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Here Is the Church, Where Is the Steeple: *Foundation of Human Understanding v. United States**

INTRODUCTION

Advancements in technology and communication have brought remarkable changes to the way the world interacts: the socially frustrated—exhausted by traditional dating—seek relationships online;¹ video chats replace phone calls;² and videoconferencing allows businesses to conduct meetings virtually in-person from countries apart.³ In almost every realm of Americans' personal and business lives, technology has expanded their reach and interaction beyond the boundaries of physical limitations. This Recent Development recognizes the extension of such advancements to churches by analyzing whether modern "Internet churches" could ever practically satisfy the same legal tests applied by the Internal Revenue Service ("IRS") and courts to neighborhood chapels, synagogues, and mosques.

Legally speaking, the determination of whether a religious organization qualifies as a church is most implicated by the tax code.⁴ Beyond the benefits of tax exemption granted to all qualified religious organizations,⁵ churches are granted special privileges, including limitations on their notification requirements to the IRS⁶ and greater protection against government investigation.⁷ Given the

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1. See Anne Kadet, *The Truth Behind Those Web Dating Stats*, SMARTMONEY (Jan. 12, 2011), <http://www.smartmoney.com/spending/technology/the-truth-behind-those-web-dating-stats-1294872108799/>.

2. See Stephen Lawson, *Will Videoconferencing Replace the Telephone?*, TECHWORLD (Nov. 25, 2010), http://www.techworld.com.au/article/369276/will_videoconferencing_replace_telephone_/.

3. See Alison Diana, *Executives Demand Communications Arsenal*, INFO. WEEK (Sept. 30, 2010), <http://www.informationweek.com/news/smb/network/showArticle.jhtml?articleID=227501053>.

4. See, e.g., I.R.C. § 6033(a)(3)(A) (2006) (exempting churches from filing annual returns).

5. I.R.C. § 501(a) (2006).

6. I.R.C. § 508(c)(1)(A) (2006).

7. I.R.C. § 7611 (2006) (setting stringent procedural restrictions before the IRS may conduct a tax inquiry into churches, including a reasonable belief of violations and inquiry notice to the church).

government's interest in facilitating church growth,⁸ its ability to encourage the creation of churches through tax incentives, and the potential for growth among Internet churches,⁹ legal analysis regarding the qualifications of Internet churches under tax law is a window into the evolving debate over the most traditional of institutions.

This Recent Development focuses on *Foundation of Human Understanding v. United States* ("Foundation III"),¹⁰ which offers two issues for analysis. The first is the question of which test to use in distinguishing churches from mere religious organizations under the federal tax code. In brief, prior to *Foundation III*, the associational test was carved out of fourteen criteria used by the IRS¹¹ (the "fourteen criteria test") for making its own determinations of church status.¹² The associational test emphasizes certain criteria of those fourteen, such as regular assemblies, which, taken together, test the "associational role" of churches.¹³ Although the associational test is credited to *American Guidance Foundation, Inc. v. United States*,¹⁴ that court used it merely as a threshold test, which it held the

8. See *Church of the Visible Intelligence that Governs the Universe v. United States*, 4 Cl. Ct. 55, 64 (1983) (addressing, as a reason for Congress's decision to exempt churches from private classification, Congress's belief that they would be "responsive to the needs of the public" (citing S. REP. No. 91-552, at 57 (1969), reprinted in 1969-3 C.B. 423, 461; H.R. REP. No. 91-413, pt. 1, at 19 (1969), reprinted in 1969-3 C.B. 200, 227)) (emphasis added).

9. See LIFECHURCH.TV, 2010 FINANCIAL STATEMENTS (UNAUDITED) (2010), available at <http://ext.lifechurch.tv/pdf/4q-2010-analysis.pdf> (reporting contributions in excess of \$26 million); see also Elena Larsen, *Cyberfaith: How Americans Pursue Religion Online*, in RELIGION ONLINE: FINDING FAITH ON THE INTERNET 17, 17 (Lorne L. Dawson et al. eds., 2004) ("For comparison's sake, it is interesting to note that more people have gotten religious or spiritual information online than have gambled online, used Web auction sites, traded stocks online, placed phone calls on the Internet, done online banking, or used Internet-based dating services.").

10. *Found. of Human Understanding v. United States* (*Foundation III*), 614 F.3d 1383 (Fed. Cir. 2010), cert. denied, 79 U.S.L.W. 3310 (U.S. Mar. 21, 2011) (No. 10-648). The short-form "*Foundation III*" is intended to be consistent with those names used by the appellate court. In its holding, the court referred to the decision of the U.S. Court of Federal Claims (the "Claims Court"), here on appeal, as "*Foundation II*," *Found. of Human Understanding v. United States* (*Foundation II*), 88 Fed. Cl. 203 (2009), *aff'd*, 614 F.3d 1383 (Fed. Cir. 2010), and a previous decision in 1987, holding the same foundation to be a church, as "*Foundation I*," *Found. of Human Understanding v. United States* (*Foundation I*), 88 T.C. 1341 (1987). Throughout this Recent Development, the same short-forms will be used to refer to those decisions.

11. *Am. Guidance Found., Inc. v. United States*, 490 F. Supp. 304, 306 n.2 (D.D.C. 1980) (citing Jerome Kurtz, Comm'r, IRS, Speech at PLI Seventh Biennial Conference on Tax Planning (Jan. 9, 1978), in 9 FEDERAL TAXES (P-H) ¶ 54,820 (1978)).

12. See *infra* Part I.C.

13. *Am. Guidance*, 490 F. Supp. at 306.

14. *Id.*

appellant did not satisfy.¹⁵ However, the *American Guidance* court's reliance on the associational test did not foreclose subsequent reference to the remaining criteria if an organization has satisfied the associational test.¹⁶ Among the many other criteria included in the fourteen criteria test are "a formal code of doctrine," "a membership not associated with any other church or denomination," and "established places of worship."¹⁷ The U.S. Court of Federal Claims ("Claims Court") holding in *Foundation II* voiced constitutional discomfort with the fourteen criteria test, suggesting that it might favor traditional churches, yet applied the test nonetheless.¹⁸ Ultimately, however, the court based its holding on the associational test.¹⁹ Despite echoing these same constitutional concerns with the fourteen criteria test,²⁰ the *Foundation III* court failed to issue a ruling on the test's constitutionality, instead determining that the associational test was, for the first time, exclusively satisfactory for determining church status.²¹ In limiting the review of church status to what had previously been a threshold test, *Foundation III* unnecessarily restricted itself from considering broader considerations offered by the fourteen criteria test, for which sufficient barriers were already in place to mitigate constitutional concerns.²²

The second issue that *Foundation III* presents was not actually before the court. In its incidental discussion of the Foundation of Human Understanding's ("FHU") call-in radio show and website (as

15. *Id.*; see also *Foundation II*, 88 Fed. Cl. at 232 ("The associational test is a 'threshold' standard which religious organizations *must* satisfy in order to obtain church status." (quoting *Church of Eternal Life & Liberty, Inc. v. Comm'r*, 86 T.C. 916, 924 (1986))) (emphasis added).

16. *Am. Guidance*, 490 F. Supp. at 307 (discussing the potential application of appellant's claim to such criteria as a "recognizable creed or formal discipline" and "independent status" even after determining that such organization failed the associational test).

17. *Id.* at 306 n.2 (citing Jerome Kurtz, Comm'r, IRS, Speech at PLI Seventh Biennial Conference on Tax Planning (Jan. 9, 1978), in 9 FEDERAL TAXES (P-H) ¶ 54,820 (1978)).

18. See *Foundation II*, 88 Fed. Cl. at 216–17 (opining that the criteria "appears to favor some forms of religious expression over others," which reaches the level of impermissible discrimination when " 'benefits granted to one religious group are denied to others of essentially the same class' " (quoting *Ecclesiastical Order of the ISM of AM, Inc. v. Comm'r*, 80 T.C. 833, 842 (1983))).

19. *Id.* at 234.

20. *Foundation III*, 614 F.3d 1383, 1388 (Fed. Cir. 2010), *cert. denied*, 79 U.S.L.W. 3310 (U.S. Mar. 21, 2011) (No. 10-648).

21. *Id.* at 1389 ("[T]he associational test is an appropriate test for determining church status under section 170 . . .").

22. See *Am. Guidance*, 490 F. Supp. at 306 (recognizing the "central importance" of certain criteria).

insufficient to satisfy the associational test) the court used the term “electronic ministry.”²³ All evidence points to the fact that what the court meant by the term was merely “broadcasting” as it pertains to traditional radio call-in shows;²⁴ however, the use of such a term nonetheless elicits interest in whether future, interactive electronic ministries could successfully achieve church status.

Part I of this Recent Development reviews the background law of churches and religious organizations, identifying the privileges given to churches under the Internal Revenue Code (“IRC”) and the guidance, or lack thereof, both Congress and the courts have offered in distinguishing between the two. In the next Part, this Recent Development reviews and analyzes the decisions in *Foundation II* and *Foundation III*, addressing their flawed constitutional concerns with the fourteen criteria test and contradictory interpretation of *American Guidance*, which ultimately resulted in the undeserved tarnishing of that test. Because *Foundation III*’s holding “substantially rel[ied]”²⁵ upon fears raised by the Claims Court’s flawed analysis of the fourteen criteria test and its application in previous cases, most importantly *American Guidance*, the majority of this Recent Development’s case analysis is spent on the Claims Court’s opinion. Additionally, this Recent Development discusses the appellate court’s determination that FHU’s electronic ministry did not satisfy the associational test. This Recent Development argues that despite using the term “electronic ministry,” the court merely meant broadcasts and thus its holding should not extend to Internet churches. Part III of this Recent Development introduces the modern creation of Internet churches through social media and argues that such organizations could potentially satisfy the associational test. This Part recognizes the unique associational aspects offered by innovative technology and the relevant policy considerations supporting a determination that such communications qualify for church status.

23. See *Foundation III*, 614 F.3d at 1391.

24. *Id.* (“The Foundation argues that it satisfied the associational test because its electronic ministry included a ‘callin’ show that enabled individuals to call and interact with the Foundation’s clergy over the telephone.”).

25. *Id.* at 1387.

I. BACKGROUND LAW

A. *Churches and Religious Organizations*

The importance of distinguishing between churches and religious organizations affects both the organization itself and its donors, and is thus most relevant to section 501²⁶ and section 170²⁷ of the IRC, respectively. While section 501 exempts the actual qualifying organization from taxation,²⁸ section 170 provides for the deductibility of contributions by donors.²⁹ Generally speaking, churches and their donors encounter less interference from the IRS.³⁰

IRC section 501(c) lists the organizations qualifying for exemption, which include “[c]orporations, and any . . . foundation, organized and operated exclusively for religious, charitable, scientific . . . or educational purposes.”³¹ Subsequent sections of the IRC, however, afford churches special privileges related to their exemption not afforded other religious organizations.³² Generally, these include exemptions from notification and filing requirements with the IRS.³³ As a result, an organization believing to be a church may merely hold itself out as one, without having to receive a determination by the IRS that it qualifies as a section 501 organization.³⁴ Further protective

26. I.R.C. § 501 (2006).

27. I.R.C. § 170 (2006).

28. § 501(a).

29. § 170(a).

30. See Wendy Gerzog Shaller, *Churches and Their Envidable Tax Status*, 51 U. PITT. L. REV. 345, 362 (1990) (noting Congress’s “general desire not to be too involved in church affairs”).

31. § 501(c)(3).

32. For a thorough review of the privileges, see NICHOLAS P. CAFARDI & JACLYN FABEAN CHERRY, *TAX EXEMPT ORGANIZATIONS* 199–200 (2003). For a review of the justification for such privileges, see Shaller, *supra* note 30, at 355–56 (noting that Congress’s “bias in favor of churches has been explained as necessary to ensure the constitutionally-required separation between church and state” and because stricter disclosure and filing requirements “were thought unnecessary to an effective administration of the tax laws”).

33. See I.R.C. § 508(c)(1)(A) (2006) (exempting churches from notification requirements that they are tax exempt organizations and non-private foundations); see also I.R.C. § 6033(a)(2)(A) (2006) (exempting churches from filing annual returns).

34. See CAFARDI & CHERRY, *supra* note 32, at 234. One requirement that must be met before a church tax inquiry may commence is that a high-level Department of the Treasury official must reasonably believe that the church is not exempt under section 501. I.R.C. § 7611(a)(2)(A) (2006). The rules allowing churches to avoid registration and filing have not gone un abused. See MARION R. FREMONT-SMITH, *GOVERNING NONPROFIT ORGANIZATIONS* 9 (2004) (noting that Congress’s restrictions on auditing churches has allowed organizations to create schemes to avoid paying taxes, allow for private inurement, and participate in political campaigns).

of churches, the IRC limits the ability of the IRS to examine and inquire into the church's practices and functions.³⁵ However, a church is not protected by privilege against criminal investigations or willful attempts to defeat or evade any tax.³⁶ Ultimately, all churches are religious organizations though not all religious organizations are churches.

IRC section 170(c) allows individual taxpayers to make an itemized deduction for "charitable contribution[s]" to a foundation "organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes."³⁷ Although a determination by the IRS that an organization qualifies under section 501 does not by rule allow contributions to that organization to be deducted by their donors, there is substantial overlap between the criteria.³⁸ Contributions to religious organizations are deductible whether they are made to "a church or a convention or association of churches"³⁹ or a non-church religious organization.⁴⁰ However, contributions to churches are deductible by up to fifty percent of the donor's adjusted gross income ("AGI"),⁴¹ while deductions for donations to non-church organizations may be more limited.⁴² Furthermore, while a donation to a registered religious organization under section 501 will be deductible,⁴³ if the recipient is a church that

35. See § 7611 (granting procedural safeguards to churches from IRS investigations); see also § 7611(i) (limiting the restraints on IRS inquiries).

36. § 7611(i).

37. I.R.C. § 170(c)(2)(B) (2006).

38. BENDER'S 2011 DICTIONARY OF 1040 DEDUCTIONS, § Schedule A, at A-31 to A-34 (2011) (summarizing tax holdings and procedures). Furthermore, the disconnect between the sections generally does not involve religious organizations. See, e.g., I.R.C. § 501(c)(6) (2006) (involving recreational clubs); § 501(c)(11) (relating to teachers' retirement fund associations); § 501(c)(12) (reviewing benevolent life insurance associations).

39. § 170(b)(1)(A)(i).

40. § 170(b)(1)(A)(vi).

41. § 170(b)(1)(A). AGI is a calculation achieved by deducting a taxpayer's enumerated adjustments from her gross income. This calculation is then used to eventually reach a taxpayer's taxable income. See *FEDERAL INCOME TAXATION* 33-34 (William A. Klein et al. eds., 15th ed. 2009).

42. If the religious organization is one that "normally receives a substantial part of its support . . . from direct or indirect contributions from the general public," it will also be afforded a fifty percent limitation. § 170(b)(1)(A)(vi). If not, the greatest allowable deduction is only thirty percent of the donor's AGI. § 170(b)(1)(B).

43. For a cumulative list of tax-exempt organizations by state, see *SOI Tax Stats—Exempt Organizations: IRS Master File Data*, IRS.GOV, <http://www.irs.gov/taxstats/charitablestats/article/0,,id=97186,00.html> (last visited Mar. 31, 2011).

has affected its privilege to not file with the IRS⁴⁴ and the donor is audited, the burden of proving that the organization is indeed a church is put upon that individual.⁴⁵

B. Congressional Guidance and The Fourteen Criteria

Unfortunately, despite providing different rules and privileges for churches, the IRC fails to define the term “church,”⁴⁶ and Congress has offered little as to its meaning.⁴⁷ Some privileges, however, offer insight into Congress’s assumptions about churches. For example, section 509 exempts churches from having to prove they are non-private because “Congress considered these exceptional organizations as inherently responsive to the public need.”⁴⁸ Generally, though, legal scholars attribute this lack of guidance to the reluctance at all levels to encroach upon religious beliefs.⁴⁹

In 1978, the commissioner of the IRS introduced a set of fourteen criteria which were to be used by the agency in its assessments of churches’ applications. These criteria include:

- (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) a complete organization of

44. For instructions regarding the application for recognition by the IRS as a tax-exempt organization, see generally INTERNAL REVENUE SERV., PUB. NO. 1828, TAX GUIDE FOR CHURCHES AND RELIGIOUS ORGANIZATIONS: BENEFITS AND RESPONSIBILITIES UNDER THE FEDERAL TAX LAW 4 (2009), available at www.irs.gov/pub/irs-pdf/p1828.pdf. Although churches are not required to file this application, the IRS may later conduct an inquiry if it reasonably believes the organization is not a church. *Id.* at 26.

45. See CAFARDI & CHERRY, *supra* note 32, at 234.

46. See David A. Pratt, *Very Serious Business: Sense and Nonsense Under Section 403(b) of the Internal Revenue Code of 1986*, 59 ALB. L. REV. 1197, 1221 (1996) (discussing the different uses of the term “church” in various sections of the IRC).

47. See generally Charles M. Whelan, “Church” in the Internal Revenue Code: The Definitional Problems, 45 FORDHAM L. REV. 885 (1977) (discussing the enormously diverse and confusing range of approved church structures in the United States).

48. Shaller, *supra* note 30, at 356 n.64 (citing H.R. REP. NO. 91-413, pt. 1, at 41 (1969), reprinted in 1969-3 C.B. 200, 227; S. REP. NO. 91-552, at 57 (1969), reprinted in 1969-3 C.B. 423, 461).

49. See John R. Wylie & Timothy G. Pfeifer, *Types of Religious Organizations: Differences from a Tax Perspective*, COLO. LAW., Nov. 1997, at 63, 63 (“This effort [to define religious organizations] is challenging even for a theologian, but the restrictions imposed on government by the Free Exercise and Establishment Clauses of the First Amendment make this task even more difficult.”). Read together, these clauses state, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof” U.S. CONST. amend. I.

ordained ministers; (8) ordained ministers selected after completing prescribed courses of study; (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.⁵⁰

The IRS conceded that the list was not exhaustive and should not be applied with any quantitative rigidity.⁵¹

C. Courts and American Guidance

Courts generally agree that Congress intended a more narrow meaning for church than religious organization.⁵² In determining what constitutes a church, several tests have evolved. Although no longer accepted as valid, the first approach to analyzing a group's claim for church status was put forth by the court in *De La Salle Institute v. United States*,⁵³ stating that Congress had intended the "common meaning and usage of the word."⁵⁴ However, that test has since been criticized for not considering the broad range of religious beliefs and practices.⁵⁵

Two years after the introduction of the fourteen criteria test, in *American Guidance Foundation, Inc. v. United States*, the U.S. District Court for the District of Columbia denied a nonprofit

50. Wylie & Pfeifer, *supra* note 49, at 63.

51. I.R.S. Gen. Couns. Mem. 38,699 (Apr. 23, 1981) ("[W]e have no objection to the publication of the criteria . . . [if it is made clear that] the list is not exclusive and some of the characteristics may be given more weight than others [and] that a fifteenth criterion be added to read 'any other facts and circumstances which may bear upon the organization's claim for church status' . . .").

52. See *Am. Guidance Found., Inc. v. United States*, 490 F. Supp. 304, 306 (D.D.C. 1980) ("Although it is settled that Congress intended a more limited concept for 'church' than for the previously identified 'religious organization,' Congress has offered virtually no guidance as to precisely what is meant."); see also *Foundation II*, 88 Fed. Cl. 203, 218 (2009), *aff'd*, 614 F.3d 1383 (Fed. Cir. 2010) ("Therefore, '[a]lthough every church may be a religious organization, not every religious organization is a church.'" (quoting *Foundation I*, 88 T.C. 1341, 1357 (1987))).

53. 195 F. Supp. 891 (N.D. Cal. 1961); see also *Lutheran Soc. Serv. of Minn. v. United States*, 758 F.2d 1283, 1287 (8th Cir. 1985) (declining to opine on the trial court's application of the *De La Salle* approach after noting that the Supreme Court had refused to either endorse or reject the approach).

54. *De La Salle*, 195 F. Supp. at 903.

55. See *Am. Guidance*, 490 F. Supp. at 306 ("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."); see also *Foundation I*, 88 T.C. 1341, 1356 (1987) ("[G]iven the plurality of religious beliefs in this country, the validity of this approach is not without doubt.").

corporation seeking a declaration that its organization qualified as a church.⁵⁶ The organization consisted of a three-person family in which both the husband and wife served as directors and, as the court found, used only a recorded telephonic message to disseminate its doctrine.⁵⁷ In its review of the fourteen criteria test, the court recognized,

While some of these are relatively minor, others, e.g. the existence of an established congregation served by an organized ministry, the provision of regular religious services and religious education for the young, and the dissemination of a doctrinal code, are of *central importance*. The means by which an avowedly religious purpose is accomplished separates a "church" from other forms of religious enterprise.⁵⁸

Immediately following, the court reemphasized those criteria it found to be of central importance and set the threshold standard for churches: "At a minimum, a church includes a body of believers or communicants that assembles regularly in order to worship. Unless the organization is reasonably available to the public in its conduct of worship, its educational instruction, and its promulgation of doctrine, it cannot fulfill this associational role."⁵⁹ Although the court did not use the term itself, subsequent holdings have referred to this threshold as the associational test.⁶⁰ It is important to note the similarities between the criteria the court found to be of central importance and the elements of the associational test, which clearly reflected nothing more than a recorded clarification.

In applying the associational test to the appellant's claim, the *American Guidance* court determined that the organization failed to meet this threshold.⁶¹ However, recognizing its own omission of several parts of the fourteen criteria test into the not-yet-coined associational test, the court went on to mention how other criteria

56. *Am. Guidance*, 490 F. Supp. at 307.

57. *Id.* at 306–07.

58. *Id.* at 306 (emphasis added) (citing *Chapman v. Comm'r*, 48 T.C. 358, 367 (1967) (Tannenwald, J., concurring)).

59. *Id.*

60. *Foundation II*, 88 Fed. Cl. 203, 232 (2009), *aff'd*, 614 F.3d 1383 (Fed. Cir. 2010) ("The Associational Test is a 'threshold' standard which religious organizations *must* satisfy in order to obtain church status." (quoting *Church of Eternal Life & Liberty, Inc. v. Comm'r*, 86 T.C. 916, 924 (1986))) (emphasis added).

61. *Am. Guidance*, 490 F. Supp. at 307 ("AGF fails to qualify under the threshold indicia of communal activity necessary for a 'church.' ").

would have been applied, had the associational test been met.⁶² Thus, the court's decision to omit those criteria from its threshold should not be read as an indication of its unwillingness to assign them any importance.⁶³

In the years following *American Guidance*, courts similarly recognized the fourteen criteria test in dicta despite not requiring its application because of various appellants' failures to satisfy the associational test.⁶⁴ Thereby, over time, the courts' use of the fourteen criteria was often described as "guidance"⁶⁵ while their determinations ultimately rested on the associational test.⁶⁶ In no case, however, did any court find the associational test to be an unconditionally sufficient test.

II. FOUNDATION OF HUMAN UNDERSTANDING

In *Foundation III*, the United States Court of Appeals for the Federal Circuit affirmed the decision by the Claims Court⁶⁷ holding that an organization that had previously received church status under section 170 of the IRC no longer met the necessary requirements to warrant such standing.⁶⁸ The Claims Court had raised constitutional

62. *Id.* ("Although the record is far from clear in establishing a recognizable creed or formal discipline, the Court does not rely on such uncertainties. The Court also need not address the matter of AGF's dubiously independent status . . .").

63. The court, of course, was not required to evaluate the organization's claim following its failure to satisfy threshold requirements. Its willingness to do so, however, suggests that if the organization *had* satisfied the threshold, the court would have had no hesitation in seeking further guidance from the fourteen criteria.

64. *See, e.g., Universal Bible Church, Inc. v. Comm'r*, 51 T.C.M. (CCH) 936, 938-39 (1986) (noting several criteria, such as the organization's lack of affiliation with other churches and distinct religious history, but ultimately recognizing the appellant's failure to meet the minimum established in *American Guidance*); *Church of the Visible Intelligence that Governs the Universe v. United States*, 4 Cl. Ct. 55, 65 (1983) ("Plaintiff has satisfied few of the 14 requirements in the IRS guidelines and fails the minimal test set out in *American Guidance Foundation*").

65. *See, e.g., Spiritual Outreach Soc'y v. Comm'r*, 927 F.2d 335, 339 (8th Cir. 1991) ("[W]e view the fourteen criteria as a guide, helpful in deciding what constitutes a church."); *Foundation I*, 88 T.C. 1341, 1358 (1987) ("Although the criteria developed by the IRS are helpful in deciding what is essentially a fact question, whether petitioner is a church, we do not adopt them as a test.").

66. *See, e.g., Church of Eternal Life & Liberty, Inc. v. Comm'r*, 86 T.C. 916, 925 (1986) ("The record fails to establish . . . any associational role for purposes of worship."). *But see Spiritual Outreach Soc'y*, 927 F.2d at 338 (reviewing the sufficiency of the criteria instead of applying the associational test).

67. *Foundation II*, 88 Fed. Cl. 203, 234 (2009), *aff'd*, 614 F.3d 1383 (Fed. Cir. 2010).

68. *Foundation III*, 614 F.3d 1383, 1386-87 (Fed. Cir. 2010), *cert. denied*, 79 U.S.L.W. 3310 (U.S. Mar. 21, 2011) (No. 10-648) (noting FHU's sale of its buildings, infrequency of meetings, and separate incorporation of its school). Founded by Roy Masters in 1961 on a philosophy emphasizing "emotional self-control" through a specific type of meditation as

concerns with the fourteen criteria test—while nonetheless applying it—before ultimately resting its decision on the appellant’s failure to satisfy the threshold associational test.⁶⁹ In affirming the Claims Court, the *Foundation III* court echoed these constitutional concerns, determining the associational test, in itself, to be sufficient in determining church status.⁷⁰

A. *Facts and Holding*

In 1987, the U.S. Tax Court, in granting “church status” to FHU, recognized that FHU owned multiple buildings for services, operated an academy for children, conducted seminars, and held regular services for 50 to 350 people.⁷¹ Subsequently, during the 1990s, FHU sold its buildings, held less frequent meetings, and lost incorporation of its school.⁷² Instead, FHU focused its efforts on a call-in radio show and website.⁷³ As a result, the IRS revoked its church status, a determination confirmed by the Claims Court.⁷⁴

In its holding, the Claims Court remarked, “[t]he [fourteen criteria test] 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.”⁷⁵ Echoing these concerns, the *Foundation III* court concluded, “the associational test is an appropriate test for determining church status under section 170.”⁷⁶

Besides extinguishing the fourteen criteria test, the *Foundation III* court recognized the Claims Court’s decision as a “thorough and carefully reasoned opinion on which [it] substantially rel[ied].”⁷⁷ In its final review of FHU’s claim under the associational test, the

the key to salvation, *Foundation I*, 88 T.C. at 1342, the IRS first declined FHU’s application for church status in 1983. *Foundation III*, 614 F.3d at 1386.

69. *Foundation II*, 88 Fed. Cl. at 217, 234.

70. *See Foundation III*, 614 F.3d at 1388–89.

71. *Foundation I*, 88 T.C. at 1347–48.

72. *Foundation III*, 614 F.3d at 1386.

73. FOUND. OF HUMAN UNDERSTANDING WORLDWIDE, <http://www.fhu.com> (last visited Mar. 31, 2011). Linked from the main page, FHU’s website offers several other pages, including “Sunday Conversations,” offering audio/visual recordings of Masters’s lectures, available with a paid subscription, and, under the “Shop” link, FHU’s catalog of products, including books, CDs, and DVDs. Other links offer visitors the ability to donate and read FHU’s newsletter.

74. *Foundation II*, 88 Fed. Cl. at 234.

75. *Id.* at 217.

76. *Foundation III*, 614 F. 3d. at 1389.

77. *Id.* at 1387.

Foundation III court agreed with the Claims Court's determination that, with respect to electronic ministry, "disseminating religious information, whether through print or broadcast media, does not fulfill the associational role required to qualify as a 'church' under section 170."⁷⁸ The *Foundation III* court further stated, "broadcast ministry does not provide individual congregants with the opportunity to interact and associate with each other in worship."⁷⁹

B. *Analysis of Foundation II*⁸⁰

The Claims Court's departure from the fourteen criteria test was based on its concern that unconstitutional discrimination would occur "if benefits granted to one religious group [were] denied to others of essentially the same class."⁸¹ The use of this test, it determined, "appears to favor some forms of religious expression over others."⁸² Unsatisfied with previous courts' attempts to mitigate such dangers through a limited application of the fourteen criteria test, the *Foundation III* court concluded that the associational test was appropriate for determining church status.⁸³ However, if the Claims Court's reasoning for abandoning the fourteen criteria test is that applying fewer of the criteria creates the same threat to the Establishment and Free Exercise Clauses as using the whole fourteen criteria test,⁸⁴ then its resort to the associational test is misplaced.⁸⁵ The associational test itself is no more than an assimilation of certain core criteria.

First, the Claims Court's sudden abhorrence for the fourteen criteria test ignores the flexible application of the test by both the IRS

78. *Id.* at 1391.

79. *Id.*

80. As mentioned above, the *Foundation III* court substantially relied on the opinion of the Claims Court. See *supra* notes 77–78 and accompanying text. It is reasonable to assume, then, that the Claims Court's logic in determining the existence of constitutional problems concerning the fourteen criteria test was the cause of the *Foundation III* court's decision ultimately to dismiss the test. As such, it is the analysis of the Claims Court that deserves review.

81. *Foundation II*, 88 Fed. Cl. 203, 216 (2009) (quoting *Ecclesiastical Order of the ISM of AM, Inc. v. Comm'r*, 80 T.C. 833, 842 (1983)), *aff'd*, 614 F.3d 1383 (Fed. Cir. 2010). Furthermore, in its most pointed language condemning the test, the court wrote, "[t]he criteria used by the IRS to determine church status . . . strongly suggest[] that [they] are time-conditioned and reflect institutional characteristics that no longer capture the variety of American religions and religious institutions in the twenty-first century." *Id.* at 217.

82. *Id.*

83. *Foundation III*, 614 F.3d at 1389.

84. *Foundation II*, 88 Fed. Cl. at 220.

85. *Foundation III*, 614 F.3d at 1388–89 (describing the overlap between the associational test and the fourteen criteria test).

and the courts. When the fourteen criteria were first introduced in 1978, Commissioner Kurtz acknowledged that their application could not and would not be applied rigidly.⁸⁶ It was understood that even long-established, traditional churches would not satisfy all of the criteria.⁸⁷ Likewise, recognizing the impossibly high bar that would be set by a rigid application of the fourteen criteria test, courts used the test as a guide⁸⁸ and dissected from it those elements they found to be of greatest importance.⁸⁹ Specifically, as mentioned above, the court in *American Guidance* recognized, “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*.”⁹⁰ It concluded that “[a]t a minimum, a church includes a body of believers or communicants that assembles regularly in order to worship. Unless the organization is reasonably available to the public in its conduct of worship, its educational instruction, and its promulgation of doctrine, it cannot fulfill this associational role.”⁹¹ This, of course, later came to be termed the associational test.

Criticizing the *American Guidance* approach, the Claims Court wrote, “it does not appear to the court that any problems resulting from a mechanical application of the fourteen factors are likely to be ameliorated by determining that a lesser number of those factors . . . are of ‘central importance.’”⁹² From this logic, it is apparent that the Claims Court distinguished between the centrally important criteria recognized by *American Guidance* and the associational test, condemning the former but adopting the latter. This interpretation of *American Guidance* is wrongfully technical, as the close similarities between the centrally important criteria and elements of the associational test illustrate. The court in *American Guidance* found the most important criteria to include: “[1] the existence of an

86. See *Church of the Visible Intelligence that Governs the Universe v. United States*, 4 Cl. Ct. 55, 64 (1983) (citing Jerome Kurtz, Comm’r, IRS, Speech at PLI Seventh Biennial Conference on Tax Planning (Jan. 9, 1978), in 9 FEDERAL TAXES (P-H) ¶ 54,820 (1978)).

87. *Foundation I*, 88 T.C. 1341, 1358 (1987) (“It is recognized that few traditional churches could meet all of the criteria.”).

88. See *supra* note 65 and accompanying text.

89. See *Spiritual Outreach Soc’y v. Comm’r*, 927 F.2d 335, 339 (8th Cir. 1991) (“We are mindful of [plaintiff’s] claim that criteria discriminate[;] . . . for this reason we have emphasized what we view as the *core requirements* of the fourteen criteria.”) (emphasis added).

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

91. *Id.*

92. *Foundation II*, 88 Fed. Cl. 203, 220 (2009), *aff’d*, 614 F.3d 1383 (Fed. Cir. 2010).

established congregation ... [2] regular religious services ... [3] religious education for the young, and the [4] dissemination of a doctrinal code.”⁹³ The associational test envelops: “[1] a body of believers or communicants that [2] assembles regularly in order to worship ... [3] is reasonably available to the public in its ... educational instruction, and [4] its promulgation of doctrine.”⁹⁴ Clearly, the associational test is an embodiment of a “lesser number of those factors.”⁹⁵

After the Claims Court based its abandonment of the fourteen criteria test on the determination that a limited application of the criteria fails to ameliorate constitutional concerns, it cannot in turn adopt the associational test. While *Foundation III* gives some lip service to the fact that the two tests overlap,⁹⁶ it inexplicably fails to further distinguish between the two tests, one that the court casts a shadow of unconstitutionality over and one that it adopts.

Likely provoked by the Claims Court’s constitutional stand, the *Foundation III* court took the final step in determining that the associational test is “an appropriate test for determining church status.”⁹⁷ Consequently, whereas *American Guidance* consulted the remaining criteria,⁹⁸ the *Foundation III* court limited its analysis entirely to those criteria which are incorporated into the associational test.

Without providing more specific grounds for abolishing reference to the fourteen criteria test,⁹⁹ a return to the *American Guidance* approach provides the most thorough analysis of any appellant’s claim. The willingness of past courts to conduct technically needless analysis under the fourteen criteria test where respective appellants had already failed the threshold test best demonstrates

93. *Am. Guidance*, 490 F. Supp. at 306.

94. *Id.*

95. *Foundation II*, 88 Fed. Cl. at 220.

96. *Foundation III*, 614 F.3d 1383, 1389 (Fed. Cir. 2010), *cert. denied*, 79 U.S.L.W. 3310 (U.S. Mar. 21, 2011) (No. 10-648) (“[W]e recognize that the associational test and the ‘14 criteria test’ substantially overlap.”).

97. *Id.*

98. *Am. Guidance*, 490 F. Supp. at 307 (discussing the elements of congregation, religious instruction, organized ministry, and others).

99. It’s important to note that the Claims Court refused to hold explicitly that the fourteen criteria test was unconstitutional. *Foundation II*, 88 Fed. Cl. at 216 (“Constitutional jurisprudence dictates that a court refrain from deciding a constitutional issue that, as in this case, is not squarely before the court.”); *id.* at 217 (“The court, therefore, regards plaintiff’s conclusory and glancing First Amendment arguments as outside the scope of this opinion.”).

their comfort in the criteria's stability.¹⁰⁰ Furthermore, because *American Guidance* includes the associational test as its initial minimum determination, the *Foundation III* court could take comfort in an approach that would equally require an emphasis on those associational aspects of an organization. Notably, given that these tests involved the same initial determination, which FHU here failed to satisfy as a threshold matter, the outcome of this case under the *American Guidance* approach would have been resolved the same way.

C. *Electronic Ministry, but Not Really*

In its review of FHU's evidence under the associational test, the *Foundation III* court noted, "[w]ith respect to its 'electronic ministry,' the Foundation asserts that its members regularly assembled to worship as a 'virtual congregation' by listening to sermons broadcast over the radio and the Internet"¹⁰¹ Although the term "electronic ministry" is not a common one, its closeness to "Internet churches" and "cyberchurches" could potentially create confusion. However, little should be read into the court's use of this term. The court most likely only used the term because it was adopting the language used in FHU's brief.¹⁰² For purposes of clarity and precision, the term "electronic ministry," here intended to describe only broadcasts, proves to be unnecessarily broad after recognizing that much more sophisticated and interactive communications, far more reciprocal than a radio call-in show, could also be categorized as such.

Evidence that the court here actually meant broadcasting when it said electronic ministry can be found in the context of its review, the cases it cites for support, and a thorough reading of the Claims Court's holding. Addressing FHU's argument that its call-in show, which the court had included among the offered electronic ministry,¹⁰³ failed to satisfy the associational test, the court noted "a call-in show, like other forms of broadcast ministry, does not provide individual congregants with the opportunity to interact and associate with each

100. See *supra* notes 64–66 and accompanying text.

101. *Foundation III*, 614 F.3d at 1391.

102. See Reply Brief of Plaintiff-Appellant at 15, *Foundation III*, 614 F.3d 1383 (No. 2009-5129) ("[T]he Trial Court failed to address the uncontroverted evidence in the record that distinguishes the Foundation's electronic ministries from mere 'broadcasting' activities."). Unfortunately, for matters of clarification, the court failed to distance itself from FHU's language by anything more than the use of quotation marks, which merely suggests the court's skepticism of its accuracy.

103. *Foundation III*, 614 F.3d at 1391

other in worship.”¹⁰⁴ Additionally, the cases cited by the court in support of this holding all involved broadcast materials.¹⁰⁵ Finally, in support of the contention that the court meant only broadcasting by the words “electronic ministry,” one can look to the language of the Claims Court, which the *Foundation III* court affirmed. The Claims Court noted that “radio and internet *broadcasts* lack critical associational aspects characteristic of religious services and are therefore instead properly regarded simply as broadcasting.”¹⁰⁶

Ultimately, the real importance of the court’s language is that it introduces the idea of electronic ministry into the discussion of churches, providing the opportunity to explore the potential for electronic religious interaction beyond the aging mediums of television and radio.

After appropriately limiting the holding of *Foundation III* with respect to broadcasts to a mere repeat of precedent,¹⁰⁷ the determination of whether other electronic ministries, enhanced by modern technological networking capabilities, could satisfy the associational test remains unresolved. In other words, whether Internet churches and online ministries that continue to develop advanced mediums for intimate off-site worship qualify as churches under the IRC—at least under the minimum threshold analysis of the associational test—is unaffected by *Foundation III*.

III. (REAL) ELECTRONIC MINISTRY

Before introducing the concept of a modern Internet church, it is necessary to clarify the applicable scope of this Recent Development’s use of the term. First, this discussion does not apply to basic Internet sites which are affiliated with established churches.¹⁰⁸

104. *Id.* (emphasis added).

105. See *id.* *Church of Eternal Life & Liberty, Inc. v. Commissioner* discussed the appellant’s newsletter, holding that it did not support his claim to church status. 86 T.C. 916, 921, 928 (1986). *First Church of In Theo v. Commissioner* held that petitioner’s writing, publishing, and distribution of literature did not support a finding of church status. 56 T.C.M. (CCH) 1045, 1046 (1989). *VIA v. Commissioner* determined that petitioner’s newsletter and possible “newshour” on television failed to establish a valid application for church status. 68 T.C.M. (CCH) 212, 217 (1994).

106. *Foundation II*, 88 Fed. Cl. 203, 232 (2009) (emphasis added), *aff’d*, 614 F.3d 1383 (Fed. Cir. 2010).

107. See *Foundation III*, 614 F.3d at 1391 (citing *VIA*, 68 T.C.M. (CCH) at 212–13, 217; *First Church of In Theo*, 56 T.C.M. (CCH) at 1045, 1050; *Church of Eternal Life & Liberty*, 86 T.C. at 921).

108. For a broader discussion distinguishing “religion online”—the provision of information by religious groups—from “online religion,” which invites Internet visitors to participate, see generally Glenn Young, *Reading and Praying Online: The Continuity of*

“Internet church” is a term broadly used to describe a variation of organizations and their websites.¹⁰⁹ This Part will attempt to narrow the term such that its appropriate and accurate use will describe an organization which passes the associational test.

If, as it will be argued here, modern Internet churches possess the capability to overcome the physical divide that distinguishes them from in-person religious services, the IRS and courts should recognize them as legal churches and provide them the same privileges as traditional houses of worship. On its face, no element of the associational test—a body of believers, regular assembly, public availability, or promulgation of doctrine¹¹⁰—prohibits such recognition. In addition to these modern institutions being legally sufficient under the associational test, there are significant incentives for the government to recognize them as churches. Not only do public policy and politicians alike favor a nondiscriminatory approach to religious practice, but the possibility of growth among these churches presents an enormous opportunity for potential revenue.

Finally, although this Recent Development does recognize aspects of various organizations that do and do not meet the necessary test, it does not attempt to offer any existing Internet church as an example that fully satisfies the test.

A. *Introduction to Internet Churches*

Religion is hardly new to the Internet.¹¹¹ Religious followers, scholars, and critics have used it to share and discuss beliefs and resources over the past thirty years.¹¹² However, the relatively recent development of social media¹¹³ offers organizations the opportunity to

Religion Online and Online Religion in Internet Christianity, in RELIGION ONLINE: FINDING FAITH ON THE INTERNET, *supra* note 9, at 93.

109. See HEIDI A. CAMPBELL, WHEN RELIGION MEETS NEW MEDIA 23–25 (Stewart M. Hoover et al. eds., 2010) (including in such description email discussion lists and popular social networking sites like Jewmango).

110. See *supra* Part II.B.

111. For a discussion of the evolution of religion and the Internet, from original bulletin boards to Facebook, see CAMPBELL, *supra* note 109, at 22–26.

112. *Id.*

113. See Andreas M. Kaplan & Michael Haenlein, *Users of the World, Unite! The Challenges and Opportunities of Social Media*, 53 BUS. HORIZONS 59, 61 (2010) (“Social Media is a group of Internet-based applications that . . . allow the creation and exchange of User Generated Content.”). It includes websites that allow users to interact by sharing pictures, music, posts, and video. See, e.g., FACEBOOK, <http://www.facebook.com> (last visited Mar. 31, 2011); TWITTER, <http://www.twitter.com> (last visited Mar. 31, 2011); YOUTUBE, <http://www.youtube.com> (last visited Mar. 31, 2011).

connect more closely with their followers.¹¹⁴ Additionally, the wide popularity of streaming video and webcams now offers ordinary home computer users the ability to watch one another in real time.

LifeChurch¹¹⁵ was one of the first organizations to expand into the interactive dimension of the Internet, offering not only broadcasted sermons to thousands of people at virtual campuses, but also an interactive website allowing followers to confess publicly.¹¹⁶ Today, LifeChurch, now better known as LifeChurch.tv, operates a website offering, among other resources, video sermons, study groups, and public discussion of the broadcasted messages.¹¹⁷ A similar experiment occurred in the United Kingdom, where the Church of Fools, supported by the Methodist Church of Britain, developed a three-dimensional online church in which congregants could control avatars¹¹⁸ who attended live services inside a virtual-reality temple.¹¹⁹ There, avatars controlled by users could sing, interact, and pray with each other.¹²⁰ Although the Church of Fools no longer provides this tool,¹²¹ it offers a colorful backdrop to the innovative ways churches are now attempting to connect with the online community.

*B. Passing the Associational Test*¹²²

Obviously, the greatest distinction between traditional churches and Internet churches, and the greatest hurdle for the latter to overcome in achieving church status, is their lack of *physical*

114. See Rachel Zoll, *Internet Believers: Pastors Open Online Churches*, HUFFINGTON POST (Nov. 2, 2009), http://www.huffingtonpost.com/2009/11/02/internet-believers-pastor_n_342479.html?view=print ("The sites are fully interactive, with a dedicated Internet pastor, live chat in an online 'lobby,' Bible study, one-on-one prayer through IM and communion.").

115. LIFECHURCH.TV, <http://www.lifechurch.tv/> (last visited Mar. 31, 2011).

116. See Neela Banerjee, *Intimate Confessions Pour Out on Church's Web Site*, N.Y. TIMES, Sept. 1, 2006, at A11, available at <http://select.nytimes.com/gst/abstract.html?res=F20D14F9355A0C728CDDA00894DE404482&showabstract=1>.

117. See LIFECHURCH.TV, *supra* note 115.

118. "Avatar" refers to an interactive representation of a human in a virtual reality environment See *A Beginner's Web Glossary*, CASE W. RES. UNIV. INFO. TECH. SERVS., <http://www.cwru.edu/help/webglossary.html> (last visited Mar. 31, 2011).

119. CAMPBELL, *supra* note 109, at 24.

120. *Id.*

121. This portion of the website was disconnected after a substantial number of participants created an avatar of Satan. *Online Church Blocks Satan Visits*, BBC NEWS (May 19, 2004), http://news.bbc.co.uk/2/hi/uk_news/3730807.stm.

122. Like the court in *Foundation III*, this Recent Development does not attempt to determine the religious sincerity of the Internet church. The discussion here merely addresses the organization's ability to satisfy the elements exclusive to the associational test.

association between congregants. Although the *Foundation III* court never used the word “physical” in its discussion of churches, other courts have used this term.¹²³

The argument against the requirement of physical association is two-fold: first, non-physical associations can equally achieve the implicit qualities that physical associations create; second, the requirement of physical proximity for worship borders the previously discussed issue of unconstitutionality by favoring traditional worship.¹²⁴

The *Foundation III* court, adopting the language of the Claims Court, qualified its holding regarding FHU’s electronic ministry by saying, “[t]here is no evidence . . . that [the Foundation’s] adherents regard their experience while listening to [the Foundation’s] broadcasts as a *shared experience* with other . . . followers, or as a *communal experience* in any way.”¹²⁵ From this language, it can be deduced that the purpose of the associational aspects of the test is to achieve shared and communal experiences. Unlike FHU’s audience, there is strong evidence that congregants of Internet churches share in their experiences.¹²⁶ Reflecting on his experience after creating the avatar-populated temple for the Church of Fools, Simon Jenkins remarked, “As the prayers started to appear on the screen . . . [e]ven though it was being done in a virtual space, and we were separated by hundreds and even thousands of miles geographically, what we were doing was authentically praying together.”¹²⁷ On a more tangible level of connection, congregants to Internet churches also are often able to

123. See, e.g., *Chapman v. Comm’r*, 48 T.C. 358, 367 (1967) (Tannenwald, J., concurring) (“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.”).

124. See discussion *supra* Part II.B.

125. *Foundation III*, 614 F.3d 1383, 1391 (Fed. Cir. 2010) (alteration in original) (emphasis added) (quoting *Foundation II*, 88 Fed. Cl. 203, 232 (2009)), *cert. denied*, 79 U.S.L.W. 3310 (U.S. Mar. 21, 2011) (No. 10-648).

126. Zoll, *supra* note 114 (“The goal is to not let people at home feel like they’re watching what’s happening, but they’re part of it. They’re participating.”); see also Christopher Helland, *Popular Religion and the World Wide Web: A Match Made in (Cyber) Heaven*, in RELIGION ONLINE: FINDING FAITH ON THE INTERNET, *supra* note 9, at 23, 31 (“[S]ome studies indicate ‘that people who connect to the Internet are more likely to use it for cultivating their social and cultural proclivities.’ . . . [F]or many people cyberspace is a real space. . . . It is becoming an environment—a place—where people can ‘be’ religious if and when they choose to be.”).

127. Simon Jenkins, *Rituals and Pixels: Experiments in Online Church*, 3 HEIDELBERG J. RELIGIONS ON INTERNET 95, 105 (2008), <http://archiv.ub.uni-heidelberg.de/volltextserver/volltexte/2008/8291/pdf/jenkins.pdf>.

exchange personal information.¹²⁸ Although there is arguably some tangible disconnect in meeting people online, researchers at Carnegie Mellon University recently observed the willingness of otherwise-strangers to share information, remarking, “One cannot help but marvel at the amount, detail, and nature of the personal information some users provide”¹²⁹ Given the opportunity for these individuals to reconnect outside of church,¹³⁰ the connections built between people through Internet churches are arguably as associational as those built in traditional churches.

Although the disappearance of space is best left to black holes and astrophysicists, the general notion that the “world is shrinking” through increased interaction is largely uncontested.¹³¹ Magnifying this idea through the lens of the Internet, one MIT professor wrote:

[I]n the near future, as the possibilities of cyberspace and the Internet are developed further, physical distances will become irrelevant for face-to-face experience: one will be connected with far-away places as if they were just outside one’s window and even be able to smell the Swiss Alps and their “(digital) manure” when on the other side of the planet.¹³²

Given the diminishing barrier of distance and space, a distinction based on such reliance now risks unconstitutionality because it would result in unequal treatment to members of the “same class.”¹³³

If it is understood, then, that the lack of *physical* proximity among congregants should not prevent Internet churches from achieving church status, it becomes necessary to distinguish those

128. Zoll, *supra* note 114 (“Thumbnails of viewers’ Facebook profiles appear during worship . . . so people can click on each others’ pages to quickly connect.”).

129. NOREEN HERZFELD, *TECHNOLOGY AND RELIGION: REMAINING HUMAN IN A CO-CREATED WORLD* 81 (2009).

130. See Lorne L. Dawson, *Religion and the Quest for Virtual Community*, in *RELIGION ONLINE: FINDING FAITH ON THE INTERNET*, *supra* note 9, at 75, 79 (citing a comparison of Internet users and nonusers showing that users are “as involved or even more involved with community and political activities [and] have wider circles of social contacts”).

131. See Karen Pärna, *Technophilia: Internet as a Vessel of Contemporary Religiosity*, in *TECHNOLOGY, TRUST, AND RELIGION: ROLES OF RELIGIONS IN CONTROVERSIES ON ECOLOGY AND THE MODIFICATION OF LIFE* 55, 64–66 (Willem B. Drees ed., 2009) (discussing the philosophical idea of the Internet causing a shrinking world).

132. *Id.* at 65 (quoting NICHOLAS NEGROPONTE, *BEING DIGITAL* 165 (1995)).

133. *Ecclesiastical Order of the ISM of AM, Inc. v. Comm’r*, 80 T.C. 833, 841–42 (1983) (“[T]he Government may constitutionally tax the income of religious organizations . . . [and] may decide not to . . . [but that unconstitutional discrimination may arise] if benefits granted to one religious group are denied to others of *essentially the same class*.”) (quoting *Parker v. Comm’r*, 365 F.2d 792, 795 (8th Cir. 1966)) (alteration in original) (emphasis added).

churches from broadcasted messages, which also lack physical associations. Reviewing the *Foundation III* court's language, FHU's call-in show failed to meet the associational test because there was no evidence that the broadcasts created a "‘shared experience.’"¹³⁴ Broadcasting by its very nature is unilateral: there is a speaker and there are listeners. As with any call-in show, listeners are able to respond to each other, but only through the speaker. Internet churches offer multilateral communication. Through the use of chat rooms, video conferences, and real-time interaction, congregants can respond to not only the speaker but the fellow listeners directly. For these organizations, such interaction provides reasonably realistic communication, allowing a strong argument that they create a shared and communal experience.

If Internet churches are thus able to satisfy the associational test, further analysis of their claim for church status would be necessary under the remaining elements of the fourteen criteria test, assuming the courts were to re-adopt the *American Guidance* approach as recommended above. Of the remaining criteria, the only ones that are reasonably problematic to Internet churches are an "established place[] of worship," "Sunday schools . . . for the young," and "a membership not associated with any other church."¹³⁵ Given the previous determination that physical association is not necessary to achieving church status, it would seemingly follow that it is no longer necessary for a church to have an "established place of worship" if such term implies "place" to mean "building." Sunday schools, likewise, are unachievable for the same reason. However, effectively mitigating this shortcoming, at least one electronic ministry offers separate sermons, lessons, and activities for children.¹³⁶ More problematic for an Internet church's claim for church status, strong evidence exists that a large number of congregants are also likely to be members of their local church.¹³⁷ However, a recent study by the Pew Forum revealed a "highly fluid and diverse national religious life."¹³⁸ Specifically, it showed that "[i]f shifts among Protestant

134. *Foundation III*, 614 F.3d 1383, 1391 (Fed. Cir. 2010) (alteration in original) (quoting *Foundation II*, 88 Fed. Cl. 203, 232 (2009)), *cert. denied*, 79 U.S.L.W. 3310 (U.S. Mar. 21, 2011) (No. 10-648).

135. See *Am. Guidance Found., Inc. v. United States*, 490 F. Supp. 304, 306 n.2 (D.D.C. 1980) (citing Jerome Kurtz, Comm'r, IRS, Speech at PLI Seventh Biennial Conference on Tax Planning (Jan. 9, 1978), in 9 FEDERAL TAXES (P-H) ¶ 54,820 (1978)).

136. See LIFEKIDS.TV, <http://lifekids.lifechurch.tv/> (last visited Mar. 31, 2011).

137. Zoll, *supra* note 114 (noting the pastor at LifeChurch.tv's admission that many people who watch his message also attend their local church).

138. HERZFELD, *supra* note 129, at 133.

denominations are included, then it appears that 44 percent of Americans have switched religious affiliations.”¹³⁹ Furthermore, a trend has developed away from identifying oneself wholly with any particular denomination.¹⁴⁰ Given such strong evidence of religious fluidity in the United States, the criteria requiring exclusivity of church membership, although already non-determinative under analysis of the whole fourteen criteria test, is dated and should be weighted accordingly.

C. Other Considerations

Several political and policy considerations support a determination that Internet churches be able to attain church status. Politically, the government is generally reluctant to rule for or against the religiosity of any “activity, function, or purpose.”¹⁴¹ In so avoiding, the government is able to sidestep not only the constitutional concerns of discrimination, such as those raised by the *Foundation II* and *III* courts,¹⁴² but also political backlash by those affected.¹⁴³ Additionally, politicians favor allowing deductions to churches, like other public associations, which not only inject billions of dollars back into the economy, but also, despite being tax exempt, generate billions of dollars in tax revenue from their operating expenditures.¹⁴⁴

Another policy consideration involves the value of churches to society. In a recent study of Protestants between the ages of eighteen and twenty-two, Lifeway Research found that seventy percent no

139. *Id.* (citing THE PEW FORUM ON RELIGION & PUBLIC LIFE, U.S. RELIGIOUS LANDSCAPE SURVEY 5 (2008), available at <http://religions.pewforum.org/pdf/report-religious-landscape-study-full.pdf>).

140. See GEORGE BARNA, REVOLUTION 62 (2005) (“Perhaps the major reasons [people are leaving congregations] are [their] insistence on choices and their desire to have customized experiences.”); *OMGod: The World’s First Online Church*, 3NEWS.CO.NZ (Aug. 5, 2010), <http://www.3news.co.nz/OMGod-The-Worlds-first-online-church/tabid/423/articleID/169062/Default.aspx> (quoting the vicar of New Zealand’s first online church as stating, “People don’t have to be ‘religious’ to join. We are committed to OMGod being presented in a way that’s interesting, helpful and easy to digest for everyone”).

141. CAFARDI & CHERRY, *supra* note 32, at 201.

142. See discussion *supra* Part II.A.

143. Similarly, in allowing such deductions, Congress arguably supports pluralism. See Peter J. Wiedenbeck, *Charitable Contributions: A Policy Perspective*, 50 MO. L. REV. 85, 97 (1985) (citing PRESIDENTIAL TASK FORCE ON THE ARTS & HUMANITIES, REPORT TO THE PRESIDENT 18 (1981)) (noting that such a deduction “fosters the coexistence of nonmajoritarian values—it encourages experimentation by the private sector in new solutions to our social problems”).

144. See BRUCE R. HOPKINS, THE TAX LAW OF ASSOCIATIONS § 1.3(h) (2006).

longer attended church on a regular basis.¹⁴⁵ Social media and the Internet offer one way to attempt to reconnect¹⁴⁶; by the end of 2009, fifty-four percent of the U.S. population that used the Internet visited Facebook¹⁴⁷ and one in four visited websites were major social networking sites.¹⁴⁸ Internet churches offer the same contributions to society that in part justify the traditional tax benefits given to long-established churches. If the IRS recognizes Internet churches as legitimate, their potential for facilitating religious participation further accomplishes that desired end.¹⁴⁹

D. Addressing Concerns

Although heretofore unvoiced, likely because the issue has not yet come before any court, skeptics might suggest a certain danger in granting political legitimacy to online churches. However, these concerns are more likely attributable to the novelty of the concept than to any real danger posed by the organizations.¹⁵⁰

Legitimacy aside, the more important consideration is whether allowing Internet churches to achieve church status conflicts with their privileges.¹⁵¹ It is important first to note the statutory limitations of such privileges.¹⁵² For example, these privileges do not protect the church from routine requests for information about filing returns.¹⁵³

145. Brett McCracken, *The Perils of 'Wannabe Cool' Christianity*, WALL ST. J., Aug. 13, 2010, at W9, available at <http://online.wsj.com/article/SB10001424052748704111704575355311122648100.html>; see also Helland, *supra* note 126, at 33 (noting that the percentage of Canadians not religiously affiliated has increased from one percent in the 1960s to sixteen percent in 2001).

146. Kaplan & Haenlein, *supra* note 113, at 63–64 (“Social networking sites are of such high popularity, specifically among younger Internet users, that the term ‘Facebook addict’ has been included in the Urban Dictionary . . .”).

147. LeeAnn Prescott, *54% of US Internet Users on Facebook, 27% on MySpace*, SOC. BEAT (Feb. 10, 2010), <http://venturebeat.com/2010/02/10/54-of-us-internet-users-on-facebook-27-on-myspace/>.

148. *Id.*

149. See, e.g., *Causes*, LIFECHURCH.TV, <http://www.lifechurch.tv/causes/compassion> (last visited Mar. 31, 2011) (follow “Learn more about this cause” hyperlink) (noting the online church’s causes of aiding less fortunate people in Monterrey, Mexico; providing medical care to children in Central America; supplying food and transportation for drug addicts in New York City; and donating supplies to citizens in Oklahoma).

150. Zoll, *supra* note 114 (recognizing one church’s Internet supervisor as saying, “We live in a day and age and a culture where people go to school online, bank online, date online and do other things online . . . Why not create a platform for them to go to church online?”).

151. See discussion *supra* Part I.A.

152. See I.R.C. § 7611 (2006). For a broad discussion of the limitations on the authority of the IRS to audit churches, see INTERNAL REVENUE SERV., *supra* note 44, at 26.

153. § 7611(i).

Additionally, restrictions on church inquiries do not apply to criminal investigations or investigations into the tax liability of any person connected with the church.¹⁵⁴

Nonetheless, the Internet context does present certain opportunities for fraud, not associated with church-related matters, including the ability to misrepresent oneself.¹⁵⁵ Although this Recent Development does not purport to offer much technical advice to avoid these concerns, it does recognize the problems that phony misrepresentations could create, especially in compliance with statutory record-keeping requirements.¹⁵⁶ However, concerns of authentication are likely solvable by the use of verifiable, secured payment options, guaranteeing the identities of both the donor and church.

Despite the legitimate concerns over allowing a nontraditional organization to enter the legal landscape of such a protected institution, and the natural reluctance caused by the novelty of such an idea, the popularity and growth of Internet churches foreshadow their inevitable challenge to achieve the same tax privileges as traditional houses of worship. Given the convincing evidence that normal, everyday occurrences that once required travel can now be accomplished in solitude, the possibility that courts will soon recognize legitimate, communal worship from one's own living room is somehow no longer so absurd.

CONCLUSION

The U.S. Court of Appeals for the Federal Circuit in *Foundation III* unnecessarily limited itself to the associational test amid its unsubstantiated concerns that the fourteen criteria test risked unconstitutionally favoring more traditional churches. Not only did the IRS, in practice, apply the criteria flexibly, but the court's own use of the associational test was in fact a limited application of the fourteen criteria test. Unless the court is prepared to more specifically identify the criteria that prompted the abandonment of this test, the analysis offered in *American Guidance*, which, as a threshold matter applies the associational test but also allows the flexible application of

154. *Id.*

155. See HERZFELD, *supra* note 129, at 82 ("Age is one of the most frequently lied-about characteristics, as the young attempt an older, more experienced identity, while others relive their youth.").

156. See INTERNAL REVENUE SERV., PUB. NO. 526, CHARITABLE CONTRIBUTIONS 18 (2011), available at www.irs.gov/pub/irs-pdf/p526.pdf (noting, for example, that for cash contributions, the donor must keep either a bank record, receipt, or payroll deduction).

the fourteen criteria test, allows the greatest consideration of factors relevant to a determination of an appellant's religious standing.

Capitalizing on the court's recognition and use of FHU's phrase "electronic ministry," the *Foundation III* court also offers an end-run around the not-yet-considered question of whether Internet churches should be eligible to achieve church status. Ultimately, the physical limitations of an Internet church alone should not prevent it from gaining church privileges, and the appeal of a legitimate Internet church, satisfying the requirements of the associational test, is one the courts will soon face.

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