

ESSAY

In Defense of Churches: Can the IRS Limit Tax Abuse by “Church” Impostors?

*Lidiya Mishchenko**

ABSTRACT

A large gap in our Tax Code allows certain religious organizations to amass extraordinary riches while preying on the faithful. Their conduct is causing damage to the church as an institution and is inconsistent with the purpose of tax exemptions—to provide a public good. This Essay proposes that the IRS create a narrower, more specific definition of what constitutes a “church” for tax purposes. This change would force more religious entities to file annual returns with the IRS, and would better define the IRS threshold for auditing such organizations. Consistent, systematic enforcement of this definition may lead to increased disclosure to the IRS by both religious entities and third parties, and would provide a general boost to public confidence in the tax system and trust in legitimate churches.

* J.D., 2016, The George Washington University Law School. The Author thanks Professors Neil H. Buchanan and Robert L. Glicksman for their valuable input and comments on this Essay. Thanks also to Dane P. Shikman, Maxwell K. Weiss, and Nicholas Griepsma for their revisions and suggestions. And thanks to the rest of the editorial staff at *The George Washington Law Review* for all the hard work that goes into getting every piece through production.

TABLE OF CONTENTS

INTRODUCTION: THE INVISIBILITY CLOAK FOR CHURCH	
IMPOSTORS IN OUR TAX SYSTEM	1362
I. BACKGROUND: HOW ARE CHURCHES CURRENTLY TREATED UNDER THE TAX CODE?	1365
A. <i>Statutory Framework: Congress Creates Information Vacuum for IRS</i>	1365
B. <i>Lack of Clear Definition of “Church” in Tax Enforcement</i>	1367
II. A MODEST PROPOSAL: NARROWING THE CATEGORY OF “CHURCH” FOR TAX PURPOSES	1369
A. <i>Proposed Definition of “Church”</i>	1371
B. <i>How Can the IRS Create a Definition of “Church” to Which Courts Defer?</i>	1380
III. POLITICAL, CONSTITUTIONAL, AND PRACTICAL CRITIQUES OF NARROWING THE “CHURCH” CATEGORY FOR TAX PURPOSES	1385
CONCLUSION	1387

INTRODUCTION: THE INVISIBILITY CLOAK FOR CHURCH IMPOSTORS
IN OUR TAX SYSTEM

“If a man really wanted to make a million dollars, the best way to do it would be to start his own religion.”

—Alleged statement by L. Ron Hubbard,
founder of Scientology¹

America is a religious nation. In 2014, around 76.5% of Americans identified themselves as having a religious affiliation.² Religious freedom is viewed as one of the founding principles of this country.³ It is thus not surprising that our Tax Code exempts religious organizations from taxation.⁴ What is surprising, however, is that the Tax Code distinguishes between “churches” and “religious organizations.”⁵ In fact, Congress has provided organizations claiming to be

¹ Michael Browne, Comment, *Should Germany Stop Worrying and Love the Octopus? Freedom of Religion and the Church of Scientology in Germany and the United States*, 9 IND. INT’L & COMP. L. REV. 155, 160 (1998) (citing RUSSELL MILLER, BARE-FACED MESSIAH: THE TRUE STORY OF L. RON HUBBARD 148 (1987)).

² PEW RESEARCH CTR., AMERICA’S CHANGING RELIGIOUS LANDSCAPE (2015), <http://www.pewforum.org/files/2015/05/RLS-08-26-full-report.pdf>.

³ See SYDNEY E. AHLSTROM, A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE 379–80 (2d ed. 2004).

⁴ 26 U.S.C. § 501(c)(3) (2012).

⁵ See, e.g., *id.* §§ 508, 6033.

“churches”⁶ with one of the biggest tax loopholes of all time—complete invisibility from the Internal Revenue Service (“IRS”). Churches, unlike other religious organizations, do not have to apply for recognition of their tax-exempt status and are also exempt from annual filing with the IRS.⁷

And no loophole goes unused. Pastors of several prominent “prosperity gospel” megachurches⁸ promise thousands of live and television congregants every week that all their worldly ills will be cured if they send large monetary donations to their church.⁹ Many of these promises are quite precise, assuring a cure for a specific disease or eliminating credit card debt as a consequence of a donation.¹⁰ Under the prosperity gospel, church membership may actually be conditioned on provision of regular donations, or “tithes,” and if a congregant is struggling in their life, they may be told that God is punishing them and they need to donate even more money to the church.¹¹ Other “churches,” such as the Church of Scientology, charge its members for religious services, such as “auditing,” teaching that these are necessary for spiritual awareness and for moving up in the church hierarchy.¹²

6 Scare quotes are used for the word “church” to emphasize its status as a tax category.

7 See, e.g., §§ 508, 6033.

8 Megachurches are churches that attract over 2000 congregants every weekend. Gerrit V. Betz, Note, *Megachurches and Private Inurement: Are Some Faiths Taxable?*, 44 NEW ENG. L. REV. 733, 750 (2010).

9 Abby Ohlheiser, *Comedian John Oliver Takes on the Prosperity Gospel by Becoming a Televangelist*, WASH. POST (Aug. 17, 2015), <https://www.washingtonpost.com/news/acts-of-faith/wp/2015/08/17/comedian-john-oliver-takes-on-the-prosperity-gospel-by-becoming-a-televangelist/>.

10 Marlow Stern, *John Oliver Exposes Shady Televangelists Fleecing Americans For Millions*, DAILY BEAST (Aug. 17, 2015, 2:13 AM), <http://www.thedailybeast.com/articles/2015/08/17/john-oliver-exposes-shady-televangelists-fleecing-americans-for-millions.html>; see KATE BOWLER, *BLESSED: A HISTORY OF THE AMERICAN PROSPERITY GOSPEL* 132–33 (2013) (discussing how various prosperity gospel preachers promise financial returns to congregants for their donations to the church and threaten misfortune for those who do not donate); Jonathan L. Walton, *Stop Worrying and Start Sowing! A Phenomenological Account of the Ethics of “Divine Investment”*, in *PENTECOSTALISM AND PROSPERITY: THE SOCIO-ECONOMICS OF THE GLOBAL CHARISMATIC MOVEMENT* 107, 112 (Katherine Attanasi & Amos Yong eds., 2012) (explaining that the “seed faith” tenet of one of the prosperity gospel movements teaches that “adherents are contractually bound to give (sow) just as God is obligated to return one’s gift at least tenfold (reap)”).

11 See D. A. Horton, *Nine Marks of a Prosperity Gospel Church*, 9MARKS (Jan. 15, 2014), <http://9marks.org/article/journalnine-marks-prosperity-gospel-church/> (“Prosperity gospel churches often equate church membership with regular attendance, tithing, and service . . .”); Stern, *supra* note 10.

12 *Church of Scientology of Cal. v. Comm’r*, 823 F.2d 1310, 1313 (9th Cir. 1987) (explaining that “auditing” is an individual process in which an “auditor” identifies the disciple’s “spiri-

These fee-based systems are coincidentally very profitable for the “churches” involved. The last reported income of the Church of Scientology, in the early 1990s, was about \$300 million a year, earned from auditing fees, among other services.¹³ In 2008, the average megachurch received an income of \$6,524,070, with 47% of that amount going to personnel income.¹⁴ Several prominent ministers of such “churches” openly display their wealth, including private jet planes and luxurious mansions.¹⁵

Why should one care if these billion-dollar organizations extract huge sums from average people? Beyond the direct harm to the defrauded faithful, these organizations are harming the church form itself, hiding behind society’s trust in its good name.¹⁶ The congregants are thus not the only ones being swindled. Churches, like other religious and charitable organizations, are tax exempt.¹⁷ All of America is subsidizing these jets and mansions.¹⁸ The country has chosen not to tax these organizations because they are supposed to provide a *public* good,¹⁹ not just another way for individuals to line their pockets. That is what private corporations are for.

So why have “church” impostors received the cloak of invisibility from the IRS?²⁰ And is there anything the IRS can do to curb this

tual difficult[ies]” using an “E-Meter”). An E-meter is an electronic device attached to the skin that assists “in the identification of spiritual difficulty.” *Id.* at 4.

¹³ Douglas Frantz, *Scientology’s Puzzling Journey From Tax Rebel to Tax Exempt*, N.Y. TIMES (Mar. 9, 1997), <http://www.nytimes.com/1997/03/09/us/scientology-s-puzzling-journey-from-tax-rebel-to-tax-exempt.html?pagewanted=all>.

¹⁴ Betz, *supra* note 8, at 750–51 (citing SCOTT THUMMA & WARREN BIRD, HARTFORD INST. FOR RELIGION RESEARCH, CHANGES IN AMERICAN MEGACHURCHES: TRACING EIGHT YEARS OF GROWTH AND INNOVATION IN THE NATION’S LARGEST-ATTENDANCE CONGREGATIONS, 4–5 (2008), <http://hrr.hartsem.edu/megachurch/Changes%20in%20American%20Mega%20churches%20Sept%2012%202008.pdf>).

¹⁵ See, e.g., Stern, *supra* note 10; Sam Stringer, *Minister Creflo Dollar Asks for \$60 Million in Donations for a New Jet*, CNN (Mar. 16, 2015, 3:03 PM), <http://www.cnn.com/2015/03/13/living/creflo-dollar-jet-feat/index.html>.

¹⁶ See *Bob Jones Univ. v. United States*, 461 U.S. 574, 589–91 (1983).

¹⁷ 26 U.S.C. § 501(c)(3) (2012).

¹⁸ See Stern, *supra* note 10.

¹⁹ See *Church of Scientology of Cal. v. Comm’r*, 823 F.2d 1310, 1315 (9th Cir. 1987) (“Organizations seeking exemption from taxes must serve a valid public purpose and confer a public benefit.” (citing *Bob Jones Univ.*, 461 U.S. at 585–92)); see also *Bob Jones Univ.*, 461 U.S. at 587–88 (“[I]n enacting both § 170 and § 501(c)(3), Congress sought to provide tax benefits to charitable organizations, to encourage the development of private institutions that serve a useful public purpose or supplement or take the place of public institutions of the same kind.”).

²⁰ In the last two years, the IRS only audited a total of three churches due to regulatory issues. *Last Week Tonight with John Oliver*, ep. 49 (HBO television broadcast Aug. 15, 2015) (citing U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-15-514, IRS EXAMINATION SELECTION: INTERNAL CONTROLS FOR EXEMPT ORGANIZATION SELECTION SHOULD BE STRENGTHENED 25

abuse and to stop impostor churches from using the good name of these religious institutions for financial gain? This Essay proposes that the IRS adopt a narrower and more specific definition of “church” for tax purposes in order to lower, or at the very least better define, the threshold for auditing abusive religious entities and to require more organizations to meet filing requirements with the IRS. Part I of this Essay examines the statutory framework that has created an information vacuum about churches for the IRS. Part I also discusses how the IRS and the courts currently define the category of “church” for tax purposes. Part II proposes a narrower and more concrete IRS definition of “church” that would push more entities into the “religious organization” tax category, with corresponding filing requirements. This Part also analyzes the IRS’s authority to define the category of “church” within statutory parameters. Finally, Part III addresses some of the possible critiques of this Essay’s proposal.

I. BACKGROUND: HOW ARE CHURCHES CURRENTLY TREATED UNDER THE TAX CODE?

A. *Statutory Framework: Congress Creates Information Vacuum for IRS*

Section 501(c)(3) of the Internal Revenue Code exempts organizations from taxation that are “operated exclusively for religious . . . purposes, . . . no part of the net earnings of which inures to the benefit of any private shareholder or individual.”²¹ More precisely, a qualified tax-exempt religious organization (1) must engage exclusively in religious activities, (2) its net earnings may not inure to the benefit of private individuals, and (3) as clarified by the Supreme Court in *Bob Jones University v. United States*,²² must serve a valid public purpose and confer a public benefit.²³

Though § 501(c)(3) does not distinguish between “religious organizations” and “churches,” other parts of the code impart additional

(2015) [hereinafter GAO STUDY]), *relevant segment available at* <https://www.youtube.com/watch?v=7y1xJAVZxXg> at 10:09. The IRS has resumed church examinations based on existing regulations with modified procedures. GAO STUDY, *supra*. However, it seems that the IRS is less than forthcoming with information about church examinations. *See id.* at 26 n.47 (“In April 2015, a Freedom of Information Act lawsuit was filed in [district court] against the IRS . . . for the failure to release documents related to church inquiries and examinations since January 2009 . . .”).

²¹ § 501(c)(3).

²² *Bob Jones Univ. v. United States*, 461 U.S. 574, 585–86, 590–92 (1983).

²³ *Church of Scientology*, 823 F.2d at 1315.

benefits to churches in particular.²⁴ Churches, unlike other 501(c)(3) organizations, do not have to apply for recognition of their tax-exempt status—they are automatically considered exempt.²⁵ Churches are also exempt from annual filing with the IRS.²⁶ The IRS may not discover that a church exists unless the church files tax returns for unrelated business income²⁷—if it has any—or indirectly by examining third-party referrals,²⁸ individual taxpayer charitable deductions,²⁹ or income taxes withheld by the church for church employees other than ministers.³⁰ None of these methods, however, would inform the IRS about a church’s income or corporate structure.³¹ In addition, even if the IRS does somehow learn of a “church’s” potentially abusive revenue tactics, the Tax Code makes it very difficult to audit a church.³² The IRS can audit a “church” only if “an appropriate high-level Treasury official reasonably believes (on the basis of facts and circumstances recorded in writing) that the church . . . may not be exempt, by reason of its status as a church . . . or otherwise engaged in activities subject to taxation.”³³

The legislative history of these various tax provisions exempting “churches” from filing requirements is opaque.³⁴ The term “church” is not clearly defined in the Tax Code or its legislative history.³⁵

²⁴ Compare § 501(c)(3) (referring only to religious organizations), with § 508(c)(1)(A) (referring only to churches).

²⁵ § 508(c)(1)(A).

²⁶ § 6033(a)(3)(A)(i).

²⁷ See John Montague, *The Law and Financial Transparency in Churches: Reconsidering the Form 990 Exemption*, 35 CARDOZO L. REV. 203, 215 (2013).

²⁸ See GAO STUDY, *supra* note 20, at 9.

²⁹ See Mathew Encino, *Holy Profits: How Federal Law Allows for the Abuse of the Church Tax-Exempt Status*, 14 HOUS. BUS. & TAX L.J. 78, 86 (2014) (“[N]o statute or regulation explicitly requir[es] that the 501(c)(3) status of a church be formally recognized by the IRS in order for a donation to be deductible.”).

³⁰ See INTERNAL REVENUE SERV., PUBLICATION 1828, TAX GUIDE FOR CHURCHES & RELIGIOUS ORGANIZATIONS 21 (2015) (noting that income “for services performed by a . . . minister of a church in the exercise of his or her ministry” is not subject to tax).

³¹ See Memorandum from Theresa Pattara & Sean Barnett, Staff of S. Fin. Comm., to Sen. Charles Grassley, S. Fin. Comm. 20 (Jan. 6, 2011) [hereinafter Grassley Memorandum] (on file with S. Fin. Comm.), <http://www.finance.senate.gov/newsroom/ranking/download/?id=1f92d378-baa2-440d-9fbd-333cdc5d85fc>.

³² See Encino, *supra* note 29, at 88.

³³ 26 U.S.C. § 7611(a)(2) (2012).

³⁴ See *Found. of Human Understanding v. United States*, 614 F.3d 1383, 1388 (Fed. Cir. 2010).

³⁵ See Wendy Gerzog Shaller, *Churches and Their Enviably Tax Status*, 51 U. PITT. L. REV. 345, 350 (1990).

Courts have interpreted the word “church” to be a narrower subset of all “religious organizations.”³⁶

Legislative history seems to only hint at why Congress chose to grant churches this special tax status. There is evidence that Congress found disclosure and filing requirements for churches to be “unnecessary to an effective administration of the tax laws.”³⁷ In addition, when explaining why it created a higher procedural hurdle for the IRS to audit churches, Congress noted “problems of separation of church and state . . . that arise when the Internal Revenue Service . . . examines the records of a church.”³⁸ Although Congress may have very noble reasons for protecting churches, it seems determined to protect them even at the cost of harming the reputation of the institution itself. Though Congress has recognized repeatedly that the church form is being used as a tax-avoidance device,³⁹ and has even held hearings where the filing-requirement exemption was considered in detail,⁴⁰ it has yet to pass any legislation that would require any organization considering itself to be a church to file documents with the IRS.⁴¹

B. *Lack of Clear Definition of “Church” in Tax Enforcement*

Given congressional silence, the IRS resorted to forming its own definition of “church.” The IRS’s fourteen criteria standard was first announced in 1978 by then IRS Commissioner Jerome Kurtz at a tax conference and was published by the IRS that same year as a news release.⁴² The IRS’s fourteen criteria standard evaluates if an organi-

³⁶ See, e.g., *De La Salle Inst. v. United States*, 195 F. Supp. 891, 898 (N.D. Cal. 1961) (“There would be no sound reason to use the term ‘church’ in the statute, unless there was an intention to express a more limited idea than is conveyed by ‘religious organization.’”); Shaller, *supra* note 35, at 350–51 (citing *De La Salle*, 195 F. Supp. at 898).

³⁷ Shaller, *supra* note 35, at 356 (citing S. REP. NO. 91-552, at 54 (1969)).

³⁸ STAFF OF JOINT COMM. ON TAXATION, GENERAL EXPLANATION OF THE REVENUE PROVISIONS OF THE DEFICIT REDUCTION ACT OF 1984, H.R. REP. NO. 98-4170, at 1139–40 (1984) [hereinafter 1984 H.R. REP.]. Notably, the IRS has since admitted that there would be no constitutional issues with requiring churches to file annual documents with the IRS. *Federal Tax Rules Applicable to Tax-Exempt Organizations Involving Television Ministries: Hearing Before Subcomm. on Oversight of the H. Comm. on Ways and Means*, 100th Cong. 54–55 (1987) [hereinafter *1987 Television Ministries Hearing*] (statement of IRS Commissioner Gibbs) (“We are of the opinion that there is not a constitutional prohibition on requiring churches to file Form 990 information returns.”).

³⁹ See, e.g., 1984 H.R. REP., *supra* note 38, at 1140; H.R. REP. NO. 91-413, pt. 1, at 47 (1969).

⁴⁰ See, e.g., *1987 Television Ministries Hearing*, *supra* note 38.

⁴¹ See Montague, *supra* note 27, at 221 (“The 1987 hearings ended without any changes to the law.”). See generally *id.* (exhorting in 2013 that Congress end the church filing exemption).

⁴² See *Found. of Human Understanding v. Comm’r*, 88 T.C. 1341, 1357–58 (1987) (citing Remarks of IRS Commissioner Jerome Kurtz, PLI Seventh Biennial Conference on Tax Plan-

zation qualifies as a church based on factors including whether the organization has an established place of worship, regular congregations, and regular religious services.⁴³ The IRS has also adopted “a catch-all fifteenth criterion pertaining to all relevant facts and circumstances” that looks for any private inurement and private benefit indicators.⁴⁴ Some courts have adopted or used these criteria, giving different weight to different factors.⁴⁵ Other courts have criticized the criteria for “favor[ing] some forms of religious expression over others”⁴⁶ and have chosen alternative tests.⁴⁷ One court concluded that, in absence of a congressional definition of the term “church,” the term is properly defined in “light of the common understanding of the word.”⁴⁸ However, other courts have declined to use this plain meaning approach due to line-drawing difficulties.⁴⁹

A sizeable number of courts have adopted a more functional test referred to as the “associational test.”⁵⁰ This test emphasizes two of the IRS’s fourteen criteria: “regular congregations” and “regular religious services.”⁵¹ Under the associational test, the church must create “the opportunity for members to develop a fellowship by worshipping together.”⁵² In other words, “a church’s *principal means* of accomplishing its religious purposes must be to assemble regularly a group

ning (Jan. 9, 1978) [hereinafter Kurtz Remarks]); INTERNAL REVENUE SERV., INTERNAL REVENUE MANUAL § 7.26.2.2.4 (1999).

43 See *Found. of Human Understanding*, 88 T.C. at 1357–58 (“(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 or discipline; (5) a distinct religious history; (6) a membership not associated with any other church or denomination; (7) a complete organization of ordained ministers ministering to their congregations; (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 the religious instruction of the young; and (14) schools for the preparation of its ministers.” (citing Kurtz Remarks, *supra* note 42)).

44 Shaller, *supra* note 35, at 353–54.

45 *Id.* at 353.

46 *Found. of Human Understanding v. United States*, 614 F.3d 1383, 1387 (Fed. Cir. 2010) (quoting *Found. of Human Understanding v. United States*, 88 Fed. Cl. 203, 207 (2009)).

47 *Id.* at 1388.

48 Shaller, *supra* note 35, at 350–51 (quoting *De La Salle Inst. v. United States*, 195 F. Supp. 891, 903 (N.D. Cal. 1961)).

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

50 See *Found. of Human Understanding*, 614 F.3d at 1388 (“Courts have been more receptive to the associational test as a means of determining church status under section 170.”).

51 *Id.* at 1389.

52 *Id.*

of individuals related by common worship and faith.”⁵³ Courts look to the “frequency or nature of the meetings, the consistency of the congregation, [and] the extent to which those meetings enable[] members to associate with each other in worship.”⁵⁴ Some courts also note that “[u]nless 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.”⁵⁵

Though the associational test may have more traction than some of the other standards, there is no uniformly applied definition of “church” from the courts.⁵⁶ The IRS’s fourteen (plus one) criteria are vague, and courts do not consider them in a consistent manner.⁵⁷ Although it is not clear if this hodgepodge of definitions is directly contributing to the dearth of IRS enforcement in the church arena,⁵⁸ creating a narrower definition of “church” that is applied by the IRS and courts alike may provide some distinct benefits in terms of increased IRS enforcement and self-policing, as discussed in Part II.

II. A MODEST PROPOSAL: NARROWING THE CATEGORY OF “CHURCH” FOR TAX PURPOSES

The IRS is extremely limited in what information it can receive from churches due to statutory constraints, as elaborated in Part I. However, the IRS appears to have discretion in how it defines the category of “church” for filing, contributions, and auditing purposes.⁵⁹ Clarifying and narrowing the definition of this term in the Tax Code would have several benefits. First, it would make it easier for the IRS to institute a church tax audit by lowering the threshold and providing more specific grounds for “reasonably believ[ing] . . . that the church . . . may not be exempt, by reason of its status as a church.”⁶⁰ Although the IRS Internal Revenue Manual now supplements its fourteen “church characteristics” with “any other facts and circumstances,”⁶¹ a narrower definition for “church” may actually improve

⁵³ *Id.* (emphasis added) (quoting *Church of Eternal Life & Liberty, Inc. v. Comm’r*, 86 T.C. 916, 924 (1986)).

⁵⁴ *Id.* at 1390.

⁵⁵ *Am. Guidance Found., Inc. v. United States*, 490 F. Supp. 304, 306 (D.D.C. 1980).

⁵⁶ See Shaller, *supra* note 35, at 351–52 (describing the use of an “associational” definition by some courts and an “implied” definition by others).

⁵⁷ See *Found. of Human Understanding*, 614 F.3d at 1388.

⁵⁸ See 26 U.S.C. § 501(c)(3) (2012).

⁵⁹ See *id.* §§ 170(b)(1)(A)(i), 508(c)(1), 6033(a)(3)(A), 7611; see also Encino, *supra* note 29, at 89.

⁶⁰ 26 U.S.C. § 7611(a)(2).

⁶¹ INTERNAL REVENUE SERV., *supra* note 42, § 7.26.2.2.4.

enforcement. More specific grounds for enforcement, including particularized factors relating to private inurement, will give IRS investigators more confidence in systematically instituting audits, will reduce the accusations of arbitrary treatment by their targets, and will make it easier for the IRS to have its actions hold up in court if they are ever litigated.⁶²

Second, a narrower definition would push more entities out of the category of “church” into the larger category of “religious organizations.” Religious organizations, unlike churches, are required to file annually with the IRS.⁶³ Thus, “church” impostor organizations potentially abusing the tax system would no longer be legally hiding in the same tax category as legitimate churches. With a narrower legal definition and more consistent enforcement, religious entities skirting the boundaries of the law may realize that the “church” category is not as easy to satisfy as it was before and may begin to file with the IRS on their own as “religious organizations.” This is more likely to occur if congregants begin to have increased difficulty in writing off their charitable deductions to their “church” without inciting an IRS audit.⁶⁴ With a narrower legal definition and increased enforcement, congregants and donors would gain more peace of mind for putting their trust in their local place of worship, perhaps leading to increased donations to these legitimate churches.⁶⁵ Third, if the definition of “church” is narrowed, public perception of IRS enforcement may change, especially if the courts apply the new definition consistently and uniformly. Such a change could have the added benefit of en-

⁶² See Gerald M. Caplan, *The Case for Rulemaking by Law Enforcement Agencies*, 36 *LAW & CONTEMP. PROBS.* 500, 514 (1971) (considering similar benefits to justify comprehensive rules for police actions).

⁶³ See Grassley Memorandum, *supra* note 31, at 17–18.

⁶⁴ See Encino, *supra* note 29, at 86 (“[T]here is no statute or regulation explicitly requiring that the 501(c)(3) status of a church be formally recognized by the IRS in order for a donation to be deductible. . . . [A] contributor may deduct the contribution from his or her income, and the contributor merely assumes the ‘burden of establishing that the church in fact meets the qualifications of a Section 501(c)(3) organization,’ should he or she be audited.” (quoting *Branch Ministries v. Rossotti*, 40 F. Supp. 2d 15, 19–20 (D.D.C. 1999))). If donors feel that their donation to a church cannot be properly deducted from their taxes, or that their contribution will incite an IRS audit, they are less likely to give money to the church. If a church is already registered with the IRS as a qualified, tax-exempt organization, donors have more certainty that their deduction will go through without raising any red flags. See INTERNAL REVENUE SERV., PUBLICATION 526, CHARITABLE CONTRIBUTIONS 2 (Jan. 2015) (“You can deduct your contributions only if you make them to a qualified organization. Most organizations, other than churches and governments, must apply to the IRS to become a qualified organization.”).

⁶⁵ See Montague, *supra* note 27, at 246.

couraging more input from third parties about possible tax avoidance tactics by “church” impostors.⁶⁶

Finally, if Congress is dissatisfied with these IRS line-drawing efforts for religious organizations, it may be prompted to eliminate the IRS filing exemption for churches altogether—a solution that would be less onerous for the IRS and would decrease the amount of selective entanglement of church and state in this area of regulation.⁶⁷

A. *Proposed Definition of “Church”*

In the process of defining the word “church,” it is important to consider why the United States chose to exempt churches from taxation in the first place. Like all tax-exempt organizations, churches serve “desirable public purposes.”⁶⁸ Society is thus compensated for the loss in tax revenue by the benefits that such organizations provide to the general public.⁶⁹ This is precisely why private inurement is prohibited—why would the general public subsidize an organization that is only benefitting one or several private individuals? As explained in *Bob Jones University v. United States*:

When the Government grants exemptions or allows deductions all taxpayers are affected[.] . . . History buttresses logic to make clear that, to warrant exemption under § 501(c)(3), an institution must fall within a category specified in that section and must demonstrably serve and be in harmony with the public interest. The institution’s purpose must not be so at odds with the common community conscience as to undermine any public benefit that might otherwise be conferred.⁷⁰

By swindling desperate congregants out of their money, impostor churches are “at odds with the common community conscience” and do not serve the public interest. They are enriching themselves at the expense of hardworking people of the faith. In contrast, legitimate churches provide a unique public benefit: providing a stabilizing or

⁶⁶ See GAO STUDY, *supra* note 20, at 18 (“Referrals [complaints of potential noncompliance of exempt organizations] are the third largest source of EO [IRS Exempt Organizations unit] examinations.”) Third parties are more likely to report misconduct if they think their tips to the IRS will be taken seriously and may lead to an audit. In addition, clear rules will make it easier to spot misconduct in the first place.

⁶⁷ See Montague, *supra* note 27, at 262 (“Some commentators have argued that . . . the [Supreme] Court would view the special treatment of churches in the Internal Revenue Code, including the exemption from filing the Form 990, as unconstitutional violations of the Establishment Clause.”).

⁶⁸ *Bob Jones Univ. v. United States*, 461 U.S. 574, 589 (1983).

⁶⁹ *Id.* at 590.

⁷⁰ *Id.* at 591–92.

harmonizing effect on the community and fostering moral and mental improvement.⁷¹ The definition of “church” for tax purposes thus needs to promote community building and discourage private inurement.

This Essay proposes a specific definition for the “church” tax category, incorporating the two concepts of promoting association and discouraging inurement. Some commentators have previously proposed that the IRS develop more specific guidelines for private inurement⁷² or have mentioned that the IRS and the courts should focus on some combination of associational and private inurement factors in enforcing the “church” category.⁷³ This Essay, however, presents a particularized definition of “church” for purposes of the Tax Code that includes specific inurement factors. In addition, although it is possible that a clearer definition of “church” may lead to some loss of flexibility in IRS enforcement,⁷⁴ this cost is far outweighed by the benefits, such as improved notice for religious organizations and clearer guidelines for IRS staff in enforcement proceedings.⁷⁵

The proposed definition consists of two types of factors: (1) associational and (2) inurement-based, examined in this order. If the definition of “church” is not met, then the entity is presumed to be a “religious organization” for tax purposes.⁷⁶ If the associational factors do not favor a finding of “church,” the inquiry is over, and the entity is a “religious organization” for tax purposes. If the associational factors lean in favor of a finding of “church,” then the inurement-based considerations are examined as disqualifying factors. The disqualifying factors, depending on their weight, can then potentially push the entity out of the “church” category into the “religious organization” category.

The associational factors are modifications of the associational test courts have developed, as described in Part I. These factors ensure that organizations claiming to be churches actually serve the local

⁷¹ See *Walz v. Tax Comm'n of New York*, 397 U.S. 664, 672 (1970).

⁷² See Encino, *supra* note 29, at 93.

⁷³ See Shaller, *supra* note 35, at 351–52 (“Moreover, with the modern abusive attempts to use the church form to obtain tax benefits, the associational requirement is one clear way, together with the proscription against private inurement, to assist in the proper administration of the tax laws.” (footnote omitted)).

⁷⁴ See Encino, *supra* note 29, at 91.

⁷⁵ See *supra* note 62 and accompanying text.

⁷⁶ The IRS can then examine the religious organization to see if it meets the requirements of § 501(c)(3). See *supra* notes 21–23 and accompanying text. That examination is beyond the scope of this Essay.

community and foster communal harmony.⁷⁷ None of the following factors are determinative. The factors are whether: (1) the church has a distinct, independent legal existence from its founders or members,⁷⁸ a formality which would eliminate the most basic tax avoidance schemes;⁷⁹ (2) members share a common faith or doctrine;⁸⁰ (3) there are interactive, physical gatherings of a congregation;⁸¹ (4) the same congregants gather frequently and regularly,⁸² a factor revolving around fostering a local community of worshippers;⁸³ and finally, (5) regularly assembling a group of individuals related by common worship and faith is the organization's "*principal means* of accomplishing its [religious] purpose."⁸⁴

In the next portion of the analysis, the disqualifying private inurement factors focus on (1) specific conduct of a church "insider," usually the religious leader⁸⁵ and (2) the specific tenets of the church's belief system that may point to private inurement by the organization. Although "private inurement" may lead to an organization's complete loss of tax-exempt status under § 501(c)(3), these factors are specific to religious organizations, are more narrowly tailored than the IRS definition for "private inurement" under § 501,⁸⁶ and are limited to disqualifying an entity as a "church," not the loss of exempt status altogether. The purpose of this component of the test is to ensure entities qualifying for preferential tax treatment are not abusing their status for private benefit.

⁷⁷ This serves the tax exemption's legislative purpose. See *Walz v. Tax Comm'n of New York*, 397 U.S. 664, 672 (1970).

⁷⁸ See INTERNAL REVENUE SERV., *supra* note 42, § 7.26.2.2.4(4)(A).

⁷⁹ See, e.g., *Betz*, *supra* note 8, at 739–40 (describing how a tax avoidance scheme was orchestrated when a member abused access to a church bank account).

⁸⁰ See INTERNAL REVENUE SERV., *supra* note 42, § 7.26.2.2.4(4)(B), (D).

⁸¹ See *id.* (factor 4(J)). Note that internet and television broadcasts do not harmonize local communities to the same extent as in-person services, if at all. Thus e-ministries would not favor a finding of "church" under this factor. See, e.g., I.R.S. Priv. Ltr. Rul. 201420020, at 6–7 (May 16, 2014), <https://www.irs.gov/pub/irs-wd/1420020.pdf> (rejecting § 501(c)(3) status to an e-ministry because it does not satisfy the "associational components" of the fourteen criteria).

See INTERNAL REVENUE SERV., *supra* note 42, § 7.26.2.2.4(4)(L).

⁸² See *id.* (factor 4(L)).

⁸³ See *Walz v. Tax Comm'n of New York*, 397 U.S. 664, 672–73 (1970).

⁸⁴ See *Shaller*, *supra* note 35, at 351 (quoting *Chapman v. Comm'r*, 48 T.C. 358, 367 (1967) (Tannenwald, J., concurring)).

⁸⁵ See *Betz*, *supra* note 8, at 743–44 (describing the current IRS practice of imposing intermediate sanctions against excess benefits that flow to "insiders").

⁸⁶ See *Encino*, *supra* note 29, at 92 ("Judge Posner declared [the IRS's "facts and circumstances" private inurement analysis] 'no standard at all.'" (quoting *United Cancer Council, Inc. v. Comm'r*, 165 F.3d 1173, 1179 (7th Cir. 1999))).

The two “insider” factors, adapted by a commentator from an article by Darryll K. Jones, are targeted at congregation leaders abusing the church form for their own benefit:

- 1) Is the insider realizing an accession to wealth greater than the value of goods or services that he or she is providing to the entity?
- 2) Is the insider exercising his right of control in a manner that renders the entity’s wealth synonymous with his own regardless of whether the total amount is less than what would be a reasonable salary, and is such exercise providing insubstantial benefit to the organization’s purported beneficiaries [i.e., the congregation or the community]?⁸⁷

The definitions of “insider,” “the value of goods or services,” and the “reasonable salary” are to be evaluated based on a modified excess-benefit standard.⁸⁸ The “insider” is a person working inside the church with substantial control over the church.⁸⁹ And the value of the insider’s services, or a reasonable salary to the insider, is to be evaluated against a salary of “functionally comparable” positions in “similarly situated” tax-exempt religious organizations.⁹⁰ Similarly situated organizations would be ones with objectively comparable characteristics, such as similar revenue and number of members.⁹¹ A “functionally comparable” position to a priest may be a chairman of the board, CEO, or another similar leadership role in a religious charity.⁹² The disqualifying weight of factor (1) is proportional to the amount of excess realized. The disqualifying weight of factor (2) is proportional to the value of the wealth used primarily for private benefit. The key to these two factors is the use of objective, verifiable features. Subjective valuations about the importance of a specific church leader are not a consideration.

⁸⁷ *Id.* at 95 (internal citations omitted) (adapting factors from Darryll K. Jones, *The Scintilla of Individual Profit: In Search of Private Inurement and Excess Benefit*, 19 VA. TAX REV. 575, 595, 613 (2000)). An example of the second factor would be a minister using a church’s jet for private business trips.

⁸⁸ 26 U.S.C. § 4958 (2012).

⁸⁹ See Encino, *supra* note 29, at 94 (defining an “insider” in the church context as one with “ownership-like authority” (quoting Jones, *supra* note 87, at 577)).

⁹⁰ See 26 C.F.R. § 53.4958-6(c)(2)(i) (2015); see also Encino, *supra* note 29, at 97 (discussing this excess-benefit standard).

⁹¹ See Encino, *supra* note 29, at 100.

⁹² See, e.g., Grassley Memorandum, *supra* note 31, at 43–44 (describing how a compensation consulting firm estimated one pastor’s salary, when compared to a for-profit CEO, should be set at \$2 million dollars).

The other set of inurement factors focus on the church's belief system:

- (3) The church belief system includes promises of specific, real-world consequences upon payment of fees or donations.

For example, televangelists from the prosperity gospel may promise that one's credit card debt will be erased or a disease will be cured because of a donation.⁹³ This factor only considers specific, verifiable promises, not general promises of salvation or simple requests by a church for donations. Although this would not eliminate potential abuse stemming from general promises, the prohibition of all promises would render the definition of "church" too narrow to be practicable. At the very least, this factor would help the IRS flag egregious cases that have proven effective in the past.⁹⁴

- (4) The church charges fees to perform certain rites or services that are believed to be necessary for spiritual advancement and/or progression in the church hierarchy.⁹⁵

For example, the Church of Scientology charging for "auditing"⁹⁶ services would weigh against a finding of "church."

For factors (3) and (4), the greater the percentage of total church revenues derived from these types of donations or fees, the more the disqualifying factor weighs against the finding of "church" status. Factors (3) and (4) do not delve into the sincerity of the belief that such promises are genuine or such services are necessary.⁹⁷ These factors are also deliberately broad in language to provide the IRS with flexi-

⁹³ See, e.g., Stern, *supra* note 10.

⁹⁴ See, e.g., BOWLER, *supra* note 10, at 105 (discussing that televangelism "proved not only an effective tool of evangelism but also one of generating income[.]" in part because ministers would "promis[e] viewers miraculous returns on their donations"); *id.* at 78 ("Prosperity was a gospel of weights and measures. As preachers heaped promise after promise of monetary gain, supporters sought out scales by which to weigh their own rewards.").

⁹⁵ The IRS has struggled with drawing lines in this category in the past. In *Hernandez v. Commissioner of Internal Revenue*, 490 U.S. 680 (1989), the Supreme Court upheld the IRS determination that contributions for "auditing" sessions were not tax deductible. Betz, *supra* note 8, at 755–56 (citing *Hernandez*, 490 U.S. at 684). However, "there are plenty of exchanges between believers and religious organizations that look like a quid pro quo but [that the IRS has found] do not defeat exemption." Betz, *supra* note 8, at 756 (citing *Hernandez*, 490 U.S. at 708–09 (1989) (O'Connor, J., dissenting)) (discussing inconsistent treatment of such exchanges by the IRS). Perhaps if the IRS proposes more definite guidelines, such as the one proposed *infra* in Part II, it will be forced to refine its line drawing efforts (e.g., in informal guidance).

⁹⁶ *Church of Scientology of Cal. v. Comm'r*, 823 F.2d 1310, 1313 (9th Cir. 1987).

⁹⁷ This type of difficult analysis is reserved for deciding whether a religious organization qualifies for tax exemption at all under § 501(c)(3), which is beyond the scope of this proposal. See *Found. of Human Understanding v. United States*, 614 F.3d 1383, 1389 n.3 (Fed. Cir. 2010) (holding that the Foundation did not qualify as a church "[b]ecause the IRS ruled that the Foun-

bility in determining whether an entity is using its church status for private inurement purposes. Over time, the IRS can provide more examples of what would qualify under factors (3) and (4) in informal guidance, for example through Internal Revenue Rulings. This proposal is only aimed at making sure that religious organizations that appear to be primarily and disproportionately benefitting a small number of individuals are at least obligated to report their financial dealings to the IRS. Churches have tax-exempt status, and are thus subsidized by all tax payers, because they benefit the public as a whole, not a small number of individuals.⁹⁸ If there are signs that an organization is not living up to its public-benefit purpose, the public is entitled to closer scrutiny of that organization's dealings.

A real-life example demonstrates how the IRS can use this new balancing test to target improper church designations for tax purposes. Senator Grassley's 2011 report on media-based ministries provides some insight into the structure and financing of certain megachurches.⁹⁹ The data gathered for this report was primarily based on information voluntarily provided by the churches themselves, anonymous insider informants, and public records.¹⁰⁰ Without any requirement for churches to file 1023 or 990 forms with the IRS, the limited information gathered from these types of sources would be the only basis for the IRS to challenge a church's tax-exempt status as a "church" in a real-life situation.¹⁰¹ However, as the hypothetical will demonstrate, the proposed definition of church would allow the IRS to delve into particularized inurement-based considerations that are not part of its fourteen-criteria test,¹⁰² providing the IRS with the possibility of instituting a church tax audit in which more information could come to light. Increased rigor in IRS analysis would provide more guidance to courts and organizations determining if they can qualify as a non-filing "church" for tax purposes.

dation qualified as a 'religious organization' for purposes of [26 U.S.C.] § 501(c)(3), the Foundation did not need to establish the sincerity or legitimacy of its religious beliefs").

⁹⁸ *Bob Jones Univ. v. United States*, 461 U.S. 574, 591–92 (1983).

⁹⁹ See Grassley Memorandum, *supra* note 31.

¹⁰⁰ *Id.* at 1–3; see also Minority Staff Review of Without Walls International Church from Lynda F. Simmons, Staff of S. Fin. Comm., to Sen. Charles Grassley, S. Fin. Comm. 1 (Jan. 6, 2011) [hereinafter WWIC Memo] (on file with S. Fin. Comm.), <http://finance.senate.gov/newsroom/ranking/download/?id=92ca4e4e-4146-4448-9bcc-ebf81631f300>.

¹⁰¹ See Encino, *supra* note 29, at 87 (arguing that the filing of a 1023 form "put[s] the IRS on notice of the church's existence and make[s] a church tax inquiry more probable than without").

¹⁰² The IRS's "facts and circumstances" private inurement analysis does not have any particularized factors. See *id.* at 92.

Senator Grassley's staff gathered a substantial amount of information about the Without Walls International Church ("WWIC"), in part because this church agreed to undergo a limited external audit.¹⁰³ In the early-to-mid 2000s, WWIC boasted a membership of 20,000 members¹⁰⁴ and total revenue of almost \$40 million.¹⁰⁵ The two ministers of the church, Randy and Paula White, preached the prosperity gospel, promising that contributions to the church would result in financial rewards.¹⁰⁶ The IRS would probably find that the WWIC is a "church" based on its fourteen criteria or the modified associational factors of the proposed test in this Essay. This is because the WWIC has a distinct legal existence,¹⁰⁷ a common faith (the prosperity doctrine),¹⁰⁸ and frequent physical gatherings of congregants.¹⁰⁹

Under the proposed test, the IRS could then turn to the inurement-based factors. The "insider" factors are particularly compelling in this case. Paula and Randy White each received compensation in excess of \$1 million annually.¹¹⁰ This fact alone may disqualify WWIC as a "church" under the first "insider" factor: accession to wealth greater than the value of services provided.¹¹¹ Though it is difficult to gather revenue and salary data from non-profit religious organizations,¹¹² which would ideally be the point of comparison in an actual

¹⁰³ See WWIC Memo, *supra* note 100, at 2–3.

¹⁰⁴ *Our History*, WITHOUT WALLS INT'L CHURCH, <https://withoutwalls.org/our-history/> [<https://perma.cc/Q9HC-N73T>] (last visited July 21, 2016).

¹⁰⁵ WWIC Memo, *supra* note 100, at 6.

¹⁰⁶ See John Barr, *Athletes and Evangelists Cross Paths*, ESPN (Apr. 17, 2009), <http://espn.go.com/espn/otl/news/story?id=4076585>; see also BOWLER, *supra* note 10, at 137 (naming the WWIC's leaders, Paula and Randy White, as "famous names in prosperity theology").

¹⁰⁷ See WWIC Memo, *supra* note 100, at 3.

¹⁰⁸ See Barr, *supra* note 106.

¹⁰⁹ The church attempted to gather large crowds in arena-like spaces. See *Our History*, *supra* note 104. Perhaps the IRS could decide that the associational factor of interactive physical gathering is weak if there were some data about the number of followers that watched the televised services online and contributed donations to the church, but this alone would likely not disqualify WWIC as a "church" given the large numbers of congregants that actually gathered to attend services. See *id.*

¹¹⁰ WWIC Memo, *supra* note 100, at 7.

¹¹¹ See *supra* note 87.

¹¹² How the IRS would gather such data in reality is beyond the scope of this Essay, though one commentator has suggested that this may be feasible:

[This] would require the Treasury or a similarly situated entity to compile data determining reasonable compensation ranges for churches in each region, state, or other measure of geographic territory. In making such determinations, that entity could consider various factors, including church revenue, monthly attendance, geographical location, and the standard of living of the area in which the church is established. This data could then be used in setting reasonable salary ranges within which the parties could safely enjoy the presumption of reasonableness.

IRS analysis of an entity, a study of for-profit companies noted that the median CEO salary for a company with \$1 billion in revenue in 2011 was \$1.7 million.¹¹³ Considering that the revenue of WWIC is two orders of magnitude lower than \$1 billion, while the Whites' salary is in the same order of magnitude as the median salary of a for-profit CEO, it would not be difficult to show that the Whites are highly overpaid for their services.¹¹⁴

If the first insider factor is not enough to disqualify WWIC as a "church" for tax purposes, the second "insider" factor also weighs towards disqualification. The second factor looks at how insiders exercise the right of control over the church's assets as if they were their own while providing insubstantial benefit to the congregants.¹¹⁵ There are reports of the Whites expensing \$10,000 dollars of their personal credit card purchases to the church.¹¹⁶ They also paid for someone's plastic surgery and chartered a jet trip to Las Vegas to attend a boxing match using church money.¹¹⁷ This would easily add up to tens of thousands of dollars. Even more telling, the Whites, with the WWIC's CFO, allegedly determined how *all* of WWIC's revenue is spent, disregarding the WWIC's board of directors.¹¹⁸ It is therefore possible that a very large fraction of the church's income was being used by these insiders as if it were their own, again weighing heavily for disqualification.

Finally, if WWIC makes concrete promises to donors that financial rewards will result from donations, this would satisfy the third disqualifying inurement factor. Because WWIC's main source of revenue is donations,¹¹⁹ a substantial part of the church's revenue may be "tainted" with specific promises of financial rewards, making the factor weigh heavily against qualification of "church."¹²⁰

Encino, *supra* note 29, at 100.

113 M. Bamberger, *How Much Does The Average CEO Really Earn?*, CHIEF EXEC. (Nov. 16, 2012), <http://chiefexecutive.net/how-much-does-the-average-ceo-really-earn/>.

114 The IRS can provide further examples in informal guidance. The IRS may choose to provide numerical recommendations, but this will of course be at the cost of enforcement flexibility. Encino, *supra* note 29, at 100 (recommending IRS adopt numerical recommendations).

115 *See supra* note 87.

116 *See* WWIC Memo, *supra* note 100, at 6.

117 *See id.* at 11, 13.

118 *See id.* at 6.

119 *Id.*

120 Proof about these types of promises may be difficult to gather firsthand, especially if the promises are only spoken at sermons. Third-party referrals would then be the IRS's primary source of information on this factor.

In sum, even though the IRS may not have all necessary financial information from WWIC, it may have enough to disqualify it as a “church” under the proposed test. If disqualified, WWIC would have to file Forms 1023 and 990.¹²¹ These forms would help the IRS determine the organizational structure of WWIC, how much is spent in travel expenses, if WWIC has joint ventures with other for-profit organizations, the number of congregants, the place of worship, whether the ministers are also CEOs or directors, etc.¹²² With this new filing requirement, even though the church does not have to report the income of ministers for performing their ministerial duties,¹²³ the WWIC would have to report the income of the Whites for their roles as CEOs or as directors. The WWIC would also have to report on its many affiliated organizations that may be presently providing routes for income manipulation or funneling.¹²⁴

This hypothetical may actually be unrealistic in some sense. It is unknown whether the IRS has the same resources as Senator Grassley’s staff did in collecting this type of information. Senators, for example, have the threat of subpoena power at their disposal.¹²⁵ In addition, even with the threat of subpoena power, Grassley’s staff was not able to gather as much information about other churches, such as Creflo Dollar’s church.¹²⁶ However, as detailed above, the proposed test could have been used to disqualify WWIC based on multiple factors. Thus, even with the limited information that can be realistically gathered about organizations such as Creflo Dollar’s church, the IRS should still be able to disqualify flagrant abuse of the church tax category. For example, information about Creflo’s promises under the prosperity gospel¹²⁷ and the circumstantial evidence of Creflo’s houses

¹²¹ Since WWIC has an annual revenue of \$40 million, they would have to file a full 990 form. See *Which Forms Do Exempt Organizations File?*, INTERNAL REVENUE SERV. (last updated Feb. 8, 2016), <https://www.irs.gov/charities-non-profits/form-990-series-which-forms-do-exempt-organizations-file-filing-phase-in> [<https://perma.cc/U9XB-5N8C>].

¹²² See INTERNAL REVENUE SERV., INSTRUCTIONS FOR FORM 990 RETURN OF ORGANIZATION EXEMPT FROM INCOME TAX (Jan. 12, 2016), <https://www.irs.gov/pub/irs-pdf/i990.pdf>.

¹²³ INTERNAL REVENUE SERV., *supra* note 30, at 22.

¹²⁴ For example, at least from the external audit information available to the Grassley staff, the auditor ignored all “intercompany transactions” between WWIC and these related companies because they are “under common control.” WWIC Memo, *supra* note 100, at 3.

¹²⁵ See Grassley Memorandum, *supra* note 31, at 1.

¹²⁶ See Minority Staff Review of World Changers Church International (WCCI) from Lynda F. Simmons, Staff of S. Fin. Comm., to Sen. Charles Grassley, S. Fin. Comm. (Jan. 6, 2011) [hereinafter Creflo Memorandum] (on file with S. Fin. Comm.), <http://www.finance.senate.gov/imo/media/doc/WCCI%20Dollar%2001-05-11.pdf>.

¹²⁷ See Walton, *supra* note 10, at 113. Walton describes one of Creflo Dollar’s sermons: He assures attendees that they should not be “tempted” not to tithe or allow the

and jets could still be used to disqualify him under inurement factors (2) and (3).¹²⁸ Thus, the proposed church definition, though not fool-proof, should still allow the IRS to insist that “churches” with more blatant cases of abuse do not qualify for the automatic church tax exemption and need to file annually.

Ideally, this same test would be used by the IRS when deciding to institute a tax inquiry and would also be used by the courts when reviewing IRS decisions. The IRS cannot bind the courts to a specific test, however. The only realistic way to create uniformity is for the IRS to get deference for its “church” definition in the courts on a case-by-case basis.¹²⁹ Consistent treatment by the IRS and the courts of the “church” category for the entire Internal Revenue Code, including audits, filing requirements, and charitable deductions,¹³⁰ would simplify IRS enforcement and judicial review and would be more effective at instilling a general perception that the definition of church is well-defined and consistently enforced.¹³¹ The question then becomes: will the IRS be able to convince the courts to defer to its definition of “church” for tax purposes?

B. How Can the IRS Create a Definition of “Church” to Which Courts Defer?

The IRS has been applying its fourteen-criteria test, at least internally, since the 1970s.¹³² However, courts have not consistently used this definition, often developing their own varying multi-factor tests.¹³³ One of the reasons courts have not strictly adhered to the IRS fourteen-criteria test is because it was only promulgated as informal guidance that was published in a newsletter in 1978.¹³⁴ In fact, why the IRS chose these particular criteria seems to have been lost in the bureaucratic sands of time. It is also not clear how rigorously or consistently the IRS applies this current test internally. The IRS Internal

state of their finances to “weigh heavier than God’s command.” Citing Proverbs . . . he encourages the assembly . . . to “lean not on your own budget.” But rather by giving generously toward the offering, God will honor the faithful with a financial “breakthrough.”

Id.

¹²⁸ See Creflo Memorandum, *supra* note 126, at 8–11.

¹²⁹ See *infra* note 142 and accompanying text.

¹³⁰ *E.g.*, 26 U.S.C. §§ 170(b)(1)(A)(i), 508(c)(1), 6033(a)(3), 7611 (2012).

¹³¹ See *supra* text accompanying notes 64–68.

¹³² *Found. of Human Understanding v. Comm’r*, 88 T.C. 1341, 1357–58 (1987) (citing Kurtz Remarks, *supra* note 42).

¹³³ See *supra* notes 47–55.

¹³⁴ See INTERNAL REVENUE SERV., *supra* note 42, § 7.26.2.2.4(5).

Revenue Manual cites these fourteen “church characteristics” as non-exclusive, instructing staff to consider “any other facts and circumstances.”¹³⁵ The manual also lists the various tests applied by the courts as “provid[ing] most of the guidance on the meaning of ‘church.’”¹³⁶ Given that the informal and inconsistent application by the IRS of its fourteen-criteria test, it is no wonder courts have declined to use the fourteen criteria as definitive or exclusive.¹³⁷ In fact, the U.S. Government, when arguing on the side of the IRS during litigation, does not expect a court to exclusively use the fourteen criteria.¹³⁸

In view of the limited success of the informal fourteen-criteria test, the most effective way for the IRS to create a uniform standard for the “church” category would be to pass a binding rule.¹³⁹ Although no court has found that it would be unconstitutional for the IRS to define the “church” category for tax exemption or filing purposes,¹⁴⁰ a court has also never addressed whether the IRS has been delegated rulemaking authority to create a binding rule to this effect.

If the IRS were to pass a binding rule defining the “church” category, using notice-and-comment procedures, then it would likely be entitled to *Chevron*¹⁴¹ deference by the courts.¹⁴² As the Supreme

¹³⁵ *Id.*

¹³⁶ *See id.* § 7.26.2.2.5.

¹³⁷ *Found. of Human Understanding v. United States*, 614 F.3d 1383, 1388 (Fed. Cir. 2010) (“With respect to the 14 criteria, we . . . note that courts have generally declined to accept the 14 criteria as a definitive test for whether an institution qualifies as a church.”).

¹³⁸ *See, e.g.*, Brief for the Defendant-Appellee at 40–41, 58, *Found. of Human Understanding*, 614 F.3d 1383 (No. 2009-5129) (referring to the fourteen criteria as “guidance for courts” but also arguing the organization’s status under associational factors).

¹³⁹ A statutory solution is unlikely given the politically-charged nature of this issue and the general congressional tendency to overcorrect in order to avoid church and state entanglement. *See supra* Section I.A.

¹⁴⁰ *De La Salle Inst. v. United States*, 195 F. Supp. 891, 903 (N.D. Cal. 1961) (“Plaintiff contends that the First Amendment to the Federal Constitution prevents the exemption from being accorded only to those organizations which meet the ‘orthodox’ conception of what is a church. . . . If the Constitutional argument has any merit, it should cause the exemption to be struck down as a whole—not cause it to be extended to those who are not within its terms.”); *Church of Scientology of Cal. v. Comm’r*, 83 T.C. 381, 462 (1984) (“The establishment clause does not cloak a church in utter secrecy, nor does it immunize a church from all governmental authority.”). The test proposed by this Essay will likely withstand constitutional scrutiny. *See Hernandez v. Comm’r*, 490 U.S. 680, 696 (1989) (upholding a law that, in effect, disqualified *quid pro quo* contributions to the Church of Scientology from tax deductions, even though the law may have imposed a higher burden on this particular religious organization as compared to others).

¹⁴¹ *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

¹⁴² *Chevron*, one of the most influential cases in administrative law, explained that when Congress leaves an agency’s organic statute ambiguous, this constitutes an implicit delegation of

Court in *Mayo Foundation for Medical Education and Research v. United States*¹⁴³ recently explained, “[t]he principles underlying our decision in *Chevron* apply with full force in the tax context.”¹⁴⁴ Thus, for IRS notice-and-comment rulemaking, the traditional *Chevron* analysis applies. *Chevron* analysis often results in significant deference by a court to an agency’s interpretation of a statute, making binding rulemaking the optimal approach for the IRS in creating a uniformly applied definition of “church.”¹⁴⁵

If the IRS were to use rulemaking to provide a new definition of “church” for tax purposes, it would easily pass the *Mead*¹⁴⁶ threshold test to qualify for *Chevron* deference: “[1] that Congress delegated authority to the agency generally to make rules carrying the force of law, and [2] that the agency interpretation claiming deference was promulgated in the exercise of that authority.”¹⁴⁷ The IRS has general rulemaking authority to “prescribe all needful rules and regulations for the enforcement [of the Internal Revenue Code],”¹⁴⁸ thus satisfying part one of *Mead*.¹⁴⁹ If the IRS cites to this authority when promulgating a rule defining the “church” category after notice-and-comment procedures, it would also satisfy part two of *Mead*.¹⁵⁰

policy discretion to the agency that courts need to respect. *Chevron*, 467 U.S. at 843–44. *Chevron* emphasized agency expertise and political accountability as two main reasons for deference. *Id.* at 865.

¹⁴³ *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44 (2011).

¹⁴⁴ *Id.* at 55. Before *Mayo*, there was some uncertainty in the law about whether *Chevron*, or another case, *National Muffler*, applied in the context of deference to IRS statutory interpretation. *Id.* at 53–54 (citing *Nat’l Muffler Dealers Ass’n, Inc. v. United States*, 440 U.S. 472 (1979)). *Mayo* concluded that *Chevron* overruled *National Muffler* and is the default test for most administrative law statutory interpretation cases. *See id.* at 53–55 (refusing “to carve out an approach to administrative review good for tax law only”).

¹⁴⁵ *See Chevron*, 467 U.S. at 844.

¹⁴⁶ *United States v. Mead Corp.*, 533 U.S. 218 (2001).

¹⁴⁷ *Id.* at 226–27.

¹⁴⁸ 26 U.S.C. § 7805(a) (2012).

¹⁴⁹ *See Mayo*, 562 U.S. at 57.

¹⁵⁰ There has been some inconsistency in the law about what general rulemaking authority means in terms of authorizing an agency to pass substantive rules. *See* ROBERT L. GLICKSMAN & RICHARD E. LEVY, *ADMINISTRATIVE LAW: AGENCY ACTION IN LEGAL CONTEXT* 270–73 (2d ed., 2015). The IRS, however, has a long-standing history of passing substantive rules. In addition, *Mayo* explicitly refused to recognize a distinction between general and specific rulemaking authority when it came to *Chevron* deference. *See Mayo*, 562 U.S. at 56–57. Finally, there is striking similarity between the IRS passing a rule to define the category of “church” for various Tax Code provisions under its general rulemaking authority, *see* 26 U.S.C. §§ 170(b)(1)(A)(i), 508(c)(1), 6033(a)(3), 7611 (2012), with the facts in *Mayo*, where the IRS defined the term “student” for a Social Security tax-exemption provision, citing the same general rulemaking powers. *Mayo*, 562 U.S. at 49–50. The court may of course instead cite to *King v. Burwell*, 135 S. Ct. 2480 (2015), where the Supreme Court held that the Affordable Care Act’s language “established by

If the IRS satisfies the threshold test, a court would next consider part one of the *Chevron* test: “whether Congress has directly spoken to the precise question at issue . . . [and whether] the intent of Congress is clear”¹⁵¹ If the answer to this step is “yes” then the court “must give effect to the unambiguously expressed intent of Congress.”¹⁵² In this case, however, Congress has been entirely silent on the matter. There is no definition of “church” in the Tax Code, and the legislative history offers minimal guidance.¹⁵³ There is little doubt that the definition of “church” is a gap left by Congress in the Tax Code that the IRS has the authority to fill.¹⁵⁴

Because “Congress has not directly addressed the precise question at issue”¹⁵⁵ in this case, *Chevron* step one is satisfied. A court would then advance to step two of the *Chevron* analysis, requiring a determination of “whether the agency’s answer is based on a permissible construction of the statute.”¹⁵⁶ Empirical studies show that this is a very deferential standard of review—the vast majority of courts that reach step two of the *Chevron* analysis defer to the agency’s construction.¹⁵⁷ Courts are not to disturb an agency rule unless it is “arbitrary

the State” was too “economic[ally] and politic[ally] significan[t]” to have been delegated to the IRS to define. *Id.* at 2488–89. *King* is distinguishable from the case at hand, however, because the Affordable Care Act is newly drafted legislation, *see id.* at 2482, while the “church” category has been undefined in the Tax Code since at least 1969, *see supra* Section I.A.

It is also unlikely that a court would consider this rule to be a pure question of law exempt from *Chevron* deference. Some caselaw has indicated that pure questions of statutory construction may not be eligible for *Chevron* deference. *See, e.g.,* *Immigration & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 446–48 (1987). The proposed “church” definition rulemaking would probably be considered a mixed question of law and fact, however, not a pure question of law, given the policy considerations influencing the rule. In sum, if the IRS cites to its general rulemaking authority in passing a binding rule defining the “church” category, it is likely a court would find that the IRS has satisfied part two of *Mead* to qualify for *Chevron* deference.

¹⁵¹ *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

¹⁵² *Id.* at 842–43.

¹⁵³ *See supra* Section I.A.

¹⁵⁴ *See Chevron*, 467 U.S. at 843–44 (“If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. . . . Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.”).

¹⁵⁵ *Id.* at 843.

¹⁵⁶ *Id.*

¹⁵⁷ Orin S. Kerr, *Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Courts of Appeals*, 15 *YALE J. ON REG.* 1, 31 (1998) (finding that agency rules are upheld in eighty-nine percent of cases that proceed to *Chevron* step two).

or capricious in substance, or manifestly contrary to the statute.”¹⁵⁸ It is not clear how the courts would determine whether the definition of “church” is contrary to statute or is arbitrary and capricious, in view of the sparse amount of guidance Congress has provided on the topic. The proposed definition¹⁵⁹ has support in caselaw and statutes. The associational factors are based on the IRS’s fourteen criteria and prior cases defining “church” for various Tax Code provisions.¹⁶⁰ The “insider” private inurement factors are based on IRS regulations pertaining to excess benefits.¹⁶¹ Finally, the private inurement disqualifying factors having to do with fees for religious services have support in case precedent such as *Hernandez v. Commissioner*,¹⁶² which upheld the IRS in prohibiting charitable deductions for quid pro quo religious services.¹⁶³ Thus, the proposed IRS interpretation of the Tax Code’s use of the word “church” appears reasonable enough to pass the *Chevron* step two analysis. In sum, it is likely that the IRS can pass a binding rule similar to the one proposed in this Essay and that it would receive *Chevron* deference by a court.¹⁶⁴

¹⁵⁸ *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 53 (2011) (quoting *Household Credit Serv., Inc. v. Pfennig*, 541 U.S. 232, 242 (2004)).

¹⁵⁹ See *supra* Section II.A.

¹⁶⁰ See, e.g., *Am. Guidance Found., Inc. v. United States*, 490 F. Supp. 304, 306 (D.D.C. 1980) (defining a minimum definition for “church” under § 170 as an organization which “includes a body of believers or communicants that assembles regularly in order to worship”).

¹⁶¹ See 26 C.F.R. § 53.4958–6 (2015); Encino, *supra* note 29, at 95–97.

¹⁶² *Hernandez v. Comm’r*, 490 U.S. 680 (1989).

¹⁶³ *Id.* at 694 (“[W]e conclude that petitioners’ payments to the Church for auditing and training sessions are not ‘contribution[s] or gift[s]’ within the meaning of that [§ 170] statutory expression.” (second alteration in original)).

¹⁶⁴ If the IRS were to decide that the notice-and-comment rulemaking procedures would be too onerous given the politically-sensitive nature of classifying religious organizations, it may choose to proceed via informal rulemaking by publishing a nonlegislative rule with the new “church” definition. Nonlegislative rulemaking has the advantage of attracting less scrutiny, would allow the IRS flexibility to change positions, and would defer judicial review. See GLICKSMAN & LEVY, *supra* note 150, at 657–61. However, without notice-and-comment procedures, this rule would probably not be binding on the taxpayers and courts would no longer defer to it under *Chevron*. See *id.* at 682–83 (citing *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44 (2011)) (proposing the idea that *Chevron* deference may only be sought for binding rules and that notice-and-comment procedures are usually necessary to make rules binding). Nonetheless, since a nonlegislative rule may still get some deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), the IRS could still, to some extent, promote uniformity in how courts treat the “church” category by passing a nonlegislative rule.

However, *Skidmore* deference is weak and less predictable than *Chevron* deference. See GLICKSMAN & LEVY, *supra* note 150, at 682–83. In addition, a nonbinding rule, by definition, would not bind the taxpayers, see *id.*, providing guidance that entities may choose to simply ignore. Thus, the goal of consistent application of the “church” definition would likely be diluted or lost with a nonlegislative rule.

Passing a binding rule using notice-and-comment procedures would establish a uniform, enforceable definition of “church” for tax purposes, with the benefits detailed above.¹⁶⁵ In addition, a public and lengthy notice-and-comment procedure would help bring to light any constitutional and administrative issues that the IRS may need to consider before enacting such a rule and would help the IRS legitimize any rule that it ultimately passes in the eyes of the public. Such publicity may even entice Congress to take legislative action, and, ideally, legislative action that does something more than maintain the dysfunctional status quo.

III. POLITICAL, CONSTITUTIONAL, AND PRACTICAL CRITIQUES OF NARROWING THE “CHURCH” CATEGORY FOR TAX PURPOSES

The IRS will likely receive increased amounts of criticism and political pressure for attempting to change its tax-exemption categories. There is strong evidence that Congress does not want the IRS to become deeply entangled with religious organizations.¹⁶⁶ Congressional concern may actually result in a positive outcome of the proposed IRS changes as Congress may decide to subsequently weigh in. The simplest legislative solution to “entanglement” concerns would be to simply create filing requirements for *all* religious organizations, without special treatment for churches.¹⁶⁷ Although this may appear to disadvantage legitimate churches, commentators believe that increased transparency may actually benefit churches and their congregants.¹⁶⁸ For example, transparency provides congregants peace of mind and trust in their local parish,¹⁶⁹ and makes donors more confident and more willing to give the church money.¹⁷⁰ It is worth noting that imposing a filing requirement on all religious organizations would actually be a simpler solution than the proposed IRS definition, but, given

¹⁶⁵ *Supra* notes 60–66 and accompanying text.

¹⁶⁶ See Grassley Memorandum, *supra* note 31, at 32 (“Congress sent a strong signal with the enactment of section 7611, also known as the Church Audit Procedures Act, and the 2002 amendments to the parsonage allowance provision, that it expects minimal interference in church operations from the IRS.”).

¹⁶⁷ See Montague, *supra* note 27, at 262 (“Some commentators have argued that . . . the [Supreme] Court would view the special treatment of churches in the Internal Revenue Code, including the exemption from filing the Form 990, as unconstitutional violations of the Establishment Clause.”).

¹⁶⁸ See *id.* at 246–54.

¹⁶⁹ *Id.* at 251.

¹⁷⁰ *Id.* at 246.

congressional history on this subject, legislative action appears to be unlikely in this area.¹⁷¹

Another political roadblock may be relevant—the IRS may prefer to avoid any more run-ins with powerful religious organizations after its costly loss in its war of attrition with the Church of Scientology.¹⁷² Perhaps the IRS will decide that it is cheaper just to give impostor churches tax-exempt status than to deal with constant litigation. Hopefully, this cynical perspective will be dwarfed by the recent publicity that the IRS has received for these unchecked tax abuses,¹⁷³ forcing the agency to act nonetheless.

Any constitutional claims¹⁷⁴ of persecution or discrimination under this proposed “church” definition are outweighed by the advantages of the reform such as increased transparency and public confidence.¹⁷⁵ This proposal would not deprive any churches of tax-exempt status but would simply impose filing requirements on a greater number of religious entities that wrongly claim to be churches for tax purposes. In addition, these filing requirements would not involve publishing the names of congregants, which should alleviate some of the privacy concerns.¹⁷⁶ Finally, the Supreme Court has already explained that tax obligations that predominantly affect specific religious organizations, such as taxation on *quid pro quo* religious services, are not necessarily unconstitutional or discriminatory.¹⁷⁷ In fact, the least discriminatory approach would actually be to apply the same fil-

171 *Supra* notes 37–41, 139 and accompanying text.

172 Grassley Memorandum, *supra* note 31, at 21 (“In the case of the Church of Scientology, an organization for which we received multiple investigation requests, it might appear that obtaining church status is a result of having the financial resources to battle the IRS.”).

173 *E.g.*, Abby Ohlheiser, *supra* note 9.

174 Any general constitutional Free Exercise Clause arguments are beyond the scope of this Essay. For more on the murky caselaw surrounding this issue and the particular problems with government delving into sincerity of belief, see Betz, *supra* note 8, at 754–60 (“[N]o matter how government approaches the issue, it will entangle itself with religious affairs either by taxing or by exempting religious organizations . . .”).

175 *See supra* notes 168–70 and accompanying text.

176 *See* INTERNAL REVENUE SERV., *supra* note 30, at 22.

177 *See* Hernandez v. Comm’r, 490 U.S. 680, 696 (1989).

It may be that a consequence of the *quid pro quo* orientation of the “contribution or gift” requirement is to impose a disparate burden on those charitable and religious groups that rely on sales of commodities or services as a means of fund-raising, relative to those groups that raise funds primarily by soliciting unilateral donations. But a statute primarily having a secular effect does not violate the Establishment Clause merely because it “happens to coincide or harmonize with the tenets of some or all religions.”

Id. (quoting McGowan v. Maryland, 366 U.S. 420, 442 (1961)).

ing standard to *all* religious organizations instead of giving churches preferential treatment.¹⁷⁸

Finally, fears about increased filing burdens on small churches are exaggerated. Ideally, no legitimate churches would be subject to a filing requirement under this proposal. In addition, since many smaller religious organizations are already subject to these requirements,¹⁷⁹ the filing burden is likely manageable. In fact, the e-postcard form that small tax-exempt organizations file requires only basic information, such as the organization's name and contact information.¹⁸⁰ Even this amount of information would still be more than what the IRS currently has on entities classified as "churches." Overall this proposal's benefits of improving IRS enforcement against illegitimate organizations, increasing public confidence, and improving transparency outweigh the potential increased burdens that may befall certain religious organizations.

CONCLUSION

Congress has created a giant loophole for impostor churches in the Internal Revenue Code, and people are taking advantage of it. The IRS has little room to maneuver, but it has the discretion to create a narrower, more specific definition of what constitutes a "church" for tax purposes.¹⁸¹ This change would force more religious entities to file annual returns with the IRS and would better define the IRS threshold for auditing such organizations. Consistent, uniform enforcement of this definition may lead to increased disclosure to the IRS by both religious entities and third parties, and would provide a general boost to public confidence in the tax system and trust in legitimate churches. The IRS's actions may also prompt Congress to create a law that would apply filing requirements uniformly to all religious entities, leading to even greater transparency and public confidence. Either way, the IRS can succeed in curbing abuse of the church tax form.

¹⁷⁸ Montague, *supra* note 27, at 262.

¹⁷⁹ INTERNAL REVENUE SERV., *supra* note 30, at 22 (Aug. 2015).

¹⁸⁰ *Information Needed to File e-Postcard*, INTERNAL REVENUE SERV., <https://www.irs.gov/Charities-&-Non-Profits/Information-Needed-to-File-e-Postcard> [<https://perma.cc/X3EC-58EL>] (last updated July 20, 2016).

¹⁸¹ 26 U.S.C. §§ 170(b)(1)(A)(i), 508(c)(1), 6033(a)(3)(A), 7611 (2012); *see* Encino, *supra* note 29, at 89.