

THE PARSONAGE EXEMPTION VIOLATES THE ESTABLISHMENT CLAUSE AND SHOULD BE DECLARED UNCONSTITUTIONAL

ERWIN CHERMERINSKY*

I. INTRODUCTION

In December 2001, I received a call from a staff attorney at the Ninth Circuit. She said that a panel of the Ninth Circuit had just heard oral argument in a case involving the parsonage allowance and wanted to know if I was available to accept an appointment to be a friend of the court and write a brief concerning its constitutionality. She explained that the parsonage allowance was a provision of the tax code which allowed “ministers of the gospel” to be paid a tax-free housing allowance. The issue to be briefed was whether this benefit for clergy violated the Establishment Clause of the First Amendment. I said that, of course, I would accept the appointment.

About a week later, I received another phone call from the staff attorney saying that there was division within the panel as to how to proceed. She said that I should wait before doing any work. Several weeks later, she said that the panel had approved my appointment as an *amici*, by a 2-to-1 vote, and in a published opinion.¹ A briefing

* Sydney M. Irmas Professor of Public Interest Law, Legal Ethics, and Political Science, University of Southern California.

1. *Warren v. Commr.*, 282 F.3d 1119 (9th Cir. 2002). There was a sharp exchange between Judge Reinhardt, writing for the court, and Judge Tallman, dissenting from the court’s choice to appoint a friend of the court to brief the issue. *See id.* at 1123-24.

schedule was set, with each side required to file its briefs by May 6, 2002 and response briefs due on May 20, 2002.²

The case, *Warren v. Commissioner of Internal Revenue*,³ involved a minister in Orange County, California.⁴ In each of the taxable years at issue, all or a significant part of the compensation provided to Richard D. Warren by Saddleback Valley Community Church for ministerial services took the form of a cash housing allowance.⁵ Each year, he claimed approximately 80 thousand dollars as a tax-free housing allowance.⁶ The IRS challenged this, and claimed that Warren was entitled only to the reasonable rental value of the property.⁷ The Tax Court ruled in favor of Warren, holding that he could claim all of his housing costs as a tax-free parsonage allowance.⁸ The IRS appealed to the Ninth Circuit.⁹ At oral argument, the judges raised the question of whether the parsonage exemption violated the Establishment Clause.¹⁰ The panel then decided to ask for briefing as to whether the provision was unconstitutional, and whether it had authority to raise the issue on its own.¹¹

Briefs were filed in the Ninth Circuit on May 6, 2002. Shortly thereafter, the House of Representatives unanimously passed the *Clergy Housing Allowance Clarification Act of 2002*.¹² The expressly stated purpose of the law was to moot the *Warren* case.¹³ The House bill provided that for all years prior to 2002, clergy could receive a tax-free allowance for all of their housing costs. But for 2002 and later years, the parsonage exemption would be restricted to reasonable rental value of the property.¹⁴ Accordingly, Warren would prevail for the tax years in question, but the IRS would get what it wanted for future

2. *Id.* at 1120.

3. 114 Tax Ct. 343 (2000).

4. *See id.* at 344.

5. *Id.* at 345.

6. *Id.*

7. *Id.* at 346.

8. *Id.* at 350-51.

9. *Warren v. Commr.*, 282 F.3d 1119 (9th Cir. 2002).

10. *Id.* at 1123.

11. *Id.* at 1119-20.

12. 148 Cong. Rec. H1306-02 (daily ed. Apr. 16, 2002).

13. *Id.* at H1299-01, H1301.

14. *See Clergy Housing Allowance Clarification Act of 2002*, Pub. L. No. 107-181, § 2(b)(2), 116 Stat. 583 (2002).

years. Neither side would have reason to continue the litigation, thus mooting the case before the Ninth Circuit. The legislative history is explicit that the goal of the law is to protect 500 million dollars in benefits provided by the parsonage exemption for religious institutions and the clergy they employ.¹⁵

Congressman Ramstad, the sponsor of the bill, H.R. 4156, described the Ninth Circuit's action in asking for briefing as to the Establishment Clause issue and stated:

[I]n one of the most obvious cases of judicial overreach in recent memory, the Ninth Circuit Court of Appeals in San Francisco is poised to inflict a devastating tax increase on America's clergy. Unless Congress acts quickly, the [eighty-one]-year-old housing tax exclusion for members of the clergy will be struck down by judicial overreach on the part of America's most reversed and most activist circuit court.

...

[T]his is judicial activism at its worst. The legislation on the floor today will stop the attack on the housing allowance by resolving the underlying issue in the tax court case.¹⁶

Congressman Johnson also spoke in favor of the bill and declared:

The problem is that the Ninth Circuit Court of Appeals has taken it upon itself to challenge the very constitutionality of the clergy housing being tax exempt.

...

If Congress does not act, clergy in this country would be faced with a tax increase . . . of roughly [2.3 billion [dollars] in the next few years.¹⁷

The Senate quickly passed the Act without dissent.¹⁸ On Monday, May 20, 2002, President Bush signed it into law.¹⁹ On May 22, attorneys for the government and Reverend Warren filed a

15. 148 Cong. Rec. at H1299-01.

16. *Id.* at H1299-01-1300.

17. *Id.* at H1301.

18. 148 Cong. Rec. S3887-03 (daily ed. May 2, 2002).

19. *Warren v. Commr.*, 302 F.3d 1012, 1014 (9th Cir. 2002).

stipulated dismissal in the Ninth Circuit.²⁰ On the same day, I filed an Opposition to Stipulated Dismissal and a Notice of Motion to Intervene. I argued that I had standing as a taxpayer to challenge the parsonage allowance, as amended, as an impermissible violation of the Establishment Clause.²¹ The government and Warren opposed my intervention. The Ninth Circuit agreed with them and ruled that intervention was not to be granted.²² The court said that I could file a taxpayer action in District Court.²³

I will do so because I believe that the parsonage exemption is clearly a violation of the Establishment Clause. Clergy, and only clergy, have the enormous financial benefit of being paid in tax-exempt dollars. Moreover, "ministers of the gospel" then can deduct from their income taxes the mortgage interest and real estate taxes that they paid with tax-free dollars.

This article explains why the parsonage exemption is unconstitutional. Part II describes the parsonage exemption and uses the *Warren* case to describe its impact. Part III explains why this provision of the Tax Code should be declared unconstitutional.

II. THE PARSONAGE EXEMPTION

The parsonage exemption provides an enormous financial benefit to clergy, and to the religions that employ them, which is not available to any other taxpayers or employers. The "parsonage exemption" refers to Internal Revenue Code section 107, which states:

In the case of a minister of the gospel, gross income does not include[:] (1) [T]he rental value of a home furnished to him as part of his compensation; or[, (2) the rental allowance paid to him as part of his compensation, to the extent used by him to rent or provide a home.²⁴

The provision now found in section 107(1) was originally part of the *Revenue Act of 1921*.²⁵ Section 213(b)(11) was essentially the same as the present section 107(1), but it had no provision analogous to

20. *Id.*

21. *Id.*

22. *Id.* at 1016.

23. *Id.* at 1015-16.

24. 26 U.S.C. § 107 (2000).

25. Pub. L. No. 67-98, § 213, 42 Stat. 227, 239 (1921).

section 107(2), and thus was limited to those clergy members who were provided a house owned by the religious institutions that employed them.²⁶

In 1954, Congress amended the Internal Revenue Code and adopted section 107(2).²⁷ The 1954 revision permits a “minister of the gospel” to designate a portion of compensation as a housing allowance and to exclude that amount from income to the extent that it actually was used to provide a home.²⁸ In other words, the *1921 Act* and section 107(1) provide a benefit to clergy who are provided a residence by their employer; section 107(2) provides a benefit to all clergy by allowing them an exemption from income for the cost of their housing.

Section 107(2) was expressly intended to advance and benefit religion. The author of the provision, Representative Peter Mack, declared:

Certainly, in these times when we are being threatened by a godless and antireligious world movement we should correct this discrimination against certain ministers of the gospel who are carrying on such a courageous fight against this foe. Certainly this is not too much to do for these people who are caring for our spiritual welfare.²⁹

In order to claim the very substantial tax benefits of section 107(2), an individual must be officially commissioned by and under the authority of a qualified church or denomination.³⁰ Only clergy engaged in religious activities—serving as “ministers of the gospel”—can claim this benefit. To be considered a “minister of the gospel,” an individual must engage in duties such as “the performance of sacerdotal functions, the conduct of religious worship, the administration and maintenance of religious organizations and their internal agencies, and the performance of teaching and administrative duties at theological seminaries.”³¹ Thus, the benefit was denied to an ordained rabbi—the Director of Interreligious Affairs for the American

26. *See id.*

27. Pub. L. No. 83-1987, 68A Stat. 32 (1954).

28. *Id.*

29. H.R. Comm. on Ways and Means, *Hearings on Forty Topics Pertaining to the General Revision of the Internal Revenue Code*, 83d Cong. 1576 (Aug. 11, 1953).

30. 26 C.F.R. § 1.1402(c)-5(b)(2)(i) (2002).

31. 26 C.F.R. § 1.107-1(a) (2002); *see Knight v. Commr.*, 92 Tax Ct. 199, 204 (1989); *Wingo v. Commr.*, 89 Tax Ct. 922, 934 (1987).

Jewish Committee—whose duty was to promote the understanding of Jewish history by other religious groups.³² Likewise, the benefit was denied to a Baptist minister whose work consisted primarily of promoting anti-communism.³³

Section 107's blatant favoritism for religion can be seen by comparing it with other provisions of the Internal Revenue Code that provide a benefit to ministers on the same terms as others in similar situations in secular institutions. For example, section 119 of the Internal Revenue Code allows an income exclusion for the value of meals and lodging that are provided on the business premises of an employer as a convenience to the employer and as a condition of employment.³⁴ Thus, a minister who is required to live on the church's premises is allowed an exclusion under this provision, but so is the head of a school who lives on the premises, or any other employee who is required to live in housing provided at the work place. Section 107 is unique in that it provides a benefit to religion—to "ministers of the gospel"—that no one else receives.

Section 107(2) allows ministers to be paid without having to pay taxes on some or all of their salary by having it declared a housing allowance.³⁵ But the benefit is even greater than that: Clergy also can deduct their mortgage payments and real estate taxes from their income tax, even though they paid for these with tax exempt dollars. Although this type of "double-dipping" generally is not allowed, a specific provision of the Internal Revenue Code permits "ministers of the gospel" who benefit under section 107(2) to deduct the mortgage interest and property tax that they paid with their tax-exempt housing allowance.³⁶ This results in a substantial windfall—or government subsidy—for clergy that no one else receives. One commentator explains this with a simple example:

[S]uppose [a] taxpayer receives a \$1,000 per month rental allowance from the church. Assume also that he pays \$333 in

32. *Tanenbaum v. Commr.*, 58 Tax Ct. 1, 2, 4, 9-10 (1972).

33. *Colbert v. Commr.*, 61 Tax Ct. 449, 456-57 (1974).

34. 26 U.S.C. § 119 (2000).

35. *Id.* § 107.

36. See 26 U.S.C. § 265(a)(6) (stating in part, "[n]o deduction shall be denied under this section for interest on a mortgage on, or real property taxes on, the home of the taxpayer by reason of the receipt of an amount as . . . (B) a parsonage allowance excludable from gross income under section 107").

mortgage interest every month, and is in the 33% tax bracket. If the taxpayer is allowed to deduct the interest under section 265, then he will get a \$111 dollar windfall every month. The church spends \$1,000, but the clergyman receives total benefits in the amount of \$1,111.³⁷

Moreover, the effect is a significant financial benefit to religion because churches and synagogues and mosques can pay their clergy much less because of the tax-free dollars. Without the parsonage exemption, religious institutions would have to pay clergy significantly more to make up this difference.

In amending the parsonage exemption to make *Warren* moot, estimates were given of the economic value of its subsidy to religion.³⁸ It was estimated that eliminating the parsonage exemption would cost clergy members 2.3 billion dollars over the next five years—a very large subsidy for religion.³⁹

Warren illustrates the enormous benefit provided by the parsonage exemption. In each of the taxable years at issue, all or a significant part of the compensation provided to Richard D. Warren by Saddleback Church for ministerial services took the form of a cash housing allowance.⁴⁰

For the 1993 tax year, Reverend Warren's entire compensation of 77,663 dollars represented a housing allowance.⁴¹ In fact, on their 1993 federal income tax return, the Warrens did not include any portion of the compensation from Saddleback Church in their gross income.⁴²

For the 1994 tax year, Reverend Warren received 86,175 dollars in total compensation from Saddleback Church and again, all of it was designated as a housing allowance.⁴³ The Warrens incurred actual housing expenses of 76,309 dollars during that year, and excluded this

37. Dean T. Barham, Student Author, *The Parsonage Exclusion Under the Endorsement Test: Last Gasp or Second Wind?*, 13 Va. Tax Rev. 397, 421 (1993).

38. Milo Geyelin, *Court Questions Tax Allowance for the Clergy*, Wall St. J. B1 (May 31, 2002); Staff Reporter, *Bush Signs Clergy Tax Break Bill*, AP Online (May 20, 2002) (available in 2002 WL 21234859).

39. Staff Reporter, *supra* n. 38.

40. *Warren v. Commr.*, 114 Tax Ct. 343, 345 (2000).

41. *Id.*

42. *Id.* at 346.

43. *Id.* at 345.

amount from their gross income. The Warrens also claimed a mortgage interest deduction in the amount of 27,107 dollars.

For the 1995 tax year, Reverend Warren received one hundred thousand dollars in total compensation from the church, eighty thousand of which was designated as a housing allowance with the remaining twenty thousand designated as salary.⁴⁴ This time, the Warrens excluded 79,999 dollars of the church compensation as a housing allowance, and as in 1994, deducted mortgage interest—in an amount slightly less than thirty-six thousand dollars.⁴⁵

In other words, this case concerns a tremendous financial benefit that the Warrens received from the United States government: Not only did they exempt hundreds of thousands of dollars in income from taxes in the first instance, but they were also able to *deduct* the mortgage payments that they made with these *tax-free dollars*.

III. THE PARSONAGE EXEMPTION VIOLATES THE ESTABLISHMENT CLAUSE

A. *UNDER TEXAS MONTHLY V. BULLOCK THE PARSONAGE EXEMPTION IS CLEARLY UNCONSTITUTIONAL*

In *Texas Monthly, Inc. v. Bullock*,⁴⁶ the Supreme Court declared unconstitutional a Texas statute that exempted religious publications from the state's sales tax.⁴⁷ The Supreme Court held that a tax exemption granted only to religion violates the Establishment Clause of the First Amendment.⁴⁸ Of course, this is exactly what section 107(2) does: It provides a benefit to "ministers of the gospel" that no one else can claim.

Texas Monthly involved a statute that exempted from the state's sales tax "[p]eriodicals that are published or distributed by a religious faith and consist wholly of writings promulgating the teaching of the faith and books that consist wholly of writings sacred to a religious faith."⁴⁹ Justice Brennan, writing for the plurality, emphasized that a

44. *Id.*

45. *Id.*

46. 489 U.S. 1 (1989) (plurality).

47. *Id.* at 25.

48. *Id.* at 5.

49. *Id.* (discussing Tex. Tax Code Ann. § 151.312 (1982)).

tax benefit provided just to religion inherently violates the Establishment Clause:

[W]hen government directs a subsidy exclusively to religious organizations that is not required by the Free Exercise Clause and that either burdens nonbeneficiaries markedly or cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion, as Texas has done, it “provide[s] unjustifiable awards of assistance to religious organizations” and cannot but “conve[y] a message of endorsement” to the slighted members of the community. This is particularly true where, as here, the subsidy is targeted at writings that *promulgate* the teachings of religious faiths. It is difficult to view Texas’[s] narrow exemption as anything but state sponsorship of religious belief, regardless of whether one adopts the perspective of beneficiaries or of uncompensated contributors.⁵⁰

Section 107(2) is identical in effect to the Texas statute considered in *Texas Monthly*. The state law was a tax exemption for publications that “promulgate” the teachings of religion; similarly, section 107(2) is a tax exemption for “ministers of the gospel.”

Although Justice Brennan wrote for a plurality of three Justices (he was joined by Justices Marshall and Stevens), Justices Blackmun and O’Connor concurred in the judgment and came to the same conclusion: A tax benefit given only to religion violates the Establishment Clause. Justice Blackmun, joined by Justice O’Connor, declared “The Establishment Clause value suggests that a state may not give a tax break to those who spread the gospel that it does not also give to others who actively might advocate disbelief in religion.”⁵¹

Justices Blackmun and O’Connor concurred in the judgment because they thought it unnecessary to discuss the Free Exercise Clause, as was done in the plurality opinion.⁵² But Justice Blackmun’s opinion left no doubt as to its agreement that the Texas statute violated the Establishment Clause. He wrote:

50. *Id.* at 15 (quoting *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 348 (1987) (O’Connor, J., concurring in judgment)) (internal cross-reference omitted).

51. *Id.* at 26 (Blackmun & O’Connor, JJ., concurring).

52. *Id.* at 27.

A statutory preference for the dissemination of religious ideas offends our most basic understanding of what the Establishment Clause is all about and hence is constitutionally intolerable.⁵³

Thus, five Justices in *Texas Monthly* held that the Establishment Clause is violated by a tax exemption that gives "a tax break to those who spread the gospel that it does not also give to others."⁵⁴ Internal Revenue Code section 107(2), at issue in this case, provides a large tax break to "ministers of the gospel" that no one else can claim. *Texas Monthly v. Bullock* is squarely on point and under its controlling authority section 107(2) is unconstitutional.

B. WALZ V. TAX COMMISSION IS CLEARLY DISTINGUISHABLE
FROM THE PARSONAGE ALLOWANCE

Those defending the parsonage exemption likely will point to *Walz v. Tax Commission* as authority.⁵⁵ *Walz*, however, is easily distinguishable, and analyzing *Walz* reveals the clear unconstitutionality of section 107(2). In *Walz*, a property owner sought an injunction to prevent the New York City Tax Commission from granting property tax exemptions to religious organizations for properties used solely for religious worship.⁵⁶ The Supreme Court rejected this challenge and upheld the tax exemption.⁵⁷

But the exemption upheld in *Walz* is very different from the parsonage exemption contained in section 107(2) of the Internal Revenue Code. First, and most importantly, the tax exemption at issue in *Walz* applied to both religious and non-religious organizations;⁵⁸ whereas the parsonage exemption benefits only religion. Chief Justice Burger's majority opinion in *Walz* stressed this neutrality in upholding the law:

It has not singled out one particular church or religious group or even churches as such; rather, it has granted exemption to all houses of religious worship within a broad class of property owned by nonprofit, quasi-public corporations which include

53. *Id.* at 28.

54. *Id.* at 26.

55. 397 U.S. 664 (1970).

56. *Id.* at 666.

57. *Id.* at 667.

58. *Id.* at 666-67.

hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups.⁵⁹

Justice Harlan, concurring in *Walz*, also emphasized that the benefit to religion was permissible because the law benefited many secular groups:

As long as the breadth of exemption includes groups that pursue cultural, moral, or spiritual improvement in multifarious secular ways, including, I would suppose, groups whose avowed tenets may be antitheological, atheistic, or agnostic, I can see no lack of neutrality in extending the benefit of the exemption to organized religious groups.⁶⁰

Indeed, the Court in *Texas Monthly* distinguished *Walz* on exactly these grounds, saying that there was a clear constitutional difference between a law that benefitted only religion and one that benefitted many groups including religions.⁶¹ Justice Brennan noted: “[In *Walz*] we in no way intimated that the exemption would have been valid had it applied *only* to the property of religious groups or had it lacked a permissible secular objective.”⁶² Justice Brennan explained that the tax exemption in *Walz* was permissible because religious groups were one of many beneficiaries. He wrote: “It is because the set of organizations defined by . . . secular objectives was so large that we saw no need to inquire into the secular benefits provided by religious groups that sought to avail themselves of the exemption.”⁶³

The tax benefit in *Texas Monthly* went only to religion so it was deemed to violate the Establishment Clause.⁶⁴ In contrast, the tax benefit in *Walz* was upheld because it went to non-profit groups, secular and religious.⁶⁵ Section 119 of the Tax Code, which allows an exemption for housing costs for all employees who must live in housing provided on the employer’s premises is analogous to *Walz* in that it benefits employees of both religious and secular organizations. But the parsonage exemption, section 107(2), is exactly like the tax

59. *Id.* at 672-73.

60. *Id.* at 697 (Harlan, J., concurring).

61. *Texas Monthly v. Bullock*, 489 U.S. 1, 12, 14 n. 4-15 (1989).

62. *Id.* at 12 n. 2.

63. *Id.*

64. *Id.* at 5, 11.

65. *Walz v. Tax Commn.*, 397 U.S. 664, 672-73 (1970).

exemption struck down in *Texas Monthly*, and unlike the one in *Walz*, because only—only “ministers of the gospel”—benefit.

Second, *Walz* is distinguishable because section 107(2) involves a subsidy to religion. In *Walz*, the Court was clear that a subsidy to religion is not allowed under the Establishment Clause.⁶⁶ *Texas Monthly* obviously gives little weight to the distinction between “exemption” and “subsidy” in finding that an exemption for religious publications from the sales tax violated the Establishment Clause—there Justice Brennan observed that “[e]very tax exemption constitutes a subsidy.”⁶⁷ Nor analytically is there any difference between an exemption and a subsidy in that both involve the government financially aiding religion.⁶⁸ But to the extent that there is any validity to this distinction, the parsonage exemption is a subsidy for religion. In fact, the Joint Committee on Taxation of the United States Congress lists the “[e]xclusion of housing allowances for ministers” as a “tax expenditure,”⁶⁹ indicating that Congress regards it as a subsidy. The parsonage exemption is explicitly included among a set of tax code provisions identified as subsidies.⁷⁰

Additionally, by allowing clergy to both exclude from their income their housing costs *and* then deduct the mortgage interest that was paid with tax-free dollars, there is an obvious government subsidy solely for clergy. As one commentator observed:

This . . . deduction amounts to a surplus, not just a wealth distribution transfer. . . . Hence, when coupled with section 107, the section 265 [property tax and mortgage] interest deduction for clergy members functions economically more like a subsidy, for

66. *Id.* at 675 (stating that “[o]bviously a direct money subsidy would be a relationship pregnant with involvement”).

67. *Texas Monthly*, 489 U.S. at 14.

68. See Boris J. Bittker, *Churches, Taxes, and the Constitution*, 78 Yale L.J. 1285 (1969) (discussing property tax exemption for property owned by religious organizations that are used for religious purposes); cf. *Camps Newfound/Owattona, Inc. v. Town of Harrison*, 520 U.S. 564, 590 (1997) (speaking of the “constitutionally significant difference between subsidies and tax exemption” in the context of the dormant commerce clause).

69. Jt. Comm. Print 107-01, at 21 (Apr. 6, 2002) (*Estimates of Federal Tax Expenditures for Fiscal Years 2001-2005*, prepared by the Joint Committee on Taxation for the Ways and Means and Finance Committees).

70. 26 U.S.C. §§ 101-140 (2000) (excluding specific items, the parsonage exemption included, from gross income).

there is greater total wealth between the parties than existed before.⁷¹

Third, not taxing the real property of churches and other places of worship, as in *Walz*, avoids government entanglement with religion. In contrast, section 107(2) increases government entanglement with religion.

If the government were to tax real property of churches, there would be serious entanglement problems as the government would need to value its worth and would have to collect funds directly from churches, including foreclosing upon church property when taxes were not paid. This would entail exactly the type of “comprehensive, discriminating, and continuing state surveillance” of religion that the Supreme Court has held constitutes excessive entanglement.⁷² Moreover, such taxes on places of worship and especially their collections would carry the “potential for entanglement in the broader sense of continuing political strife over aid to religion.”⁷³

In contrast, eliminating the parsonage exemption would not carry any risks of government entanglement with religion. The income of clergy, and their housing costs, would be treated exactly the same as all other employees and all other taxpayers. The source of the funds—whether a secular or a sectarian entity—would be of no concern to the United States government. But the parsonage exemption inevitably creates substantial government entanglement with religion. Under section 107(2), the government must determine who is a “minister of the gospel” and this inherently entangles government with religion. As one commentator observed: “Treasury regulations detail the requirements that a minister must meet to qualify for the parsonage exclusion; the IRS and the courts have devoted an ever increasing amount of time and litigation to determining whether various taxpayers meet these criteria.”⁷⁴ In administering section 107(2), the government

71. Barham, *supra* n. 37, at 421.

72. *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971).

73. *Comm. for Pub. Educ. v. Nyquist*, 413 U.S. 756, 794 (1973). Similarly, the Supreme Court has upheld a narrow exemption from the federal employment discrimination statute, Title VII, for religious organizations to avoid serious entanglement problems. *Corp. of Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. Amos*, 483 U.S. 327, 335 (1987) (explaining that the exemption was justified to alleviate “significant governmental interference with the ability of religious organizations to define and carry out their religious missions”).

74. Matthew W. Foster, Student Author, *The Parsonage Allowance Exclusion*:

must decide whether the individual is administering sacraments, conducting religious worship, and if the individual has management responsibility for a church or religious denomination.⁷⁵ Such determinations inherently entangle the government with religion by requiring evaluation of the very nature of religious activities.

Finally, the *Walz* Court emphasized that the tax exemption for places of worship traces its origins to the earliest days of the nation, stating: "It is significant that Congress, from its earliest days, has viewed the Religion Clauses of the Constitution as authorizing statutory real estate tax exemption to religious bodies."⁷⁶ The Court pointed to exemptions for church property adopted in Congress in 1802 and 1813.⁷⁷ Such history, extending to the beginning of the country, often has influenced the Court in Establishment Clause analysis.⁷⁸ But section 107(2) has no such pedigree. Section 107(2) was enacted in 1954; prior to that no provision of federal law allowed clergy to exempt their housing costs from their income taxes. In other First Amendment contexts, the Supreme Court has been clear that such relatively recent developments are very different from practices that trace back to the beginning of American history.⁷⁹

For all of these reasons, the exemption for religious property upheld in *Walz* is very different from the parsonage exemption. The parsonage exemption is much closer to what Thomas Jefferson condemned long ago:

[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical: That even the forcing [of] him to support this or that teacher of his own religious persuasion, is depriving him of . . . comfortable liberty.⁸⁰

Past, Present, and Future, 44 Vand. L. Rev. 149, 168 (1991).

75. See e.g. *Knight v. Commr.*, 92 Tax Ct. 199, 204 (1989); *Wingo v. Commr.*, 89 Tax Ct. 922, 934 (1987).

76. 397 U.S. 664, 677 (1970).

77. *Id.*

78. E.g. *Marsh v. Chambers*, 463 U.S. 783, 794-95 (1983) (upholding the constitutionality of legislative chaplains based on their existence throughout American history).

79. See e.g. *Intl. Soc. of Krishna Consciousness v. Lee*, 505 U.S. 672, 680 (1992) (holding that airports are not to be considered public fora because of "the lateness with which the modern air terminal has made its appearance")

80. Thomas Jefferson, *A Bill for Establishing Religious Freedom—June 12, 1779*,

The parsonage exemption, especially when combined with the ability of clergy to deduct the mortgage interest that they paid with tax-free dollars, has everyone in society paying taxes to financially benefit “ministers of the gospel” and the religions that employ them. This is exactly the type of forced “support” for “teachers of . . . religious persuasion” that Jefferson condemned.

C. UNDER ANY THEORY OF THE ESTABLISHMENT CLAUSE THE
PARSONAGE EXEMPTION IS UNCONSTITUTIONAL

There is no agreement among the current Justices on the Supreme Court as to the test to be used in Establishment Clause cases. The test articulated in *Lemon v. Kurtzman* has not been overruled and remains the law.⁸¹ Yet in a recent case, *Mitchell v. Helms*,⁸² a plurality of the Court said that a “neutrality test” should be used and that government aid benefitting religion should be allowed so long as it is neutral, neither favoring nor disfavoring religion.⁸³ Other Justices have emphasized whether the government is “symbolically endorsing” religion.⁸⁴

What is striking about the parsonage exemption in section 107(2) is that it is clearly unconstitutional under any theory of the Establishment Clause. The unique tax benefit given to clergy violates the *Lemon* test; this benefit is not neutral in that it favors religion over all other activities and, favors some religions over others; and it unequivocally conveys a message that religion “is favored or preferred.”

in *The Founders' Constitution* vol. 5, 77 (P. Kurland & R. Lerner eds., Univ. Chi. Press 1987).

81. 403 U.S. 602, 612-13 (1971).

82. 530 U.S. 793 (2000) (plurality).

83. *Id.* at 809-10 (Thomas, J., concurring).

84. *Allegheny County v. Greater Pitt. ACLU*, 492, U.S. 573, 627 (1989) (O'Connor, J., concurring in part and concurring in the judgment, Brennan & Stevens, JJ., concurring in part).

As a theoretical matter, the endorsement test captures the essential command of the Establishment Clause, namely, that government must not make a person's religious beliefs relevant to his or her standing in the political community by conveying a message “that religion or a particular religious belief is favored or preferred.”

Id. (quoting *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring in judgment)).

1. *The Parsonage Exemption Is Unconstitutional Under the Lemon Test*

The controlling test for the Establishment Clause was articulated in *Lemon v. Kurtzman*.⁸⁵ The Court declared: "First, the statute must have a secular legislative purpose . . . ; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"⁸⁶ A law is unconstitutional if it fails any prong of the *Lemon* test.⁸⁷ Although some Justices have criticized the *Lemon* test,⁸⁸ the Supreme Court has not overruled it and continues to apply it in determining whether government actions violate the Establishment Clause.⁸⁹ The following discussion will describe how each prong of the *Lemon* test is violated by the parsonage exemption.

a. The Absence of a Secular Purpose

First, the purpose of the exemption unquestionably is to advance religion. As discussed earlier, the author of section 107(2), Representative Peter Mack, said that the provision's goal was to help "ministers of the gospel . . . who are caring for our spiritual welfare," at a time "when we are being threatened by a godless and antireligious world movement."⁹⁰ It is not possible to imagine a more explicit statement of a religious purpose behind a law. This is crucial because the "actual" or "primary" purpose behind a law must be secular.⁹¹ Nor is it possible to conceive of any secular purpose for giving a benefit to "ministers of the gospel" and religious institutions that no other employees or employers can share.⁹²

85. 403 U.S. at 612-13.

86. *Id.* (quoting *Walz v. Tax Commn.*, 397 U.S. 664, 674 (1970), additional citations omitted).

87. See e.g. *Vernon v. City of L.A.*, 27 F.3d 1385, 1396-97 (9th Cir. 1994).

88. See e.g. *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398-99 (1993) (Scalia, J., concurring).

89. See e.g. *Agostini v. Felton*, 521 U.S. 203, 232 (1997).

90. *Hearings on Forty Topics Pertaining to the General Revision of the Internal Revenue Code*, 83d Cong. at 1576.

91. See *Vernon*, 27 F.3d at 1397.

92. See e.g. *Stone v. Graham*, 449 U.S. 39, 41 (1980) (declaring unconstitutional a state law requiring the Ten Commandments to be posted on public school classrooms because the law "has no secular legislative purpose").

Certainly the law cannot be justified on the grounds of protecting the Free Exercise of religion. The Supreme Court has expressly held the Free Exercise Clause is not violated by denying religions exemptions from taxes. In *Jimmy Swaggert Ministries v. Board of Equalization*,⁹³ the Supreme Court held that the Free Exercise Clause does not provide religious groups a constitutional right to refuse to pay general sales and use taxes for the sale of religious goods and literature.⁹⁴ This, of course, is consistent with the current law holding that the Free Exercise Clause is not violated by the application of a neutral law of general applicability.⁹⁵ Thus, there is no Free Exercise Clause problem whatsoever in taxing income for clergy by the same rules applicable to all others. The parsonage exemption cannot be justified, under the current law of the Free Exercise Clause, as constitutionally required or even as relevant to that constitutional provision which the Supreme Court has held is not implicated by neutral laws of general applicability. The unique benefit accorded to “ministers of the gospel” can be understood only as having the impermissible purpose of advancing religion.

In the *Warren* case, several arguments were made by those defending the parsonage exemption because it serves valid secular purposes. First, several of the briefs filed in the Ninth Circuit argued that the purpose of the parsonage exemption is to “remove discrimination against ministers who receive a cash allowance instead of housing in kind.”⁹⁶

But this ignores that section 107(2) itself discriminates among religions: It offers a huge financial benefit to those religions and churches that have clergy as compared to those which do not. Moreover, it discriminates among clergy based on the specific tasks they are performing. As one commentator noted:

The definition of “minister” contained in the IRS tax guide for churches, and in a number of IRS and Tax Court rulings, assumes

93. 493 U.S. 378 (1990).

94. *Id.* at 385-86; see *Hernandez v. Commr.*, 490 U.S. 680, 698-700 (1989) (rejecting a Free Exercise clause challenge to the payment of income taxes that were alleged to make religious activities more difficult).

95. *Empl. Div. v. Smith*, 494 U.S. 872, 879 (1990).

96. Supp. Br. of Appellant at 21, *Warren v. Commr.*, 302 F.3d 1012 (9th Cir. 2002); see e.g. Supp. Br. of Appellee at 21, *Warren v. Commr.*, 302 F.3d 1012 (9th Cir. 2002); Amicus Curiae Br. of the Natl. Jewish Commn. on L. & Pub. Affairs at 13, 19, *Warren v. Commr.*, 302 F.3d 1012 (9th Cir. 2002).

that a minister is engaged in pastoral ministry. This is an unreasonably narrow definition for it fails to recognize that many bona fide ministers are not engaged in pastoral ministry—they are employed by denominational agencies, seminaries, and other religious schools, parachurch ministries, or as support staff in local congregations.⁹⁷

Also, as administered section 107(2) discriminates against newer religions, which are not affiliated with a national church or which do not have a history of ordaining ministers.⁹⁸ Section 107(2) discriminates against religions in so many ways that it undermines any claim that it is justified as a way of treating religions equally.

Also, the equality argument ignores that section 107(2) takes a general benefit, available to religious and non-religious institutions and their employees, and greatly expands it only for religion. Section 119 of the Internal Revenue Code allows the exclusion of the value of meals and lodging that are provided on the business premises of an employer as a convenience to the employer and as a condition of employment.⁹⁹ Section 107(1) provides this same benefit for clergy members who are provided a furnished home as part of their compensation.¹⁰⁰ But section 107(2), at issue in this case, provides a huge benefit just to religion: Only ministers of the gospel can be paid a tax-exempt housing allowance. In other words, section 107(2) creates an enormous inequality: Favoring religious employees and religious institutions over all others. Giving more to religion hardly is a “secular purpose” sufficient to meet the *Lemon* test.¹⁰¹

Indeed, the equality argument made by the government and several of the *amici* in the *Warren* case has no stopping point. Under this reasoning, the government could directly subsidize housing for clergy if that would equalize the benefits with those who live in housing provided by their churches. The obvious impermissibility of such a subsidy shows why the equality argument is insufficient to justify the parsonage exemption. One *amici* says that the purpose of the parsonage exemption is to “equalize the impact of the federal

97. Richard R. Hammar, *Church and Clergy Tax Guide: 2001 Edition* 81 (Christian Ministry Resources, 2001).

98. *Id.* at 85.

99. 26 U.S.C. § 119.

100. *Id.* § 107(1).

101. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

income tax on ministers of poor and wealthy congregations.”¹⁰² Helping poorer religions is hardly a secular purpose; surely, the government cannot subsidize poorer religions out of a desire to help them and make them more equal with wealthier religions.

A second purported secular purpose suggested in the briefs supporting the parsonage exemption is that the clergy members’ homes are an extension of places of worship.¹⁰³ This argument is grossly overinclusive and underinclusive as a justification for the parsonage exemption. Section 107(2) allows “ministers of the gospel” to claim the parsonage exemption even if they never use their homes for religious purposes. Moreover, section 107(2) permits “ministers of the gospel” to be paid most or all of their salary in tax-free dollars. Reverend Warren was paid a tax free salary despite the fact that only a small portion of the home is used for pastoral activities. This is quite different than the deduction available to all taxpayers for a home office that is limited to the percentage of the home that is used for work purposes.¹⁰⁴ In fact, a clergy member, like any one else, can deduct costs for a home office if the requirements of the tax code are met; no separate benefit for “ministers of the gospel” is necessary to achieve this.

The parsonage exemption is also tremendously underinclusive because countless taxpayers who are not clergy members use their

102. Amicus Br. of the Natl. Jewish Commn. on L. & Pub. Affairs at 13, *Warren v. Commr.*, 302 F.3d 1012 (9th Cir. 2002) (copy on file with author).

103. See Supp. Br. of Appellee at 22, *Warren v. Commr.*, 302 F.3d 1012 (9th Cir. 2002) (stating that “[m]any religious sects, particularly those that subscribe to communitarian Christian theology, adhere to the view that ‘church’ is wherever ‘two or more are gathered in God’s name’ ”); Amici Curiae Supp. Br. of Natl. Assn. of Church Bus. Admin. at 23, *Warren v. Commr.*, 302 F.3d 1012 (9th Cir. 2002) (stating “[t]he minister may use his home for prayer, study, committee meetings, prayer meetings, and counseling”); Amicus Curiae Br. of the Natl. Jewish Commn. on L. & Pub. Affairs at 4, *Warren v. Commr.*, 302 F.3d 1012 (9th Cir. 2002) (copy on file with author). The Commission’s *amicus* brief explained:

The residence of a rabbi is, however, by Jewish tradition, very much an extension of the synagogue building itself. A rabbi in an American pulpit is now expected to invite congregants and visitors to his home for Sabbath and holiday meals, to entertain out-of-town visitors who keep the dietary laws of *kashruth*, to conduct small classes and seminars in his home, and to provide counseling at his home for those who are encountering life’s crises.

Id.

104. 26 U.S.C. § 280A (involving disallowance of certain expenses in connection with business use of home, rental of vacation homes).

homes for exactly the purposes identified in the briefs supporting the parsonage exemption: For prayer sessions, religious study, Sabbath dinners, and hosting visitors who obey the laws of *kashruth*. Both "ministers of the gospel" and those who are not clergy engage in these activities in their home; the only reason to allow the only former the tax exemption is to assist religion and that violates the Establishment Clause.

Moreover, the legal significance of religious activities in the home is unclear. The implication of the argument is that the government could grant a tax exemption to any property used at any point for prayer or religious study. But the Supreme Court in *Walz* was clear that a tax break is permissible for houses of worship only as part of "a broad class of property owned by nonprofit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups."¹⁰⁵ Allowing "ministers of the gospel" to be paid in tax-free dollars because their houses are used for religious activities, but not allowing anyone else this benefit, violates the requirement set out in *Walz*.

Finally, allowing "ministers of the gospel" to be paid in tax-free dollars because a part of their home might be used for religious activities is not a "secular purpose" as required in *Lemon* and the decisions of this Court.¹⁰⁶ The goal of furthering religious activities in clergy members' homes is about advancing religion and this, by definition, is not a secular purpose.

b. The Effect of Advancing Religion

Second, section 107(2) has the effect of advancing religion. Clergy, and only clergy, have the great advantage of being paid entirely, or in large part, in tax-free dollars. As indicated earlier, Reverend Richard Warren, the taxpayer in the case before the Ninth Circuit, exempted his entire salary from taxes in some years and in other tax years was able to exempt most of his salary. Any employee in the country would want this benefit, but only "ministers of the gospel" are accorded it by federal law.

Moreover, the effect is to benefit religious institutions because they can pay their employees who are clergy in tax-free dollars.

105. *Walz v. Commr.*, 397 U.S. 664, 673 (1970).

106. *Lemon*, 403 U.S. at 612-13.

This means that they can pay less than if there was no parsonage exemption. Surely, every employer would want this great benefit, but it is given only to religious institutions. Without the parsonage exemption, churches would have to pay their clergy much more in order to have salaries with the same economic benefit. Indeed, the more it is argued to this Court that the parsonage exemption is crucial for the finances of churches, the more apparent it is that the parsonage exemption has the effect of greatly benefitting religion.

The Supreme Court's decision in *Estate of Thornton v. Caldor, Inc.*¹⁰⁷ is exactly on point, in that the Court found that a law providing a benefit to religion, but no one else, violated the second prong of the *Lemon* test and thus the Establishment Clause.¹⁰⁸ A Connecticut statute provided that no person may be required by an employer to work on his or her Sabbath.¹⁰⁹ The Supreme Court declared the law unconstitutional and emphasized that the law created an absolute and unqualified right for individuals to not work for religious reasons and thus favored religion over all other interests.¹¹⁰ The Court concluded that "the statute goes beyond having an incidental or remote effect of advancing religion" and that it "has a primary effect that impermissibly advances a particular religious practice."¹¹¹ The parsonage exemption has the effect of impermissibly advancing religion for the exact same reason: It provides a great benefit to religion, to clergy and religious institutions, that no one else can claim.

The briefs defending the parsonage exemption in the *Warren* case made several arguments as to why the effect is permissible. First, it is argued that there are other provisions of the tax code that provide for tax-exempt housing allowances.¹¹² But this ignores that section 107(2), benefits only "ministers of the gospel"; no one other than clergy can take advantage of this provision.

107. 472 U.S. 703 (1985).

108. *Id.* at 709-11.

109. *Id.* at 706.

110. *Id.* at 710-11.

111. *Id.* at 710.

112. Supp. Br. of Appellant at 33, *Warren v. Commr.*, 302 F.3d 1012 (9th Cir. 2002) (pointing out, for example, the Internal Revenue Code § 134 benefit for those in the military, and the § 912 exclusion from gross income for foreign area allowances for those in the Foreign Service, the CIA, other agencies, and the Peace Corps); Supp. Br. of Appellee at 19, *Warren v. Commr.*, 302 F.3d 1012 (9th Cir. 2002).

The issue is whether the effect of this provision is to advance religion and the answer unquestionably is yes, even though there are a few other provisions elsewhere in the Tax Code that provide for tax exempt housing allowances for others. In *Texas Monthly*, the tax exemption for religious publications undoubtedly still would have been unconstitutional even if another provision of Texas law allowed publications for military personnel to be exempt from the state's sales tax.

Moreover, the provisions to which the defenders point are clearly distinguishable from section 107(2) and cannot be used to claim that there are a broad set of tax exemptions for housing allowances of which the parsonage exemption is just a part. The government in the Warren case pointed to the ability of those in the United States military and those employed by the United States in foreign countries, such as in the Foreign Service, the CIA, and the Peace Corps, to be paid in tax exempt dollars.¹¹³ But these are all federal employees and if the government wants to pay its employees via a tax break it certainly can do so. Section 107(2), in contrast, obviously is a benefit to privately employed clergy and not at all about the government structuring the compensation for its employees. Indeed, it is notable that "ministers of the gospel" in the military or in federal employ in foreign countries get the same tax break as civilians in these entities; but the parsonage exemption benefits only religion.

Second, the briefs defending the parsonage exemption argued that it has the permissible effect of "accommodating" religion.¹¹⁴ The problem with this argument is that any benefit given just to religion can be defended as "accommodating" religion. A government program that paid the housing costs of clergy, or even their entire salaries, would meet this concept of "accommodating" religion. There is no stopping point to this accommodation argument because it would justify any benefit granted only to religion; nothing would be left of the Establishment Clause if all favoritism for religion could be upheld as "accommodation."

113. Supp. Br. of Appellant at 33, *Warren v. Commr.*, 302 F.3d 1012 (9th Cir. 2002).

114. Supp. Br. of Appellant at 19, *Warren v. Commr.*, 302 F.3d 1012 (9th Cir. 2002); Supp. Br. of Appellee at 23, *Warren v. Commr.*, 302 F.3d 1012 (9th Cir. 2002); Amicus Curiae Br. of the Church Alliance at 15, *Warren v. Commr.*, 302 F.3d 1012 (9th Cir. 2002).

The parsonage exemption in section 107(2) is not accommodation in the sense of avoiding a Free Exercise Clause violation. Rather, it is accommodation in the sense of giving religion an enormous benefit that no others can claim. This is exactly what cases like *Thornton* and *Texas Monthly* deem to violate the Establishment Clause.

Both the government and Reverend Warren relied on *Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos* as the basis for their accommodation argument.¹¹⁵ In *Amos*, the Supreme Court upheld an exemption in Title VII for religious organizations.¹¹⁶ Without the exemption in Title VII, the Catholic Church could not exclude women from the priesthood and Orthodox Jews would be forced to ordain women as rabbis. This obviously would raise serious problems under the Free Exercise Clause. The Court in *Amos* explained that the exemption was justified “to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions.”¹¹⁷

In contrast, eliminating section 107(2) would not raise any Free Exercise Clause problems. Declaring section 107(2) unconstitutional would simply mean that clergy members would have their housing costs treated under the same tax laws as all other taxpayers. This is very different from the exemption for religion in Title VII which prevents government control of core aspects of religious practices.

The government claimed that “Section 107(2) simply leaves religion alone.”¹¹⁸ Allowing “ministers of the gospel” to be paid in tax-free dollars and then deduct their mortgage interest and property tax payments is hardly leaving religion alone. It is giving religions, and only religions, a huge benefit by being able to pay their clergy member employees much less than if the provision were eliminated and the government truly left religion alone and treated clergy by the same rules as all other taxpayers. Indeed, the government’s argument is belied by the claims in the other briefs defending the parsonage exemption that it is an extremely important financial benefit for

115. 483 U.S. 327 (1985); Supp. Br. of Appellant at 19-21, *Warren v. Commr.*, 302 F.3d 1012 (9th Cir. 2002); Supp. Br. of Appellee at 23, *Warren v. Commr.*, 302 F.3d 1012 (9th Cir. 2002).

116. 483 U.S. at 329-30.

117. *Id.* at 335.

118. Supp. Br. of Appellant at 28, *Warren v. Commr.*, 302 F.3d 1012 (9th Cir. 2002).

religion.¹¹⁹ This shows the enormous effect of section 107(2) in advancing religion and that is exactly why it violates the effects prong of the *Lemon* test.

c. Excessive Entanglement With Religion

Finally, as explained above, the parsonage exemption risks substantial government entanglement with religion as the government must decide who is a "minister of the gospel." This can necessitate that the government look closely into a religious organization's internal operations and decide who within it fits this definition. In *Gonzalez v. Roman Catholic Archbishop of Manila*,¹²⁰ the Supreme Court said that the judiciary could not decide the qualifications of a chaplain of the Roman Catholic Church.¹²¹ An estate left money for the establishment of chaplaincy in the Church and specified that the funds should be given to the deceased's nearest male relative.¹²² The Church refused to allow an individual to have the position based on its religious principles.¹²³ The Supreme Court said that the judiciary could not resolve the dispute. The Court emphasized that it was improper for the judiciary to decide who is a clergy member within the church.¹²⁴ Yet, the parsonage exemption requires the governments and the courts to do exactly that, looking to the role and activities of a person within a religion.¹²⁵

119. See Supp. Br. of Appellee at 14, *Warren v. Commr.*, 302 F.3d 1012 (9th Cir. 2002) (stating that parsonage exemption is relied on by "hundreds of thousands ministers and churches" and declaring it unconstitutional "would be tremendously disruptive").

120. 280 U.S. 1 (1929).

121. *Id.* at 16. The Court stated:

Because the appointment is a canonical act, it is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them. In the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive, because the parties in interest made them so by contract or otherwise. Under like circumstances, effect is given in the courts to the determinations of the judicatory bodies established by clubs and civil associations.

Id. at 16-17.

122. *Id.* at 12.

123. *Id.* at 12-13.

124. *Id.* at 16.

125. See e.g. *Silverman v. Commr.*, 57 Tax Ct. 727, 727 (1972) (considering whether

The defenders of the parsonage exemption argue that it is justified as a way of avoiding entanglement with religion.¹²⁶ The problem with this argument is that eliminating the parsonage exemption would not entail any entanglement with religion; but keeping it inherently involves significant impermissible government entanglement.

If section 107(2) is invalidated, the income of clergy, and their housing costs, would be treated exactly the same as for all other employees and all other taxpayers. The source of the funds—whether a secular or a sectarian entity—would be of no concern to the United States government. The government argued in the *Warren* case:

If ministers were limited to the in-kind exclusion under IRC [section] 119(a)(2) for lodging that “the employee is required to accept . . . on the business premises of his employer as a condition of employment,” it would be necessary to inquire into the minister’s status as employee or self-employed person, the scope of the church’s “business premises,” and the terms of the minister’s employment.¹²⁷

But none of these inquiries would involve entanglement with religion; they are exactly the same inquiries made of any employer and asking them of religious institutions and employers would not involve any more than determining if the clergy member is employed by the church, whether the housing is on its premises, and whether the clergy member is there for the convenience of the employer. In fact, the same inquiries that the government finds objectionable are required under section 107(2): The government must decide whether a clergy member is employed as a “minister of the gospel.”

The defenders of the parsonage exemption ignore all of the ways in which section 107(2) requires inquiries that are very intrusive into religion and thus involve significant government entanglement with religion. In order to be considered a “minister of the gospel,” the

a Cantor is a “minister of the gospel” for purposes of section 107(2)); *Lawrence v. Commr.*, 50 Tax Ct. 494, 494-95, 498, 500 (1968) (holding that a nonordained, but commissioned minister of education in a Southern Baptist Church is not a “minister of the gospel” entitled to a housing allowance under section 107(2)).

126. Supp. Br. of Appellant at 30, *Warren v. Commr.*, 302 F.3d 1012 (9th Cir. 2002); Supp. Br. of Appellee at 20, *Warren v. Commr.*, 302 F.3d 1012 (9th Cir. 2002); Amicus Curie Br. of the Church Alliance at 25, *Warren v. Commr.*, 302 F.3d 1012 (9th Cir. 2002).

127. Supp. Br. of Appellant at 30, *Warren v. Commr.*, 302 F.3d 1012 (9th Cir. 2002).

clergy member must administer sacraments, conduct religious worship, and direct the spiritual life of a church or religious institution.¹²⁸ Section 107(2) requires that the government and courts determine what are "sacraments" within a religion and whether the clergy member is administering them; what is "religious worship" for a particular religion and whether the clergy member is "conducting" it; and what is the "spiritual life" of a church and whether the clergy member is "directing" it.¹²⁹ There hardly could be a set of inquiries that are more intrusive or more of an entanglement with religion than these.

Under the three-part *Lemon* test, a law is unconstitutional if it fails any prong of its requirements. The parsonage exemption violates all three parts.

2. *The Parsonage Exemption Is Unconstitutional Under the Neutrality Test Favored by Some Justices on the Supreme Court*

In *Mitchell v. Helms*,¹³⁰ four Justices on the Supreme Court said that the central test of the Establishment Clause, particularly with regard to government aid to religion, should be whether the government is neutral;¹³¹ that is, the Establishment Clause is violated if the government favors religion or particular religions. Justice Thomas wrote:

In distinguishing between indoctrination that is attributable to the State and indoctrination that is not, we have consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion. If the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government.¹³²

Justice Thomas was clear, however, that aid which favors religion or that prefers some religions over others violates the Establishment Clause. He emphasized that the aid at issue in *Mitchell*, instructional

128. See *Knight v. Commr.*, 92 Tax Ct. 199, 204 (1989); *Wingo v. Commr.*, 89 Tax Ct. 922, 932-35 (1987); 26 C.F.R. § 1.1402(c)-5(b) (2002).

129. 26 C.F.R. § 1.1402(c)-5(b)(2).

130. 530 U.S. 793 (2000).

131. *Id.* at 809-10.

132. *Id.* at 809.

equipment for parochial schools, was permissible because it “is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis.”¹³³

The parsonage exemption fails even Justice Thomas’ relaxed test for the Establishment Clause because it is not “neutral with regard to religion.”¹³⁴ Unlike the aid in *Mitchell* that was available to both secular and religious schools, only “ministers of the gospel” can claim the parsonage exemption of section 107(2) and only religious institutions among all employers get the great benefit of paying their employees in tax-free dollars. As the Supreme Court declared: “Special tax benefits, however, cannot be squared with the principle of neutrality established by the decisions of this Court.”¹³⁵

Moreover, the parsonage exemption fails the neutrality test because it favors some religions over others. Religions that employ “ministers of the gospel” receive this benefit, while religions that do not have or employ clergy do not. As one commentator observed: “Section 107(2) may unconstitutionally prefer certain religions over others. For example, a congregational religion with no permanent or specifically designated ministers would not receive section 107(2)’s financial benefits as would a centralized religion with a designated ministry.”¹³⁶

Justice Thomas wrote for only a plurality in *Mitchell*. The other five Justices expressly rejected the neutrality test.¹³⁷ What is striking, though, is that even under the most deferential test for the

133. *Id.* at 829 (quoting *Agostini v. Felton*, 521 U.S. 203, 231 (1997)).

134. *Id.* at 830.

135. *Comm. for Pub. Educ. v. Nyquist*, 413 U.S. 756, 793 (1973).

136. Thomas E. O’Neill, *A Constitutional Challenge to Section 107 of the Internal Revenue Code*, 57 Notre Dame L. Rev. 853, 865-66 (1982).

137. See e.g. *Mitchell v. Helms*, 530 U.S. 793, 839-40 (2000) (O’Connor, J., concurring in the judgment). O’Connor wrote:

[W]e have never held that a government-aid program passes constitutional muster *solely* because of the neutral criteria it employs as a basis for distributing aid.

I also disagree with the plurality’s conclusion that actual diversion of government aid to religious indoctrination is consistent with the Establishment Clause.

Id.

Establishment Clause, the parsonage exemption in section 107(2) is impermissible.

3. The Parsonage Exemption Is Impermissible Government Endorsement for Religion

In recent years, some decisions and some Justices have said that the focus for the Establishment Clause should be a prohibition against the government symbolically endorsing religion or a particular religion. For example, Justice O'Connor has written that "[e]very government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion."¹³⁸ Justice O'Connor explained the importance of such government neutrality:

If government is to be neutral in matters of religion, rather than showing either favoritism or disapproval towards citizens based on their personal religious choices, government cannot endorse the religious practices and beliefs of some citizens without sending a clear message to nonadherents that they are outsiders or less than full members of the political community.¹³⁹

The parsonage exemption clearly fails this test because by providing a benefit for clergy and religions, but no others, it is a symbolic endorsement that violates the Establishment Clause. Any person learning of the tremendous government benefit for "ministers of the gospel" could understand it in only one way: The government acting through its tax law to help clergy and religious institutions. Moreover, the parsonage exemption has the government endorsing those religions that have clergy as compared to those without. As one commentator observed:

Section 107 on its face favors taxpayers with a religious vocation, thereby creating a strong presumption that its purpose is to endorse religious efforts. Additionally, because the IRS and courts grant section 107 treatment only to *bona fide* ministers, similarly situated practitioners in other religions would not qualify for the exclusion. This result conveys a message that religious workers

138. *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984).

139. *Allegheny County v. Greater Pitt. ACLU*, 492 U.S. 573, 627 (1989) (O'Connor, J., concurring in part and concurring in the judgment).

are favored over secular workers and, therefore, would fail the endorsement test.¹⁴⁰

Justice Brennan explained in *Texas Monthly* the extension of a tax benefit solely to religion “cannot but ‘conve[y] a message of endorsement’ to slighted members of the community.”¹⁴¹ Thus, under the controlling test of *Lemon v. Kurtzman*, and indeed under every approach to the Establishment Clause, the parsonage exemption is unconstitutional.

IV. CONCLUSION

I confess that I had never heard of the parsonage exemption until I received a call from the Ninth Circuit staff attorney asking me to participate in the *Warren* case. Once I looked at it, I had no doubt that this law—which provides over 500 million dollars in support to religion each year—violates the Establishment Clause. Congress’s action succeeded in making the *Warren* case moot. But it did not alter the basic provision: Ministers of the gospel receive a tax benefit available to no one else.

My next step will be to file a taxpayer action in federal district court challenging the provision. Sooner or later, the issue will return to the Ninth Circuit and likely ultimately go to the Supreme Court. The issue is simple: Can the government provide a benefit to clergy that no one else in society receives? It is hard to imagine even the most conservative Justices being able to justify such blatant favoritism of religion.

140. Foster, *supra* n. 74, at 174 (italics added, footnotes omitted).

141. 489 U.S. 1, 15 (1989) (quoting *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 348 (1987)).

NOTES AND COMMENTS

