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Does the Parsonage Exemption in Internal Revenue Code Section 107 Violate the Establishment Clause of the 1st Amendment?

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Week 7

SCHEDULE FOR 2019 NYU TAX POLICY COLLOQUIUM
(All sessions meet from 4:00-5:50 pm in Vanderbilt 208, NYU Law School)

1. Tuesday, January 22 – Stefanie Stantcheva, Harvard Economics Department.
2. Tuesday, January 29 – Rebecca Kysar, Fordham Law School.
3. Tuesday, February 5 – David Kamin, NYU Law School.
4. Tuesday, February 12 – John Roemer, Yale University Economics and Political Science Departments.
5. Tuesday, February 19 – Susan Morse, University of Texas at Austin Law School.
6. Tuesday, February 26 – Ruud de Mooij, International Monetary Fund.
7. Tuesday, March 5 – Richard Reinhold, NYU School of Law.
8. Tuesday, March 12 – Tatiana Homonoff, NYU Wagner School.
9. Tuesday, March 26 – Jeffery Hoopes, UNC Kenan-Flagler Business School.
10. Tuesday, April 2 – Omri Marian, University of California at Irvine School of Law.
11. Tuesday, April 9 – Steven Bank, UCLA Law School.
12. Tuesday, April 16 – Dayanand Manoli, University of Texas at Austin Department of Economics.
13. Tuesday, April 23 – Sara Sternberg Greene, Duke Law School.
14. Tuesday, April 30 – Wei Cui, University of British Columbia Law School.

Does the Parsonage Exemption in Internal Revenue Code Section 107 Violate the Establishment Clause of the 1st Amendment?

by

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Abstract: Internal Revenue Code sec. 107(1) has long exempted from inclusion in income the rental value of a minister's church-provided home, or "parsonage" (with parallel relief being available as regards all religious denominations). A later amendment confirms availability of the exemption for amounts paid to defray ministers' costs for separately-acquired housing. See IRC sec. 107(2). Last year, a District Court in Wisconsin held the exemption for reimbursed parsonage allowances to represent a violation of the Establishment Clause of the 1st Amendment of the U.S. Constitution ("Congress shall make no law respecting an establishment of religion . . ."). Gaylor v. Mnuchin, 278 F. Supp. 3rd 1081 (D.Wi. 2017). The case was appealed to the Seventh Circuit Court of Appeals and that court's decision is expected imminently. The District Court based its holding on the tests laid down in Lemon v. Kurtzman, 403 U.S. 602 (1971), as understood in light of the later decision in Texas Monthly v. Bullock, 489 U.S. 1 (1989) (holding unconstitutional a state sales tax exemption for religious publications). The court looked to "whether the government's purpose [relative to sec. 107(2)] is to endorse religion and whether the statute actually conveys a message of endorsement viewed from the perspective of a reasonable observer." The court concluded that sec. 107(2) failed the Lemon test, as applied. On appeal, the government, defending the statute, has put forth two arguments: 1) the sec. 107 income exclusion represents the reasonable implementation of a broader policy in the Internal Revenue Code to afford an income exclusion under a convenience of the employer rationale - reasonable in the present case because parsonages have, since the practice originated in England centuries ago, been regarded as an adjunct of the church at which the minister frequently carries out his or her ministerial duties, including counseling parishioners, hosting persons needing housing, conducting meetings of parishioners and the like, and 2) the Lemon test is satisfied since the income exclusion functions to limit entanglement of state and religion by avoiding the need to inquire in detail into specific uses of a parsonage that might afford a deduction for use of the parsonage. Longstanding tax policy affords employees income tax exclusion treatment for the value of employer-provided housing (including housing allowances) when the housing satisfies a so-called "convenience of the employer" doctrine. It is the authors' view that this rationale reasonably supports exclusion treatment for parsonages and parsonage allowances under IRC sec. 107. Although certain nexus and other requirements attend use of the convenience of the employer doctrine by secular employees, applying these requirements to ministers discharging their religious duties would be intrusive. At the same time, it seems reasonable to believe that the requirements generally will be satisfied as regards ministers. As a result, it is the author's view that excusing ministers from the requirements applicable to secular employees is consistent with the government's accommodation of the Free Exercise of religion under the First Amendment, and should not give rise to a violation of the Establishment Clause.

Whether the case will be litigated to conclusion is not clear, because there would seem to remain real hurdles to the plaintiffs satisfying the "standing" requirement of Art. III of the Constitution to mount a challenge to sec. 107. Should they succeed, an important aspect of the case will likely be the impact, *vel non*, of more recent Supreme Court decisions, including particularly Town of Greece v. Galloway, 134 S. Ct. 1811 (2014) (upholding sectarian prayer at the opening of town meetings, based in significant part on the tradition associated with such prayers), as well as, possibly, a decision in The American Legion v. American Humanist Ass'n, 874 F.3d 195 (4th Cir. 2017), *reh. en banc denied*, 891 F. 3d 117 (4th Circ. 2017), *cert. granted*, 139 S.Ct. 451 (2018) (holding a large Latin Cross, an integral part of a World War I memorial, located on state land, to violate the Establishment Clause). This article examines the competing arguments regarding the application of the Establishment Clause, and attempts to suggest a way forward in addressing these challenges. It is the thesis of the article that in light of 1) the extreme disarray of the Establishment Clause precedents, which provide almost no guidance as to the standards for its application and 2) the very limited reliable information available regarding the underlying purpose of the Establishment Clause, beyond a purpose to avoid creating a single national religion, or to prevent the favoring of one religious group over another, an interpretive standard that grants relatively broad deference to the legitimate purposes of the enacting body is sensible.

I. Prologue

This paper is written to address the possible constitutional infirmity in the so-called pasonage exclusion in Internal Revenue Code §107, and in particular the provision in paragraph (2) of that section excluding from income allowances paid to a minister to defray his or her housing expenses.[1] The Internal Revenue Code has long provided church ministers - or persons functioning in a parallel capacity, in the case of non-Christian religions - exclusion treatment for the rental value of a so-called "parsonage", *i.e.,* a home provided for the minister by the church (or other religious institution) (For simplicity, I will generally use the nomenclature "minister" and "church", but as will be discussed, sec. 107 has been interpreted as broadly available to all religious groups.) The same treatment is provided for "housing allowances" received by ministers in the case where the minister secures his or her own housing. The particular issue is whether sec. 107 should be seen as establishing religion in violation of the First Amendment of the United States Constitution, which states that "Congress shall make no law respecting an establishment of religion…". The United States District Court for the Western District of Wisconsin has twice held that sec. 107(2) violates the Establishment Clause, and the issue is currently before the Court of Appeals for the Seventh Circuit.[2] That court's resolution of the issue will require resort to the First amendment decisions of the United States Supreme Court, which, as will be seen, provide little clarity.

Against this backdrop, this paper will, in Part II, review the Gaylor and Lew precedents and comment on those decisions. Part III will discuss Lemon v. Kurtzman,[3] the principal precedent upon which the district court relied, and then endeavor to say where the Lemon test

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[1] Internal Revenue Code section 107 provides as follows: "**Rental Value of Parsonages**. In the case of a minister of the gospel, gross income does not include—(1) the 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 and to the extent such allowance does not exceed the fair rental value of the home, including furnishings and appurtenances such as a garage, plus the cost of utilities." (Except as noted, references herein to "Section", "sec." or "§" are to the Internal Revenue Code of 1986, as amended ("Code"); and references to "Treas. Reg. §__" are to the regulations thereunder promulgated by the United States Department of Treasury.) Although phrased in terms of a "minister of the gospel", the Internal Revenue Service and the courts have properly interpreted the provision broadly to include all religious affiliations. *See* the discussion at note ___, *infra*.

[2] Gaylor v. Mnuchin, 278 F. Supp.3d 1081 (D. Wi. 2017); Freedom from Religion Foundation v. Lew, 983 F. Supp.2d 1051 (D. Wi. 2013), *rev'd*, 773 F.3d 815 (7th Cir. 2014);

[3] 403 U.S. 602 (1971).

will lead in the future (a very speculative exercise). Part IV sets forth concluding observations and a suggested direction for the future.

II. Gaylor v. Mnuchin

A. *Procedural Background*

The current challenge to sec. 107 began with the 2013 decision in Freedom from Religion Foundation v. Lew (herein "Lew") by Judge Barbara Crabb in the Western District of Wisconsin.[4] The case held that the sec. 107(2) parsonage exclusion violated the First Amendment Establishment Clause. On appeal the Seventh Circuit Court of Appeals held that the plaintiffs lacked standing and so reversed the district court and vacated the judgment. In the view of the Seventh Circuit, although the individual plaintiffs received so-called "housing allowances" from their employer, the Freedom From Religion Foundation, Inc., they had not claimed the benefit of sec. 107(2) in respect of the allowance, and therefore the allowability of the exclusion, *vel non*, presented no justiciable case or controversy.[5] The Court held that Flast v. Cohen was of no assistance to the taxpayer. Flast had created an exception to the otherwise applicable Art. III standard for a justiciable case or controversy, requiring that a plaintiff have a meaningful pecuniary stake in the outcome of the litigation in order to permit a generic taxpayer to mount an Establishment Clause challenge to an expenditure of government funds. The exception overlooked the taxpayer's trivial financial stake in the outcome. The later decision in Arizona Christian Sch. Tuition Org. v. Winn,[6] held Flast v. Cohen standing unavailable where the governmental expenditures took the form of tax credits or other tax expenditures.[7]

The individual plaintiffs then filed tax refund claims asserting that they were entitled to the benefit of the parsonage allowance, excluding their housing allowances from income. Certain of the refund claims were rejected and on that basis the individuals commenced a new action to have sec. 107(2) held unconstitutional.[8] (The IRS paid certain of the refund claims,

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[4] Lew, *supra*.
[5] 773 F.3d 815 (7th Cir. 2014).
[6] 563 U.S. 125 (2011).
[7] Winn, *supra* at ___.
[8] Plaintiff Freedom from Religion Foundation, Inc. is a non-profit organization of atheists and agnostics whose purpose is to advocate the separation of church and state. The individual plaintiffs - Annie Laurie Gaylor and Dan Barker are co-presidents of the foundation. Two church pastors were permitted to intervene in the action as defendants; these individuals received and were expected to receive housing allowances from churches. Although

apparently by inadvertence.) The plaintiffs conceded that they had no standing to challenge sec. 107(1) - applicable in the case of a church-owned parsonage made available to a minister.[9]

Judge Crabb was assigned to the case and again held for the plaintiffs in the action.[10] She first determined that they had gained standing to sue by virtue of their tax refund claims.[11] She then held that the parsonage allowance in sec. 107(2) violated the Establishment Clause and therefore was unconstitutional.[12] In reaching her conclusion, she relied on the analysis in Lew, *supra*, and therefore I will consider the two opinions together, noting differences where applicable.

B. *Freedom from Religion Foundation v. Lew and Gaylor v. Mnuchin*

The decisions base their substantive analysis on Lemon v. Kurtzman, which laid down three tests to be applied in evaluating government action. An Establishment Clause violation is present if: 1) the action has no secular purpose, 2) its primary effect advances or inhibits religion, *or* 3) it fosters an excessive entanglement between government and religion. If any of the three elements is considered present the government action violates the Establishment Clause. Judge Crabb next observed that Justice O'Connor has offered a refinement of the first two parts of the Lemon test, ". . . under which the court asks, 'whether the government's purpose is to endorse religion and whether the statute actually conveys a message of endorsement' . . . 'viewed from the perspective of a reasonable observer'."[13]

The court noted that the parties had both relied on this Lemon standard, although she went on to observe that "the Supreme Court has articulated other tests over the years . . .", citing the decisions in in Lee v. Weisman,[14] and Marsh v. Chambers,[15] both of which were both post-

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the individual plaintiffs are said to have filed tax refund claims seeking the taxes paid in respect of the housing allowances, the prayer for relief in the action filed does not seek payment of the refund. Instead, the the relief sought is limited to having sec. 107(2) declared unconstitutional.

[9] Prior cases attempting to challenge sec. 107 on constitutional grounds but dismissed, generally due to a lack of standing, are cited in the District Court's opinion. *See* Gaylor, 278 F. Supp.3d at 1102-03.

[10] Gaylor, *supra*.

[11] 278 F. Supp.3d at 1086-89.

[12] 278 F. Supp.3d at 1104. In view of the parties' concession that they lacked standing to challenge the constitutionality of sec. 107(1) the court said that she would not consider whether sec. 107(1) violates the constitution. 278 F. Supp.3d at 1096. She follows that statement with a curiously-worded assumption: ". . . I will assume that defendants are correct in asserting that the purpose of §107(1) was simply to insure [sic] that ministers received an exemption that secular employees already had." *Id*.

[13] 983 F. Supp.2d at 1060 (internal citations omitted).

[14] 505 U.S. 577 (1992).

[15] 463 U.S. 783 (1983).

Lemon cases involving an Establishment Clause challenge to government action, but were decided without reliance on Lemon.[16]

To apply Lemon to the facts at issue the court relied on the decision in Texas Monthly v. Bullock,[17] which involved an exemption from the generally-applicable Texas sales tax for religious writings. The Court held the exemption to violate the Establishment Clause. The plurality opinion - representing the views of Justices Brennan, Marshall and Stevens - concluded that the statutory exception did not have a secular purpose or effect and conveyed a message of religious endorsement; moreover, the plurality opinion observed that the exemption provided a benefit to religious organizations only, without any showing that the exemption was needed to alleviate a significant burden on free exercise. The concurring opinion of Justices Blackmun and O'Connor stated that an Establishment Clause violation was present because the exception "results in 'preferential support for the communication of religious messages.'"[18]

Finding the differences in the two opinions minimal for purposes of the case, Judge Crabb held that Texas Monthly controlled the outcome in the case, "[b]ecause a primary function of a 'minister of the gospel' is to disseminate a religious message, a tax exemption provided only to ministers results in preferential treatment for religious messages over secular ones."[19]

The court stated that in its view, sec. 107(2) was invalid under either the view of the plurality or the concurring opinion.[20] The standard of the plurality opinion was violated because it gave an exemption to religious persons without a corresponding benefit to similarly situated secular persons.[21] As regards the concurring opinion "[b]ecause a primary function of a 'minister of the gospel' is to disseminate a religious message, a tax exemption provided only to ministers results in preferential treatment of religious messages over secular ones."[22] To this, the court added that statements from the 1954 legislative history of sec. 107(2) showed that the purpose of the provision was "to assist a group of religious persons, which is not a secular purpose."[23]

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[16] 983 F. Supp.2d at 1060-61; 278 F. Supp.3d at 1089-90.
[17] 489 U.S. 1 (1989).
[18] 983 F. Supp.2d at 1061 (*quoting* Texas Monthly, *supra*, Blackmun, J., concurring). Justice White concurred in the judgment, but on the basis that a content-based exception from the sales tax represented a violation of the Press Clause of the First Amendment.
[19] 983 F. Supp.2d at 1062.
[20] 278 F. Supp.3d at 1090.
[21] *Id*.
[22] *Id*., *quoting* Lew, 983 F. Supp.2d at 1062.
[23] 278 F. Supp.3d at 1091.

The court was referring, first, to a statement in the House report for the measure that became sec. 107(2) that, under the law then in effect, a minister who receives the use of a parsonage as part of his compensation is not subject to tax under sec. 107(1), and the committee viewed this as unfair to ministers who received a housing allowance rather than a home, so that the purpose of new sec. 107(2) was to remove this discrimination by providing that the exclusion is meant to be available to housing allowances that a minister uses to own or rent a home.[24]

Second, the court referred to a statement at the hearings on the 1954 act by the bill sponsor indicated a religious, anti-Communist, purpose for the measure.[25]

The court then turned to the defendants arguments that had been more fully developed in the Gaylor action.

1. Secular purpose and effect

The court first considered whether sec. 107(2) had a secular purpose, or could be justified on secular grounds. The court divided this portion of its opinion into five parts:

a. Convenience of the employer doctrine

Internal Revenue Code section 119(a) provides that gross income of an employee does not include the value of lodging provided to the employee for the convenience of the employer if the employee is required to accept such lodging as a condition of the employee's employment. Sec. 119 codifies prior administrative practice, which made the exemption available to, among others, seamen living on a ship, and cannery and hospital workers who required such lodging in order to perform their jobs properly. Absent such an exemption the value of the lodging would represent income upon which the employee would be required to pay tax. Housing allowances are not within the scope of sec. 119 generally, although sec. 119(c) provides exclusion treatment for housing allowances in respect of camps located in remote areas.[26]

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[24] 278 F. Supp.3d at 1091, quoting H.R. Rep. No 1337.

[25] Rep. Peter Mack, the sponsor of the bill containing the measure, stated at the hearing on the bill:
"Certainly, in these times when we are being threatened by a godless and anti-religious world movement we should correct this discrimination against certain ministers of the gospel who are carrying on such a courageous fight against this. Certainly this is not too much to do for these people who are caring for our spiritual welfare."
278 F.3d at 1091 (*quoting* Hearings Before the House Committee on Ways & Means, 83d Cong., 2nd Sess. 1 at 1574-75 (June 9, 1953) (statement of Peter F. Mack, Jr.),.

[26] Kowalski v. Comm'r, 434 U.S. 77 (1977).

To the extent that part or all of an employee's home is used exclusively, on a regular basis, for business purposes, a business expense deduction may be claimed.[27]

Similar, more limited exclusions are provided by the following: sec. 134 (housing provided to members of the military stationed outside the United States, sec. 911 (housing allowance for persons who are *bona fide* residents of a foreign country); and sec. 912 (allowances paid to diplomats, employees of the Central Intelligence Agency and certain other civilian officers and government employees).

The defendants argued that sec. 107 is analogous to other provisions exempting the value of housing and / or housing allowances provided by the Internal Revenue Code under the convenience of the employer rationale.[28] The premise is that a parsonage was traditionally an adjunct of the church, provided as a living accommodation to ministers as part of their compensation. Often, the parsonage was closely proximate to the church, and several overlapping reasons existed for making such housing available to ministers: ministers frequently met with parishioners at their homes, particularly when privacy was a concern, such as might be the case if a wife or husband wished to discuss a sensitive marital topic with a minister; ministers often made accommodations available to visiting clergy or parishioners or others who had fallen on hard times; and ministers would typically host meetings of church groups in their homes. An additional value of having a parsonage in close proximity was that the minister would be near the church community and thus encouraged to conform his behavior to the expectations of the community. Obviously, all of these reasons related to the mission and function of the church.[29]

The court concluded this part of the discussion, saying there was no question whether a minister could utilize the convenience of the employer doctrine, for secs. 119 and 280A are available to them.[30] The issue, said the court, is whether the doctrine should apply "when the

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[27] *See* sec. 280A(c)(1).

[28] Code §107(1), excluding from income of a minister the rental value of home furnished to the minister as part of his or her compensation, was adopted in 1921, in response to concern that such relief might not be provided administratively. In situations in which a religious institution provided the minister with a housing allowance, the Code parsonage exception was held to be applicable. Williamson v. Comm'r, 224 F.2d 377 (8th Cir. 1955); Conning v. Busey, 127 F. Supp. 958 (D. Ohio 1954); MacColl v. U.S., 91 F. Supp. 721 (D. Ill. 1950). Notwithstanding, the housing allowance rule was added to the Code in 1954 to ensure equal treatment of ministers receiving the housing compensation in kind and via reimbursement. H.R.Rep. No. 1337, 83d Cong., 2d Sess. 15 (1954); S.Rep. No. 1622, 83d Cong., 2d Sess. 16 (1954).

[29] Practices in England, where the tradition originated, are indicated in Alan Savidge, *The Parsonage in England* (1964).

[30] 278 F. Supp.3d at 1093.

reasons for applying it are absent and the vast majority of other taxpayers are required to justify their request for an exemption."[31] The court then turned to the four special needs identified by the defendants for providing special tax treatment for ministers.

b. Unique housing needs

The court then turned to the argument that sec. 107(2) "should not be viewed in 'isolation,'" but rather was part of a "'broad' exemption that employees with 'unique housing needs' receive."[32] Upon review of these factors, the court concluded that these did not establish a secular purpose for the provision. First, the court held that the home office deduction rule in sec. 280A(c), as well as the general convenience of the employer rule in sec. 119, were irrelevant to the inquiry since those provisions are "already available to ministers" and could be invoked by any secular or religious employee . . . ".[33] Turning to secs. 134, 911 and 912 - providing exemption treatment for federal employees and persons working outside the country - the court likewise found these unhelpful to the defendants' position, for the following reasons: 1st, the court found that Congress had not considered the provisions "together"; 2nd, the court stated that sec. 107(2) didn't respond to a "convenience of the employer" rationale but instead to "provide financial assurance to those 'caring for our spiritual welfare' and 'carrying on . . . a courageous fight' against 'a godless and anti-religious world movement'".[34] 3rd, the court rejected the concept that secs. 107(2), 134, 911 and 912 as providing "categorical tax relief for employees who 'often' have work-related restrictions on their housing . . .".[35] The court disagreed however, saying that other workers, such as some healthcare providers, hotel managers, etc., also have particular housing needs, and exemption treatment is not provided for such persons. 4th, the court found sec. 107(2) qualitatively unlike secs. 134, 911 and 912, in that the latter group of provisions represented "ad hoc determinations by Congress regarding a limited number of employees in specific circumstances."[36] The court then observed that persons qualifying for relief under secs. 134, 911 and 912 are "employees whose housing is necessarily affected by their jobs",[37] whereas

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[31] *Id*.
[32] 278 F. Supp.3d at 1093.
[33] 278 F. Supp.3d at 1094.
[34] *Id*.
[35] *Id*.
[36] 278 F. Supp.3d at 1094.
[37] *Id.*

the same is true for some, but not all ministers, who are not necessarily restricted by their employer institution as to where they can live or what kind of house they might buy or rent, and may not be required to use their housing for church-related purposes. Finally, the court observed that the construction of sec. 107(2) by the IRS has allowed exemption treatment for "a rabbi working as a teacher, ministers working as counsellors or basketball churches and every member of the Church of Christ teaching at a Christian college."[38]

The court summarized its discussion of this point on the basis that even if ministers often meet the convenience of the employer rationale, the same is true also for many secular employees not covered by sec. 107(2) or comparable exemption, and in the latter situations the employees must establish their entitlement to an exemption.[39]

c. Eliminating denominational discrimination

The defendants argued that a valid secular purpose for sec. 107(2) exists in that the measure was enacted to eliminate discrimination between ministers whose organizations owned parsonages that were made available, and ministers who received a housing allowance. They court quoted the House report accompanying the measure: the "purpose of sec. 107(2) is to 'remove[]' or 'correct' the 'discrimination' in existing law between ministers who live in parsonages and those who receive housing allowance [sic]".[40] While not disputing that the eliminating discrimination might represent a secular purpose, the court disagreed that adoption of sec. 107(2) had that effect, first noting that, in its view the measure created or exacerbated a disparity between the treatment of religious and secular persons, and second by observing that sec. 107(1) "did not need to be 'corrected' because it does not discriminate on the basis of religious denomination.'"[41] The court felt that the convenience of the employer rationale for sec. 107(1) did not need to be extended since sec. 107(1) does more than simply codify the convenience of the employer rationale for employers - the provision did not contain the "on the

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[38] 278 F. Supp.3d at 1095-96.
[39] 278. F. Supp.3d at 1096.
[40] *Id* (*quoting* H.R. Rep. No. 1337, 83d Cong., 2d Sess. 15 (1954)) ("purpose of §107(2) is to 'remove[]' or 'correct' the 'discrimination' in existing law between ministers who live in parsonages and those who receive housing allowance").
[41] 278 F. Supp.3d at 1097.

business premises of the employer" and "offered as a condition of employment" requirements of §119.[42]

The intervenor-defendants said the enactment of sec. 107(2) to eliminate discrimination was required by Larson v. Valente,[43] which prohibits governmental rulemaking that discriminates between or among religious sects (the case provided relief from reporting requirements for charities in the case of religious organizations that received greater than 50% of their support from members).[44] In the present case, sec. 107(1) was said to favor wealthier religious institutions that could afford to purchase a residence in which to house the minister.[45] The court rejected this argument, however, in that Larson had not been held to apply where the discrimination resulted from the impact of the statute, rather than an express distinction made in the enacting law. Going beyond the immediate question whether sec. 107(2) eliminates discrimination that results from the operation of sec. 107(1), the court noted that the intervenor-defendants "cite[d] no cases in which a court relied on Larson to either justify a statute that showed favoritism toward religious persons or invalidate a statute that required religious persons to meet the same requirements as everyone else to obtain a government benefit."[46]

Concluding on this point, the court stated that even if it were persuaded that the purpose of sec. 107(2) was to eliminate the discriminatory operation of sec. 107(1), the measure couldn't be upheld since it was not narrowly drafted to comply with the convenience of the employer rationale. To do so, the court suggested that favorable treatment of rental allowances could have been confined to church-owned housing or housing subject to restrictions provided by the church. Moreover, the court said, if sec. 107(1) is discriminatory, then so is sec. 107(2), since both "discriminate" against religious institutions that do not have ministers that meet the definition of that term as used by the Internal Revenue Service.[47]

d. Entanglement

The court made two different observations as regards the Lemon entanglement test:

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[42] 278 F. Supp.3d at 1096.
[43] 456 U.S. 228 (1982).
[44] 278 F. Supp.3d at 1097.
[45] *Id*.
[46] 278 F. Supp.3d at 1097-98.
[47] 278 F. Supp.3d at 1098.

First, after noting that it hadn't felt obligated to address the issue in the prior action because it had held that secular purpose and effect prongs of the Lemon tests had been violated, the court repeated its observation that qualification for relief under sec. 107(2) "involves a complex and inherently ambiguous multi-factor test", citing cases involving evaluation whether a Jewish cantor - such persons not being ordained clergy - could qualify as a "minister" based on the duties and another case involving a Baptist minister of education, who had been commissioned but not ordained.[48]

The court then considered the argument made by the defendants that rather than fostering excessive entanglement, sec. 107(2) *avoids* entanglement that would arise if ministers were required to comply with the convenience of the employer requirements applicable to secular employees.[49] The court rejected the argument, however, stating that there was no proof that such entanglement concerns motivated the adoption of sec. 107, and further that factual scenarios had not been developed to show that proof of a minister's entitlement to a deduction under sec. 280A(c) would involve "difficult religious questions and interfere with a minister's exercise of religion."[50] On this basis the court concluded that the defendants hadn't shown that applying sec. 280A is any more intrusive than applying sec. 107(2).[51]

2. Exemption vs, subsidy

Next, the court addressed the defendant intervenors' argument that because sec. 107(2) involved an exemption from tax rather than a subsidy, the same Establishment Clause concerns do not arise, citing Walz v. Tax Commission of The City of New York, which stated: "[t]he grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state."[52] For purposes of evaluating the appropriateness of such a religious exemption, the defendants proposed - and the court appears to have accepted - the standard in Amos,[53] whether the

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[48] *See* 278 F. Supp.3d at 1099, *citing and discussing* Silverman v. Comm'r, 57 T.C. 727 (1972) and Lawrence v. Comm'r, 50 T.C. 494 (1968).
[49] 278 F. Supp.3d at 1099.
[50] *Id*.
[51] 278 F. Supp.3d at 1099-1100.
[52] 278 F. Supp.3d at 1101, quoting Walz, 397 U.S. 664, 675 (1970). Judge Crabb observed that, taken to its extreme, this argument would permit government to eliminate *all* taxes on religious organizations and individuals without any secular purpose for so doing - although the court acknowledged that this was an extreme position which the defendants had not advanced. 278 F. Supp.3d at 1102.
[53] *Supra*.

exemption, "alleviate[s] significant governmental interference with the ability of religious organizations to define and carry out their religious missions."[54] The court found the defendants' exemption vs. subsidy argument unavailing, however, referring to the rule holding that the imposition of generally-applicable taxes do not impose a constitutionally significant burden under the Free Exercise clause,[55] and therefore concluding that the payment of income taxes by ministers "does not qualify as a 'significant governmental interference' with religious exercise and [that] exemption[] from such taxes cannot be viewed merely as a religious accommodation."[56]

The court did not consider any entanglement issues presented by ministers seeking convenience of the employer treatment under sec. 119 or claiming deductions for their homes under sec. 280A(c).

3. History of religious tax exemptions

The intervenor defendants argued that the longstanding nature of the sec. 107 exclusion entitled the measure to a preferred status in response to an Establishment Clause challenge, citing in support the 2014 decision in Town of Greece, New York v. Galloway.[57] The Court's opinion states that, "the Establishment Clause must be interpreted by reference to historical practices and understandings."[58] The court rejected the argument, saying that Town of Greece is unavailing because 1) the history relied on by the intervenor defendants derived largely from church property tax exemptions (Walz, *supra*) and 2) "history shows that the *specific practice* is permitted . . .".[59] Important to the court was that Town of Greece involved a practice accepted by the Framers - *i.e.*, opening meetings or legislative sessions with a prayer - and that the

[54] 278 F. Supp.3d at 1102 quoting Amos, *supra*. In this regard the court cited Cutter v. Wilkinson, 544 U.S. 709 (2005), which held that under the Religious Land Use and Institutionalized Persons Act, federally-funded facilities cannot deny prisoners accommodations to engage in activities for practice of their religious beliefs.
[55] Jimmy Swaggart Ministries v. Board of Equalization, 493 U.S. 388, 391(1990).
[56] 278 F. Supp.3d at 1102.
[57] 134 S. Ct. 1811 (2014). At issue in the case was the town board's practice of opening its monthly meetings with a prayer. The decision in Town of Greece was largely based on Marsh v. Chambers, 463 U.S. 783 (1983), which permitted opening prayers in state legislatures by chaplains paid with public funds.
[58] 134 S. Ct. at 1819.
[59] 278 F. Supp.3d at 1102(emphasis in original).

constitutionality of sec. 107 "had evaded judicial scrutiny for a variety of procedural reasons for decades."[60]

4. Conclusion

Judge Crabb summarized her opinion as follows:

> Having considered all of the arguments advance by defendants, I am not persuaded either that it was an error to conclude in Lew that §107(2) is unconstitutional or that any new facts or law support a different conclusion. Defendants' stated concerns about treating religions equally and avoiding entanglement do not find any support in the facts or the law. Thus, any reasonable observer would conclude that the purpose and effect of §107(2) is to provide financial assistance to one group of religious employees without any consideration to the secular employees who are similarly situated to ministers. Under current law, the type of provision violates the establishment clause.[61]

The court then said that Congress instead could have constructed §107(2) in a manner that would satisfy these Establishment Clause concerns by allowing all taxpayers, or all low-income taxpayers such an exclusion, or by drafting the exclusion to cover taxpayers who live in rental housing provided by the employer, to taxpayers whose employers impose housing-related requirements on them, or to taxpayers who work for non-profits or, referring to a suggestion by a commentator, to taxpayers who work for non-profits and are on call at all times.[62] The court was clear that this list is non-exhaustive and that "Congress retains wide discretion in adopting tax laws that further its legitimate policies."[63]

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[60] 278 F. Supp.3d at 1102. Prior challenges to sec. 107 had been dismissed on the basis that plaintiffs lacked standing to challenge the constitutionality of tax provisions that did not affect them directly. *See* cases collected at 278 F. Supp.3d at 1103. Relying in part on Arizona Christian School Tuition Organization v. Winn, 131 S. Ct. 1436 (2010) (holding plaintiffs to lack standing to challenge Arizona's tuition tax credit program on Establishment Clause grounds), the Court of Appeals for the Seventh Circuit had rejected the instant plaintiffs' challenge to sec. 107(2) on standing grounds). Lew, *supra*. By way of background, Flast v. Cohen, 392 U.S. 947 (1968), had allowed taxpayers standing to challenge a program involving government spending for secular instruction in religious schools on Establishment Clause grounds, notwithstanding that plaintiffs had no particularized injury from the expenditure. However, Winn refused to extend the logic of Flast to a government tax credit program; instead, placing them on the same footing as other tax expenditures – a particular taxpayer's interest in a tax item that didn't directly affect the taxpayer was regarded as too slight to support a "case or controversy" within Art. III of the United States constitution. *See* Doremus v. Board of Education of Hawthorne, 342 U.S. 429 (1952) ("The party who invokes the power [of the federal courts] must be able to show not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." Doremus, *supra* at p. ___, *quoting* Frothingham v. Mellon, 262 U.S. 447, 488 (1923)).

[61] 278 F. Supp.3d at 1104.

[62] *Id*.

[63] *Id*.

C. *Analysis of Gaylor*

This portion of the paper undertakes an analysis of the Gaylor decision.[64]

1. Standing

Since the first round in the litigation ended with the plaintiffs being held to lack standing to bring the action by the Court of Appeals, that seems like a good place to begin an analysis of Judge Crabb's opinion in the latest round. The Court of Appeals' opinion had indicated that a simple solution to the standing problem apparently existed: the plaintiffs could have excluded their housing allowances from income and challenged the IRS in Tax Court if it disallowed the exclusion, or they could pay the tax and sue for a refund if the IRS refused the refund claim.[65]

The plaintiffs chose the latter course. As a result, a live controversy might be thought to exist, since the court might be persuaded that impermissible discrimination prevents plaintiffs from claiming the sec. 107 exemption, in which case a refund would be due. There are at least a couple of issues with this, however. First, the plaintiffs complaint contains no prayer for relief seeking payment of the refund. In a sense this is understandable since the plaintiffs' public interest posture is that of seeking invalidation of sec. 107 on Establishment Clause grounds. Perhaps failure to seek the refund in the complaint could be remedied by an amended complaint, or perhaps the court would award the relief irrespective of the terms of the complaint, but it must be said that the drafting of the complaint is highly suggestive that no monetary or other direct consequence to plaintiffs hinges on the outcome of the litigation - which is the reason they were held to lack standing in the initial action. Moreover, one has to believe that failure to seek repayment of the tax in the complaint wasn't just an oversight. Was there a reason plaintiffs shied away from filing a pleading seeking the refund?

Both the District Court in Lew as well as the Appeals Court in that action were clear that they thought plaintiffs were unlikely to succeed in any claim that they were "ministers of the gospel"

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[64] The case has been the subject of significant commentary. *See* Samuel Brunson, *God and the IRS* 78 n. 5 (2018) (collecting articles). Brunson asserts that "there is widespread (albeit not universal) agreement that the parsonage allowance violates the Establishment Clause of the Constitution." *Id*. Commentary that would uphold the provision includes Edward Zelinsky, *Taxing the Church* 157 - 69 (2017); Justin Butterfield, Hiram Sasser and Reed Smith, "The Parsonage Exemption Deserves Broad Protection". 16 Tex. Rev. L. & Pol. 251 (2012). In addition, several *amici* filed thoughtful briefs with the Court of Appeals for the Seventh Circuit. Of particular interest are 1) Brief for Members of Congress as *Amici Curiae* In Support of Defendant-Appellants and Intervenor-Defendant-Appellants, filed on behalf of seventeen United States Senators and Members of the House of Representatives and 2) *Amicus Curiae* Brief of Alliance Defending Freedom on Behalf of 8,899 Churches in Support of Appellants and Reversal of the District Court's Judgment.

[65] *See* Lew, *supra*, 773 F.3d at 821 n. 3.

entitled to exclusion treatment for their housing allowance under sec. 107. Regulations under sec. 107 state that "[e]xamples of specific services the performance of which will be considered duties of a minister for purposes of section 107 include the performance of sacerdotal functions, the conduct of religious worship, the administration and maintenance of religious organizations and their integral agencies and the performance of teaching and administrative duties at theological seminaries."[66] The District Court opinion in Lew states that, "Under no remotely plausible interpretation of §107 could plaintiffs Gaylor and Barker qualify as 'ministers of the gospel.'"[67] The Court of Appeals agreed, stating, "[w]e think it is unlikely that §107(2) will be interpreted to apply to the plaintiffs in this case."[68] Similarly, Judge Grubb re-stated in Gaylor her doubts about the sec. 107 claim identified in Lew: "As I noted in the earlier lawsuit, 'there is no reasonable interpretation of the statute under which the phrase 'minister of the gospel' could be construed to include employees of an organization whose purpose is to keep religion out of the public square.'"[69]

Slightly complicating the picture was the government's brief in the case, which held out the possibility that plaintiffs might qualify for sec. 107 treatment as ministers. The strangeness of the argument provoked the District Court to say, "[a]lthough defendants devote a substantial portion of their briefs to this argument, it is difficult to take it seriously."[70] And, "[d]efendants point to no regulations or decisions suggesting that a person who did not subscribe to any faith could qualify for an exemption under §107(2)."[71]

Let's assume there is good and sufficient reason for the government's advocates to contend that senior executives of an "organization of atheists and agnostics" might be "ministers of the gospel". Can achieving standing in the face of the Supreme Court's most recent pronouncement in Winn, *supra*, really involve no more than an empty assertion that plaintiff is entitled to the benefit of an exclusion or deduction even if there real world likelihood of such entitlement approaches nil? Putting a finer point on it, could a taxpayer who rents her home, aggrieved at the inability to claim a home mortgage interest deduction, claim a deduction under sec. 163 for a

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[66] Treas. Reg. sec. 1.107-1(a).
[67] Lew, *supra*, 983 F. Supp.2d at 1056.
[68] Gaylor, *supra*, 773 F. Supp.3d at 823.
[69] 278 F. Supp.3d at 1089.
[70] Lew, *supra*, 983 F. Supp.2d at 1056.
[71] *Id*. at 1057.

portion of her rent, urging a denial of equal protection? If the answer is yes, then the standing requirement would seem to be no more than an empty formality.[72]

2. Sec. 107 as part of a pattern of special tax provisions accommodating religion and ministers

[This section to detail the many special IRC provisions designed to accommodate religious institutions and ministers, including: secs. 508(a) & (c)(1)(A), which require an application for recognition of tax-exempt status be filed with the IRS as a condition of obtaining tax-exempt status, but the exception in subsection (c) makes that rule inapplicable to churches, in deference to Free Exercise considerations. Similarly, sec. 761, titled "Restrictions on Church Tax Inquiries and Examinations", fills 4 printed pages of the Internal Revenue Code (in small print), with restrictions on audits of churches. Special rules are also provided relative to FICA and SECA treatment of ministers, whose situation as employees is often unclear, as well as regarding pension plans maintained for churches and related organizations.]

3. Avoidance of entanglement

The argument that sec. 107 functions to avoid entanglement between government and religious institutions did not, as noted, obtain traction with Judge Grubb. And yet it seems there is real force to the point. If established, the meaningful avoidance of entanglement between government and religious institutions should not only represent a secular purpose, but also diminish problematic entanglement, with the result that violation of the first and third Lemon tests are avoided.

Stepping back, it is obvious that a taxing provision will always result in a degree of entanglement with religious institutions, which will either be subject to the tax or not. If

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[72] Flast v. Cohen, *supra*, created an exception to the generally applicable requirement of a meaningful financial interest in the outcome of an action, to allow taxpayers to challenge government appropriations in violation of the Establishment Clause. This overrode the general approach in standing cases that a particular taxpayer's financial interest in the outcome such a challenge - in such person's capacity as a taxpayer - is infinitesimal, and inadequate to support a "case or controversy" subject to Art. III of the constitution. As observed in note __ *supra*, the recent decision in Winn holds the Flast exception unavailable in the case of the challenge to a tax credit program, making a generic taxpayer challenge to sec. 107(2) appear impossible. A comprehensive recent article on the Establishment Clause, seems to agree that a serious standing problem exists for a taxpayer challenge to sec. 107(2), although the author suggests that such a challenge ought to be permitted. His position seems motivated in particular by a concern that Congress would approve legislation violative of the Establishment Clause. *See* Richard Fallon "Tiers for the Establishment Clause," 166 U. Penn. L. Rev. __n. 200 and __ (2017). An earlier article concluded that standing doesn't exist for a generic taxpayer plaintiff. *See* Bryce Langford, "The Minister's Hosing Allowance: Should It Stand, and if Not, Can Its Challengers Show Standing 1163 U. Kan. L. Rev. 1129 (2015).

exemption is provided, then entanglement will result from the need to determine which religious institutions satisfy the requirements for exemption. Professor Zelinsky has called the need to assure qualification for inclusion or exemption "borderline entanglement".[73] If religious institutions *will* be subject to a particular tax, then the amount of tax due will need to be determined, and enforcement measures may be needed to collect the tax. Professor Zelinsky labels interactions between government and religious institutions under this heading "enforcement entanglement".[74] Because one or the other types of entanglement will result in all cases, the required entanglement-related inquiry is more properly directed at analyzing which form of entanglement is more burdensome on the parties, and more likely to involve government involved in the details of the operation and duties of religious institutions, thereby fomenting controversy and antagonism between government and religious institutions.

The convenience of the employer rationale proceeds from a recognition that the employee's living quarters effectively represent an extension of the business premises of the employer. For that reason the employer gains a commercial advantage from the employee's proximity. In reciprocal fashion, the employee carries out the employer's business from the living quarters, or positions himself or herself to do so in short order by virtue of the proximity to the business. As regards the tax treatment of the employee, the employee's presence at or near the employee's work space may support a deduction for use of the premises by virtue of carrying on the employer's business in the space. Translating to the present case, if one assumes ministers will use their housing in furtherance of the purpose of the religious institution with which they are affiliated, then the minister's housing is effectively devoted, to a greater or lesser extent, to the work of the religious institution, and the sec. 107(1) exclusion for in-kind housing and the parsonage allowance exclusion in sec. 107(2) represents a close parallel to sec. 119 (including the housing allowance provision of sec. 119(c)). This analogy was observed many years ago by Professor Boris Bittker, who then observed that, ". . . the blanket exclusion granted by §107 might be regarded as a rule of evidence that does not 'prefer' religion but merely reduces the administrative burden of applying §119 to clergymen."[75]

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[73] *See* Zelinsky, *supra* note __ at *xv*.
[74] *Id*.
[75] Boris Bittker, "Churches, Taxes and the Constitution," 78 Yale L. Journal 1285, 1292 n. 18 (1969).

Effectively, then, there are three choices for addressing the tax treatment of ministers: 1) sec. 119, requiring that the religious institution provide the home - or requires its use - and that the minister's use of the home is for the institution's convenience; 2) sec. 280A(c), permitting a deduction for the portion of the home used for pastoral duties; and 3) sec. 107, a "rule of evidence" in Professor Bittker's terminology, that requires no proof of the use which the home is put or the conditions under which the minister occupies it. Obviously, 1) and 2) each will require significant fact-finding and analysis by government – as well as the possibility of taxpayer disputes – to determine whether the statutory conditions are met, thus triggering borderline entanglement in Professor Zelinsky's formulation.

Taking first section 119, it provides, as pertains to housing, that "[t]here shall be excluded from the gross income of an employee the value of any lodging furnished to him, his spouse, or any of his dependents by or on behalf of his employer for the convenience of the employer, but only if . . . the employee is required to accept such lodging on the business premises of the employer as a condition of his employment."

A threshold question is whether relief will be limited to persons who are "employees", since the relationship between a minister and the institution may be that of employer - employee or something else. Sec. 1402 avoids this issue by declaring all ministers self-employed. To understand the nature of the relationship, the degree of control over day-to-day duties of the minister will be relevant, as well as a host of other issues that go defining that relationship, in a context in which the issue is not likely to be relevant for any other purpose. Is the home the "business premises of the employer"? Initially, it will be necessary to decide the "business" of the religious institution, or its equivalent.[76] A minister's home can be expected to be a place where the religious institution's work will be carried out, as an adjunct to a church, temple, other place of worship, in a manner that is more private and therefore effective - *e.g.*, a conversation with a parishioner about any manner of subjects that relate to the parishioner's spiritual well being, familial issue or the like. Or the person in question may not be a parishioner, but may be a relative stranger seeking counseling regarding a life crisis. A group of parishioners might wish

[76] A recent Tax Court case adopted a flexible approach defining the business premises of the employer. In a case involving the Boston Bruins hockey team, hotels near venues where away games were being played were treated as part of the employer's "business premises", with the result that the meals served to players and staff at such hotels represented qualified fringe benefits and the 50% deduction restriction under sec. 274 was inapplicable. Jeremy M. Jacobs v. Comm'r, 148 T.C. 490 (2017). This would support treating a minister's home as part of the "business premises" of the church.

to gather in the pastor's home to discuss with him or her a sensitive personnel issue affecting a church minister or other employee, or regarding a disagreement between factions within the church. The number, nature and content of these interactions will support treatment of the minster's home as an extension of the religious institution. Obviously, however, ministers will wish to maintain confidentiality regarding such conversations, and indeed such confidentiality may be required by law.[77]

The awkwardness and intrusiveness of government verification of the use of the minister's home is obvious. A tax requirement that mandates record keeping and disclosure of meetings of the type mentioned would have significant potential to discourage the meetings. As a matter of public policy, it would seem that opportunities to obtain the type of counseling and guidance at issue represent an unqualified social good. Sec. 119 also requires that the use of the home "for the convenience of the employer"? Given the nature of a parsonage and of the role of a minister in the life of a church, it may be assumed that the use of the minister's home will always serve the purposes of the church and therefore may be said to be for the "convenience of the employer". One can only imagine self-serving language added to the contracts of the well-advised to ensure the condition is met. Similar considerations would attend use of sec. 280A(c) for a minister to support the regular use of his or her home to carry out the work of the religious institution, thereby establishing entitlement to a deduction for use of a portion of the minister's home. Thoughtful policymakers might well decide to forego the need for inquiries such as these, which would burden every attempt by a minister to rely on sec. 119 to exclude a housing allowance from income, and also on the part of the relevant religious institution, as regards the need to withhold tax in the event that the sec. 119 qualification is not available or is unclear. Issues similar to the foregoing would arise if ministers were required to support a claim of a deduction pursuant to sec. 280A(c).

Two other entanglement-related points will be noted briefly: First, amici advocating a holding of unconstitutionality argue that entanglement will result from the need to determine what constitutes a qualifying religion ". . . in the case of new religious movements, such as the

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[77] *E.g.*, N.Y. Civil Practice Laws and Rules §4505 states: "A clergyman, or other minister of any religion or duly accredited Christian Science practitioner, shall not be allowed to disclose a confession or confidence made to him in his professional character as spiritual advisor."

Pastafarians, Church of Unlimited Devotion, witch covens, and First Church of Cannabis, the latter two of which actually received tax exempt status."[78]

This may be a smaller problem than they suggest. As the amici note, the examples they cite arise in the context of evaluating the organizations' claim for tax exempt status. These issues will not be increased or lessened by resolution of the controversy affecting sec. 107(2) - the same organizations will face the same issue as to their exempt status, and the ministers' situation will be derivative from whatever determination is made. Moreover, for hundreds of thousands, if not millions of churches within established religions there will be no issue. The net contribution to entanglement of government and religion by virtue of this issue is therefore be little or none.

Second, if sec. 107(2) is held unconstitutional, obviously organizations and ministers will consider ways to come within sec. 107(1). In some cases the adjustment will be simple and relatively cost-free, such as by having the church lease property that the minister otherwise would have rented, and make the residence available to the minister as his or her parsonage. In other cases, greater expense or burden may be involved, such as would be the case if a church with limited financial resources bought a house rather than having the minister make the purchase or rental. In still other cases, it will not be feasible to undertake these arrangements, in which case the the minister will rent or purchase the residence and then rely on sec. 119 or 280A(c) to garner neutral tax treatment. A requirement that churches and ministers undertake these steps has little to recommend it as a matter of social policy.

The alternative, of course, is the approach currently taken in sec. 107(2) to provide a "rule of evidence" that deems the sec. 119 conditions to have been met. At that point "enforcement entanglement" issues are displaced by "borderline entanglement", *i.e.*, who is a minister entitled to the benefits of the provision? The answer is obviously far simpler, however. In the almost 100 years since sec. 107 came into the law, the IRS and courts have managed without great difficulty to address the handful of cases at the edges of sec. 107 that require analysis of an individual's status as a 'minister."[79]

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[78] *See Amicus Curiae* Brief of Tax Law Professors in Support of Appellees, Filed with the Seventh Circuit Court of Appeals in Gaylor v. Mnuchin 18.

[79] *See* note __, *supra*.

In connection with her consideration of the entanglement issue, Judge Crabb referred to the decisions in Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC,[80] and Amos,[81] Hosanna-Tabor involved application of a "ministerial" exemption from employment discrimination law in the case of an employee who was a "called" member of the church, and held that as a member of the church the exemption was available. Amos upheld application of a statutory exemption to the Civil Rights Act of 1964 in the case of an employee of a secular nonprofit activity of the church against an Establishment Clause challenge. Both cases obviously involve a balancing of Establishment Clause and Free Exercise considerations - with the "ministerial" exemption being provided by court decision and the parallel statutory exemption in Amos being the result of a Congressional decision. In both cases, the Free Exercise considerations prevailed. In Lew, Judge Crabb noted that entanglement considerations bore importantly on the availability of the exemption, noting that denial of the exemption "would lead to interference with 'a religious group's right to shape its own faith and mission thought its appointments.'"[82] While the circumstances obviously differ, requiring ministers to disclose details of communications with parishioners and others concerning spiritual and other sensitive matters in order to support an exclusion under sec. 119 or deduction under sec. 280A(c) raise entanglement issues that Congress presumably considered, and properly form the basis for the sec. 107 exclusion, thereby alleviating concerns for an Establishment Clause violation.

III. The Lemon Test and Its Current Status

This portion of the paper will examine more closely the test laid down in Lemon for Establishment Clause validity. After first reviewing the terms of the test and indicating some cognate doctrines that have grown up around it, I will then outline some of the criticisms that have been levied at the test.

A. The Test

[80] 132 S. Ct. 694 (2012).
[81] *Supra*.
[82] Lew, 983 F. Supp.2d at 1073 (quoting Hosanna-Tabor, 132 S. Ct. at 706).

The Court in Lemon articulated its test for Establishment Clause violations as follows: "First the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances not inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"[83] At issue in Lemon were Rhode Island and Pennsylvania statutes that, respectively, subsidized the salaries of teachers of secular subjects at religious schools, and provided secular instruction materials to such schools. The measures included protections to ensure that the subsidies did not spill over to religious instruction - *e.g.*, teachers receiving salary supplements must teach only secular subjects and may not have taught a religious subject for a specified number of years. Applying the three-factor test to the state programs the Court found a secular purpose in the objective to educate children of the state, and seemed unwilling to say a sectarian effect was present, due to the barriers designed into the programs to ensure that religious teaching would not be funded by the state. However, the Court held the programs to violate the Establishment Clause due to the presence of excessive entanglement, of two types. The first related to the auditing the states would perform to ensure that funding benefits didn't spill over to the religious sector. Commenting on these measures, the Court stated

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[83] 403 U.S. at 612 - 13 (case citations omitted). The Court cited as support for the test the decisions in Board of Education v. Allen, 392 U.S. 236 (1968), which upheld the New York statute authorizing public school boards to lend textbooks to private schools, and Walz, *supra*, which upheld the New York property tax exemption for churches and other buildings occupied by religious institutions. Interestingly, however, the language used in Lemon for the purpose and effects prongs of the test quote almost verbatim School List. of Abington Township, Pennsylvania v. Schempp, 374 U.S. 203 (1963), one of the two leading school prayer cases:

> "The test [for validity under the Establishment Clause] may be stated as follows: what are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."

374 U.S. at 222. It's interesting to speculate why the Court might have been reluctant to cite the highly-controversial school prayer case as the source of the test. Regarding the controversy, one commentator states that Engle v. Vitale, 370 U.S. 421 (1962) - the first of the school prayer decisions, decided the year prior to Schempp - ". . . provoked 'the greatest outcry against a U.S. Supreme Court decision in a century' (a century that had included Brown v. Board of Eduction)." Steven Smith, *The Rise and Decline of American Religious Freedom* 114 (2014)(quoting Bruce Direnfeld, *The Battle over School Prayer* 72 (2007). Smith continues: ". . . impassioned cirtics [of the school prayer decisions], including many ordinary American citizens, saw the decisions as radical and transformative. Here the understandings of the cultural elite and less privileged Americans parted: thus John Jeffries and James Ryan observe that 'the controversy over school prayer revealed a huge gap between the cultural elite and the rest of America.'" *Id*. at 121 (quoting "A Political History of the Establishment Clause," 100 Mich. L. Rev. 309, 325 (2001). At issue in Engle was the so-called "Regents Prayer" used in New York to begin the school day; the text of the prayer is as follows: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." 307 U.S. at 422. Obviously, the school prayer cases represented an important first salvo in the Culture Wars.

> "A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected. Unlike a book, a teacher cannot be inspected once to as to determine the extent and intent of his personal belies and subjective acceptance of the limitations imposed by the First Amendment. These prophylactic contacts will involve excessive and enduring entanglement between church and state."[84]

A second type of entanglement identified by the Court was the potential for the measure to engender partisan political debate along religious lines, which the Court characterized as "one of the principal evils against which the *First Amendment* was intended to protect.[85] The Court found that in the present case,

> ". . . we are confronted with successive and very likely permanent annual appropriations that benefit relatively few religious groups. Political fragmentation and divisiveness on religious lines are thus likely to be intensified."[86] This prong of the Lemon test has been questioned, and apparently limited.[87]

An important adjunct of the Lemon test was added by Justice O'Connor in Wallace v. Jaffree,[88] responding to a questioning of the test's general applicability by Justice Burger, who authored the test,[89] and a proposal by Justice Rhenquist to abandon the test altogether.[90] In the

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[84] 403 U.S. at 619. It isn't clear from the Court's opinion what type of surveillance activity it was envisioning. A state representative present in each class for the entirety the instruction program presumably was not intended. In other settings, schools review faculty by asking for copies of course materials and the syllabus, and occasionally visiting the class. Without more detail as to how exactly the states' oversight was to work, it seems to me that reasonable persons could differ whether this excessively entangles church and state. The Court also referred to a need to audit compliance with the statute by checking the per pupil expenditures for secular versus religious education; review of the schools' records would be necessary to accomplish this. Without explaining its conclusion, the Court states that "this kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids." It would be interesting to understand in a bit more detail what was meant by "evaluation of the religious content of a religious organization" in determining per pupil expenditures for secular eduction. It would not seem, for example, that the state would be required to investigate or understand details of religious doctrine, or debate the same with school officials.

[85] 403 U.S. at 622.

[86] 403 U.S. at 623.

[87] *See* Mueller v. Allen, 463 U.S. 388, 403 fn. 11 (1983).

[88] *Supra*.

[89] "We have repeatedly cautioned that Lemon did not establish a rigid caliper capable of resolving every Establishment Clause issue, but that it sought only to provide 'signposts'. 'In each [Establishment Clause] case, the inquiry calls for line-drawing; no fixed, per se rule can be framed.'" Wallace, 472 U.S. at 89 (Burger, C.J., concurring), quoting Lynch v. Donnelly, *supra*.

[90] At the end of a lengthy dissent in which he critiques the accuracy of the history upon which Lemon relies (a topic discussed *infra* at part III.C.), Justice Rhenquist observes, "We have noted that the Lemon establishment test is 'not easily applied,' and as Justice White noted in Committee for Public Education v Regan, 444 U.S. 646 (1980), under the Lemon best we have 'sacrifice[d] clarity and predictability for flexibility.' In Lynch we reiterated that the Lemon test has never been binding on the Court, and we cited two cases where we had declined to apply it."
472 U.S. at 112 (Rhenquist, J., dissenting). He concludes, "[i]f a constitutional theory has no basis in the history of the amendment it seeks to interpret, is difficult to apply and yields unprincipled results, I see little use in it." *Id.*

face of these criticisms of the Lemon, Justice O'Connor proposed to combine the purpose and effect prongs of the test into one inquiry: ". . . whether government's purpose is to endorse religion and whether the statute actually conveys a message of endorsement."[91]

In addition, more recent case law has expanded on Lemon's "purpose" requirement - which "aims at preventing [government] from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters" – to indicate that the "purpose" is viewed from the point of view of a reasonable, objective observer, acquainted with the statute, legislative history and implementation, and on that basis would regard the government act as having a religious rather than a secular purpose. [92]

Going further, Justice Scalia complained that the majority in McCreary County had made the test more stringent than it had been in the past, involving more detailed inquiry into the purpose of government action to support an analysis of the "purpose apparent from government action", rather than simply what an objective observer would have seen.[93] On the facts of the case, where a display of the Ten Commandments on courthouse walls evolved from an arguably secular exercise through at least three iterations to a display that included the Ten Commandments with eight other historical documents comprising "The Foundations of American aw and Government Display", with no special prominence accorded the Ten Commandments, this difference would seem material. Going on, Justice Scalia further objects that the secular purpose prong of the test "predominate" over any other purpose.[94] While evaluation of the Justice's point depends in part on a construction of the facts, which may be susceptible of differing constructions, the majority's defense of its stringent application of the purpose test was defended as necessary to avoid an "apparent sham" purpose, or "secondary secular purpose"[95] although the mixed record in the case didn't seem to involve a sham or secondary secular purpose as much as an evolving record - bad at the beginning, then better after a round in court opposite the ACLU, advice from the county's lawyers, etc.

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[91] 472 U.S. at 69 (O'Connor, J., concurring).
[92] *See* McCreary County, Ky. v. American Civil Liberties Union of Ky., 545 U.S. 844, 861 (2005).
[93] 545 U.S. at 900-01 (Scalia, J., dissenting).
[94] 545 U.S. at 865.
[95] 545 U.S. at 901.

In 2014, Justice Scalia, writing in dissent to a denial of the petition for certiorari in Elmsbrook School Dist. v. Doe,[96] stated that the Court's decision in Town of Greece,[97] had abandoned the "endorsement" test, upon the basis of which the Court of Appeals for the Second Circuit had invalidated the practice of prayers before the commencement of town board meetings.[98]

B. Criticisms of the Lemon Test

Obviously, the Lemon test, with refinements that have been grafted on, leave many opportunities for differences over interpretative aspects. To illustrate, take as an example whether a holiday creche would be viewed as a endorsing religion. Addressing the issue in her concurrence in Lynch v. Donnelly,[99] Justice O'Connor opined in an observation that has now become famous:

> "Applying that formulation to this case, I would find that Pawtucket did not intend to convey any message of endorsement of Christianity or disapproval of non-Christian religions. The evident purpose of including the creche in the larger display was not promotion of the religious content of the creche but celebration of the public holiday through its traditional symbols. Celebration of public holidays, which have cultural significance even if they also have religious aspects, is a legitimate secular purpose."[100]

While I think Justice O'Connor's conclusion can be defended, people took strong exception to her specific remarks – which obviously had a strained quality – and some persons reacted strongly.[101] Perhaps this sets the stage for consideration of criticisms that have been leveled at the Lemon test.

As noted, Justice Rhenquist has teed up two quite far-reaching criticisms of the test: the test has "no basis in the history of the amendment it seeks to interpret" and is "difficult to apply".[102] I'll consider each in turn.

1. Basis of the Lemon Test in the history of the *1st Amendment*

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[96] **CITE**
[97] *Supra*.
[98] 681 F.3d 20 (2d Cir. 2012).
[99] 465 U.S. 668 (1984).
[100] 465 U.S. at 691 (O'Connor, J., concurring).
[101] *E.g.*, Mark Tushnet stated that "Justice O'Connor's conclusion that the creche did not endorse religion came as a surprise to most Jews." Mark Tushnet, "The Constitution of Religion," 18 Conn. L. Rev. 701, 712 n. 52 (1986).
[102] *See* note __, *supra*.

Justice Rhenquist's dissent in Wallace v. Jaffree,[103] begins as follows:

"Thirty-eight years ago this Court, in Everson v. Board of Education . . . summarized its exegesis of Establishment Clause doctrine thus:

> "In the words of Jefferson, the clause against establishment of religion by law was intended to erect a 'wall of separation' between church and State.' Reynolds v. United States . . ..'

This language from Reynolds, a case involving the Free Exercise Clause of the First Amendment rather than the Establishment Clause, quoted from Thomas Jefferson's letter to the Danbury Baptist Association the phrase 'I contemplate with sovereign reverence that at of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between church and State.' 8 Writings of Thomas Jefferson 113 (H. Washington ed. 1861). It is impossible to build sound constitutional doctrine upon a misunderstanding of constitutional history, but unfortunately the Establishment Clause has been expressly freighted with Jefferson's misleading metaphor for nearly 40 years."[104]

Obviously, if Justice Rhenquist is correct, this undermines many years of Establishment Clause jurisprudence. Starting with Everson, the Supreme Court hewed to the "wall of separation" construct, and beyond that essentially issued its opinions on the basis that: Thomas Jefferson and James Madison had undertaken to write the "wall of separation" concept into the Constitution, and thereby assure that the new country would undertake a broad mandate of preventing government from sponsoring religion, ensuring that all persons of any faith - or of no faith - would be treated equally and government always would be secular and neutral in these matters.[105] However, thoughtful historians undertook a careful analysis of the First Amendment following Everson and reached quite a different conclusion.[106]

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[103] 472 U.S. 38 (1985).

[104] 472 U.S. at 91- 92 (citations omitted) (Rhenquist, J., dissenting). The opinion then undertakes a systematic analysis of the history of the First Amendment, showing that it was intended as a far more limited measure. The entirety of the opinion merits reading and its conclusions have not been meaningfully controverted by any other Supreme Court Justice.

[105] *See* Smith, *Rise and Decline* at 2.

[106] *E.g*., Mark de Wolfe Howe, *The Garden and the Wilderness: Religion and Government in American Constitutional History* 4 - 5 (1965) (". . . the Court's distorting lessons . . . have woven synthetic strands into the tapestry of American history."); Edwin Corwin, *A Constitution of Powers in a Secular State* 116 (1951) (". . . the Court has the right to make history . . . it has no right *to make it up*.") (emphasis in original). At the time of writing, Howe was Professor of American Legal History at Harvard Law School; Corwin was a Professor of Jurisprudence and chair of the Department of Politics at Princeton. Corwin also was quoted as saying, after undertaking his analysis of the history that "it appeared the Court had been 'sold a bill of goods.'" Corwin, "The Supreme Court as National School Board," 14 Law & Contemp. Prob. 3, 16 (1949), quoted in McCreary, 545 U.S. at 8990 n. 2 (Scalia, J., dissenting). Other major works reviewing the history relative to the Everson historical presentation include: Robert Cord, *Separation of Church and State: Historical Fact and Current Fiction* (1982) ("In this book, with the

I will not in this paper attempt even a summary of the history of the First Amendment. I will however sketch a few facts that I think illustrate the reasonableness of the analysis that concludes that the Everson "wall of impregnable separation" between church and state and commitment to a secular, neutral state is not at all mandated by the history of the First Amendment. While aspects of the history are not fully clear, or fully agreed by the historians who have researched the issue, it seems fair to say that by far the better view is that the history doesn't support the view of the First Amendment adopted in Everson.

Some selected facts and observations: James Madison, although he held a central role in drafting the constitution, initially opposed adoption of any bill of rights. Addressing concerns sometimes expressed that individual representatives of the states wished assurance that the federal government would not intrude in religious affairs, his response was that under the constitution the federal government possessed only specified powers with no authority to act in matters of religion. The most likely issue of religious preference was a religion test for office holders, and that had been addressed. Religious practices in the states during the period prior to adoption of the Constitution varied significantly. Five southern states had established the Church of England. The practice varied more in the north although Congregationalism was generally regarded as established in New England. In fact, Massachusetts continued to have an established religion until the 1830s. There were significant disagreements within and among the states about means of funding for churches, rights to establish sects other than the established sect, issues of religious tolerance between, *e.g.*, Catholics and Protestants in Maryland and Congregationalists and Baptists in New England, but no one expected the federal government to take any role in these matters.

There is little meaningful information relating to the drafting history of the First Amendment,[107] and this is consistent with the concept that few participants in the process had

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use of mostly primary historical documents, I show conclusively that the United States Supreme Court has erred in its interpretation of the First Amendment. The facts within this study prove beyond a reasonable doubt that no 'high and impregnable' wall between Church and State was in historical fact erected by the First Amendment nor was one intended by the Framers of that Amendment." p. *xiv*.); Thomas Curry *Church and State in America to the Passage of the First Amendment* (1986); Donald Drakeman *Church, State and Original Intent* (2010) (Drakeman summarizes his analysis regarding the Everson statement of history as, the historical sources "do not fully support the historical claims made by the justices.") Interestingly, Drakeman states that he had started his research expecting to reach the opposite conclusion. *Id*. at *ix*. Chester Antieau *et al*. *Freedom from Federal Establishment: Formation and Early History of the First Amendment Religion Clauses* (1964).

[107] Professor Levy summarizes the House debate of the bill of rights:

any expectation of an affirmative role for the federal government in the nation's religious life. In effect, the First Amendment was a federalism measure, ensuring these matters were addressed at the state level – an approach reflected in the language of the First Amendment, "Congress shall make no law respecting an establishment of religion . . .", effectively the mirror-image of the grant of powers to the national government contained in Art. I, sec. 8, "The Congress shall have Power . . . To make all laws which shall be necessary and proper . . .."

The concept that the state governments would have almost sole jurisdiction over matters of religion is easily seen in the following quotation from Joseph Story's *Commentaries on the Constitution*, written in the mind-19th century (Story was a Justice of the Supreme Court as well as a professor at the Harvard Law School):

> "Probably at the time of the adoption of the Constitution, and of the [First] Amendment . . . the general if not the universal sentiment in America was, that Christianity ought to receive encouragement from the State so far as was not incompatible with the private rights of conscience and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation."[108]

Accepting that a principal purpose - if not the purpose - of the Establishment Clause was to assure that the federal government would not oust the states from their role in the matter of religion, either by establishing a church or favoring one sect over another - the federal government was not in any way constrained from engaging in activities that recognized the role of religion in American life. For example, the same Congress that approved the bill of rights oversaw the following Thanksgiving resolution by President George Washington:

> "*Whereas, it is the duty of all nations to acknowledge the providence of Almighty God, to obey His will, to be grateful for His benefits, and humbly to implore His protection and favor*; and
> Whereas both Houses of Congress have, by their joint committee, requested me 'to recommend to the people of the United Starts a day of public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favors of

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> "The debate was sometimes irrelevant, usually apathetic and unclear. Ambiguity, brevity, and imprecision in thought and expression characterize the comments of the few members who spoke. That the House understood the debate cared deeply about its outcome, or shared a coon understanding of the finished amendment seems doubtful. Not even Madison himself, dutifully carrying out his pledge to secure amendments, seems to have troubled to do more than was necessary to get something adopted in order to satisfy the popular clamor for a bill of rights . . .." Leonard Levy, *The Establishment Clause: Religion and the First Amendment* 79 (1986).

[108] Joseph Story, *Commentaries on the Constitution of the United States* 591 (1851).

> Almighty God, especially by affording them an opportunity peaceably to establish a form of government for their safety and happiness:'."[109]

Similarly, the same Congress appropriated funds for legislative chaplains. During the first session of Congress, the Northwest Ordinance was re-enacted, containing a provision that, "Religion, morality, and knowledge being necessary to good government, . . . schools and the means of education shall forever be encouraged."[110]

Moving forward a bit, we can put a little context around the Everson recitation of the Virginia-led history and wall of separation. In President Grant's 1875 message to Congress he stressed the importance of a Constitutional amendment forbidding the use of public funds for so-called "denominational schools".[111] Grant's purpose was informed by the increasing presence of Roman Catholics in the country, and as a result of having acquired political power, their efforts to obtain school funding.[112] Pertinent here, concern was expressed that nothing in the U.S. Constitution, including the Fourteenth Amendment - which at that time may or may not have been understood to "incorporate" the First Amendment - would prevent states from providing funds to the Catholic Schools. The prompt response was a proposed constitutional amendment, authored by Rep. James G. Blaine, forbidding such funding. It stated:

> "No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefore, nor any public lands devoted thereto, shall ever be under the control of any religious sect; nor shall any money so raised or lands so devoted be divided between religious sects or denominations"[113]

The House of Representatives overwhelmingly approved the measure but it never went anywhere. Nonetheless, it illustrates the political dynamics of the time, and appears to have formed the thinking behind the opinion in Reynolds v. U.S.[114] The case involved the appeal of a prosecution for bigamy in the Territory of Utah. Seemingly irrelevant, the defendant was Mormon and argued that he was required to practice polygamy by his religion. Chief Justice Waite wrote the opinion for the Court and used the opportunity to hold forth at some length

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[109] Cord, *Separation of Church and State* at 51 - 52 quoting from James Richardson, *A Compilation of the Messages and Papers of the Presidents, 1789 - 1897*, Vol. 1.
[110] Curry, The First Freedoms at 218.
[111] Drakeman, Church, State, and Original Intent 66-67.
[112] *Id*.
[113] Drakeman at 67.
[114] 98 U.S. 145 (1878).

regarding the subject of separation of church and state, along the lines of the Virgina approach later reflected in Everson. The Everson opinion in turn relied heavily on the Reynolds analysis. Later commentators have referred to "law office history" as informing the opinion.[115]

Returning to the topic at hand, the Everson court's view about the impregnable wall of separation between church and state, and a concept of a secular, neutral state, may have fairly reflected the views of Madison and Jefferson in obtaining the adoption of the Virginia State of Religious Liberty in 1786, but was not to any degree incorporated in the bill of rights. When that analysis was repeated in the school prayer decision in Shempp,[116] it then formed the basis for the Lemon tests, asking if a secular purpose was present in the government act, and whether there was a primary purpose to support or interdict religion. Obviously these have little to do with the very limited function of the First Amendment as indicated above. In part for this reason, the conservative justices have not seen the Lemon test as legitimate. At the same, it is late in the day to undo almost 50 years of precedent.

2. Workability of Lemon test

Writing in Lamb's Chapel v. Central Moriches Union Free Sch. Dist.,[117] Justice Scalia characterized the Lemon test by comparing it with

> ". . . a ghoul in a late-night horror movie that repeatedly sits up in its gave and shuffles abroad, after being repeatedly killed and buried. [It] is there to scare us [when] we wish it to do so, but we can command it to return to the tomb at will. When we wish to strike down a practice it forbids, we invoke it, when we wish it to uphold a practice it forbids, we ignore it entirely."[118]

This seems like an accurate characterization of Lemon, with the observation perhaps casting a shadow over a reasonable portion of the Court's Establishment Clause jurisprudence, which is most often characterized by 5 -4 decisions, often with multiple overlapping concurring and dissenting opinions. The Lemon test - especially as it is expanded or varied, used or not used - in reality fails to meet the definitional quality of a test, in that it sets forth no standard that can be applied in predictable fashion by the judiciary. I think it's a mistake however to throw brickbats at the Lemon test, its author, or those who seek to apply it. The difficulty is that our

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116 *Supra*.

117 508 U.S. 384 (1993).

118 508 U.S. at 399 (Scalia, J., dissenting).

nation doesn't have an explicable or coherent way of addressing Establishment Clause issues - excepting those situations where a relatively large number of cases over time have yielded answers that are sufficient in the context, and I believe school prayer and funding would be nominees for that dubious distinction. Irrespective of whether one thinks the cases are right or wrong, there are rules and there is no suggestion that the rules are going to change anytime soon.

3. A post-Lemon era?

It seems to me that we are now in an era when the Lemon test (doctrine) has receded in importance, and the Court is more likely to make decisions that are acknowledged as being driven more by context and an appreciation of history. So rather than a stern and inflexible "impregnable wall of separation between church and state" - purportedly (but not really) mandated by the Founders - as a means of preventing Catholics from obtaining school funding, a more modern form of decision making might be more candid about its premises. I think Van Orden and Town of Greece support this view. As particular support for this perspective I would point to Justice Breyer's concurrence in Van Orden and statements such as the following:

> ". . . the Establishment Clause does not compel the government to purge from the public sphere all that in any way partakes of the religious. . . . Such absolutism is not only inconsistent with our national traditions . . . but would also tend to promote the kind of social conflict the Establishment Clause seeks to avoid."[119]
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> "As far as I can tell, 40 years passed in which the presence of this monument, legally speaking, went unchallenged (until the single legal objection raised by petitioner). And I am not aware of any evidence suggesting that this was due to a climate of intimidation. Hence, those 40 years suggest more strongly than can any set of formulaic tests that few individuals, whatever their system of beliefs, are likely to have understood the monument as amounting, in any significantly detrimental way, to a government effort to favor a particular religious sect. . . . The 40 years suggest that the public visiting the capitol grounds has considered the religious aspect of the tablets' messages part of what is a broader moral and historical message reflective of a cultural heritage.[120]
>
> ". . .. to reach a contrary conclusion here, based primarily on the religious nature of the tablets' text would, I fear, lead the law to exhibit a hostility toward religion that has no place in our Establishment Clause traditions. Such holding might well encourage disputes concerning the removal of longstanding depictions of the Ten Commandments from public buildings across the Nation. And it could thereby create the very kind of

[119] 545 U.S. at 699 (Breyer, J., concurring) (case citations omitted).
[120] 545 U.S. at 702-03 (Breyer, J. concurring) (case citations omitted).

religiously based divisiveness that the Establishment Clause seeks to avoid."[121]

A similar issue is before the Court this term in The American Legion v. American Humanist Ass'n,[122] involving a 40 foot Latin cross that is part of a World War I memorial erected in the 1920s and standing on public property in Bladensburg, Maryland. The case may provide a good testing ground for my hypothesis.

IV. Summary; Conclusion

The parsonage exemption addresses a unique income tax issue faced by ministers. The contours of the issue have not really changed since the measure became law in 1921. The minister's home is in effect an extension of the church itself, and tax-related inquiries into the details of private meetings between the minister and his or her parishioners or others seeking counsel, regarding matters that are internal to the operation of the church, and the like should obviously be avoided. For that reason, Boris Bittker opined 50 years ago - typically succinct but with rapier precision - that the allowance reached a sensible outcome, effectively implementing a "convenience of the employer" rationale. For the reasons stated in part II.C., I think the Supreme Court would endorse this conclusion if the validity of sec. 107 under the Establishment Clause ever came before that Court.

As noted, I have real doubts that the Establishment Clause issue will be addressed on the merits by the because I don't believe anyone has standing to bring the case. But I do not think that's necessarily a bad thing - and in fact I believe there is a decided silver lining to that resolution.

The fact that a court doesn't police the issue doesn't mean that any Establishment Clause affecting sec. 107 hasn't and won't receive due consideration. The Members of Congress are sworn to uphold the Constitution - and the *amicus* brief filed by The Members of Congress in the Gaylor action specifically acknowledges that responsibility. Justice Kennedy, writing in Hein,[123] similarly points out the duty of Members of Congress, as well as Executive branch officials, to

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[121] 545 U.S. at 704 (Breyer, J., concurring). *See* Professor Richard Fallon, "A Salute to Justice Breyer's Concurring Opinion in Van Orden v. Perry, 128 Harv. L. Rev. 429 (2014).

[122] 874 F.3d 195 (4th Cir. 2017), *rehearing en banc denied*, 891 F.3d 117 (4th Cir), *cert. granted*, 139 S.Ct. 451 (2018).

[123] *Supra*.

uphold the Constitution.[124] Having Congress address the issue of the constitutionality of sec. 107 is a good thing in my view, for two reasons:

First, if anything is clear from Part III. of the paper, it is that there is no extant test - whether Lemon v. Kurtzman or other - to determine the constitutionality of sec. 107. The Lemon test, when applied, is so encrusted with refinements and beset with interpretive ambiguities that it fails the definitional requirement of "test". With all due respect to Justice Breyer,[125] his standard of "legal judgment" instead of "personal judgment" is not one I can understand. I think most lawyers would say that a legal judgment is rendered on the basis of the application of rules or principles, but, as discussed, the reality is that we have none in this area - outside the setting of contexts where *stare decisis* has put to rest the need for further debate, such as I think the school funding authorities at this point. In the absence of a relevant rule of law, which can be described and applied by judges generally to reach predictable results, we are left with "judgments", but those are not legal judgments. And while Justice Breyer's judgment is plainly very good, judgments that are not legal judgments are properly made in our scheme of government by a different branch - the legislative branch. I believe this is totally proper and sound because legislators, in addition to having sound judgment, also have individually and in the aggregate a wealth of experience that places them in closer touch with the persons who will be affected by

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[124] Justice Kennedy stated:

> "It must be remembered that, even where parties have no standing to sue, members of the Legislative and Executive Branches are not excused from making constitutional determinations in the regular course of their duties. Government officials must make a conscious decision to obey the Constitution whether or not their acts can be challenged in a court of law and then must conform their actions to these principled determinations."

551 U.S. at 618 (Kennedy, J., concurring). While others may not agree, I personally believe that the Congress and Executive branch take very seriously their obligation to adhere to constitutional limitations imposed on them. An example with which I have some personal experience is the deduction limitation in Code §280E, which prohibits claiming a deduction or credit for expenses incurred in carrying a business of trafficking in controlled substances. Added by the Tax Equity and Fiscal Responsibility Act of 1982, the measure was part of an overall War on Drugs in the 1980s. During consideration of the legislation there was real pressure applied to extend the deduction and credit disallowance to the "cost of goods sold" of drug dealers - which obviously could be a significant expense, denial of which would have been well-received by those pressing the anti-drug campaign. However, denial of the cost of goods sold to a dealer would collide with the constitutional limitation that tax may only be imposed on net income. So, notwithstanding substantial pressure from persons responsible for the anti-drug campaign, both Congress and the Treasury Department resisted and limited sec. 280E to trade or business expenses and credits, but not including cost of goods sold recovery.

[125] I'm referring to the Justice's concurring opinion in Van Orden, *supra*, in which he said: "[i]f the relation between government and religion is one of separation, but not one of mutual hostility and suspicion, one will inevitably find borderline cases. And in such cases, I see no test-related substitute for the exercise of legal judgment." 545 U.S. at 700 (Breyer, J., concurring). He continued: "That judgment is not a personal judgment. Rather, as in all constitution cases, it must reflect and remain faithful to the underlying purposes of the Clauses, and it must take account of context and consequences measured in light of those purposes." *Id.*

the decision - with the knowledge that the persons affected can also remove them from office for decisions that the voters feel are wrong-headed. This is not to say that constitutional protections should not be protected where, *e.g.*, the interests of minority groups are at stake. But I personally think those situations should be limited to the extent possible, because decisions made on the basis of a "judgment" that is not a legal judgment, made by a non-representative group that does not stand for re-election has the real possibility of being regarded as tyrannical, and should be avoided.

Second, this is a big country. And it is a diverse country. John Inazu, writing in the context of law and religion, suggests an approach he calls "confident pluralism".[126] While my concept is different – although not altogether so – his description of the direction that he believes we as a society need to take has a lot to recommend it:

> "Confident pluralism says that we can, and we must, learn to live with each other in spite of our deep differences. It requires a willingness to endure strange and even offensive ways of life."[127]

While I find Inazu's concept intriguing, my suggestion is less far-reaching. This is a context of second-best solutions. As lawyers – and I'm a lawyer – I believe we tend to think in somewhat absolutist terms, so that if we believe a particular right is provided to us by the constitution, our instinct is that the perspective should be endorsed by a court with a warrant then being issued to the marshals – or the Army – to enforce it. However, decision making by courts obviously has a zero sum quality, and in the context of church and state issues, leaves little by way of solace to the losers – who may well feel that matters of great personal importance to them, that even go to their concept of being human, are being abridged. So, even assuming we think our cause is right and proper, account needs to be taken of the burden and pain to the losers, and the consequent social disaffection, which represents a real cost that all of us should think carefully about incurring. So I revert to where I started: this is big country, and it is a diverse country. Institutions affecting religion are close to the heart for many people, and change to these institutions comes at a real cost. My judgment is that we should be thoughtful and cautious in incurring those costs.

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[126] John Inazu, *Confident Pluralism* (2017).
[127] *Id*. at 125.