefits to the recognition, apart from tax purposes; there is something to being recognized by the government as a “church” instead of placed in a lesser category.

⁷⁷ There were 21 seminars conducted between January 1, 1998 and December 31, 2000. Foundation of Human Understanding v. U.S., 88 Fed Cl. 203, 227 (2009).

⁷⁸ Id. at 220-32.

In Lukumi⁷⁹ the Supreme Court found that the City of Hialeah's actions had violated the Free Exercise Clause. The City had passed ordinances, which prohibited the sacrifice of animals, which is a feature of Santeria, while allowing similar behavior conducted for secular purposes and in designated zones, the purpose of the law was to suppress Santeria. A government policy must be facially neutral; it may not discriminate based on religion or the lack thereof. The government can pass a law, which is not facially neutral, but in that case they must show that there is a compelling government interest.

In the case of Electronic or Media Ministries, there may be discrimination on the basis of religious practices, for both "religious organizations" and "churches." As in Lukumi the ultimate question is how they practice their religion. If they are oriented toward Evangelism they may turn to the internet an ever-expanding market place of ideas. Also, for some groups there is no requirement for a structured church organization. Here the government has created a disincentive for some groups who have chosen to practice their faith in a certain manner, in keeping with recent societal developments. Some religious groups, such as televangelists, propagate their religious beliefs primarily through the use of media. In the case of Foundation of Human Understanding,⁸⁰ the entity in question did at one point have a 50-350 member congregation meeting in a physical location although its media ministry would regularly reach up to 30,000 individuals. While the Court recognized that a disproportionate amount of the organization's outreach was done via media, it found that this did not outweigh the other indicators that the entity was a "church". In the 1990's the Foundation lost its church and largely for this reason lost its tax-exempt status.

⁷⁹ Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993).

⁸⁰ 88 Fed Cl. 203, 227 (2009).

Some have claimed that the hybrid nature of the Foundation's internet ministry is the reason the court found lacking an associational element.⁸¹ Case law related to broadcast televangelism, they have claimed that a pure internet church would pass the association test, citing rapid technological process, and changes in human perception. They also note that chat rooms and other instantaneous communications in an open forum enhances the associational aspect, as opposed to the call-in program where the preacher is an intermediary between the caller and "congregation." They also note that the court in Foundation never specifically says that there is a physical requirement, although other courts have.

In Larson v. Valente,⁸² the Supreme Court found that a tax regulation had a disproportionate effect on small and non-traditional religions, and therefore constituted an establishment of religion. In the Foundation's case, they would lose their special tax status, which would impose a burden upon them. There is a question of whether discrimination in the tax code might lead to unfairly target certain religious groups in certain scenarios. For example a congregation that operates via Internet video and chatrooms or message boards would fail to meet the associational test requirement. This may disadvantage smaller religious groups and newly formed religions. At least in the initial formative stages a religion may lack the funds or population density to establish a physical place of worship. Some groups, even after actively disseminating its beliefs, may never reach the levels required. Established denominations would

⁸¹ Matson Cole, HERE IS THE CHURCH, WHERE IS THE STEEPLE: FOUNDATION OF HUMAN UNDERSTANDING V. UNITED STATES, 89 N.C.L. Rev. 1248 (2011).

(Citing Chapman v. C.I.R., Chapman v. C.I.R., 48 T.C. 358, 367 (1967), as a court which explicitly mentions a physical requirement where Tannenwald J. states that the associational aspect "may not be accomplished in physical solitude").

⁸² 456 U.S. 228 (1982).

be given an advantage by assigning them preferable tax treatment, over small and/or unpopular religious groups.⁸³

The Associational test's requirement that there be a "congregation" could mean that "virtual churches" cannot be tax exempt. A congregation in the sense of a group espousing the same doctrine and creeds would be logical, but requiring actual physical meetings at regular intervals may burden certain religions more than others. The Foundation did have physical meetings in the form of seminars that were conducted at various locations, but the Court determined that these intervals were not sufficient to constitute regular services. The Court also says that it has not been established that members perceived their activities to be communal in nature. This was in spite of the fact that they were a regular audience to the broadcasts, participated in seminars, and claimed to be members of the "church." By their actions they participated in a community that was formed to fulfill a religious purpose. The Foundation's activities were almost entirely devoted to the propagation of their beliefs.

Religious organizations are not static and how they choose to organize their activities should be left to their discretion. In the case of the Foundation, the fact that the school became non-denominational combined with the loss of its local church, led to the loss of its tax-exempt status; its activities were primarily conducted through broadcast media, before and after it lost its tax exempt status. The fact that a church is forced to reform itself or even if it chooses to rely on

⁸³ In general the courts have made clear that a church has no right to tax exempt status. In Hernandez v. C.I.R., 490 US 680 (1989), the court found that the petitioner's contributions to Scientology could not be deducted. The contributions were for *auditing*⁸³ in this case the church would charge a fee for this service. The petitioner argued that there was a violation of the Free Exercise Clause since people would be less likely to contribute to Scientology because there is no personal income tax deduction. The court rejected this argument since the government has an interest in a maintaining a workable tax structure and that the fee for auditing services does not have to be deductible. In that case there was a focus on the issue of the arrangements for auditing services. In Hernandez the court found that auditing was a service that was not made generally available for free or at discounted rates, the fee was required to participate in auditing, they were not seen as the equivalent of voluntary donations made to a church.

media from its inception, should not be the determining factor in a case like this. The policy supporting the Associational Test may discriminate based on how an organization chooses to practice its religion.

Today many denominations face declining membership and many local congregations have been closed. Some groups such as Baptists and Quakers, amongst others, can continue to propagate their beliefs through the Internet, with irregular physical meetings. If one of these smaller denominations chooses to utilize the Internet or media, instead of a traditional place of worship, the decision should be left to them. Much like the definition of “religion” adopted by the courts, a proper definition of “church” should be malleable and not turn on one particular circumstance.