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The Parsonage Allowance Exclusion: Past, Present, and Future

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The Parsonage Allowance Exclusion: Past, Present, and Future

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I. INTRODUCTION

Religious freedom has played a pivotal role in the history and cultural development of the United States.¹ Religion historically has been considered a fundamental aspect of American culture, resulting in the granting of numerous legal rights and privileges to religious personnel and institutions.² These grants stem from the protections in the Bill of Rights and include privileges that, though of undoubted importance,

1. See generally S. COBB, *THE RISE OF RELIGIOUS LIBERTY IN AMERICA* (1968); D. KELLEY, *WHY CHURCHES SHOULD NOT PAY TAXES* (1977); B. SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* (1971).

2. See D. KELLEY, *supra* note 1, at 47-48, 58.

are not known widely and may fail to provoke controversy to the same extent as perceived infringements or endorsements of religion.³

Section 107 of the Internal Revenue Code grants one of the lesser-known privileges.⁴ This statute permits a "minister of the gospel" to exclude from gross income either the rental value of a furnished home or rental allowance paid to the minister as compensation to the extent that it actually is used to provide a home.⁵ Section 107, also known as the parsonage allowance exclusion, historically has created little controversy,⁶ probably because it has had relatively little impact on tax revenues⁷ and is known primarily to its beneficiaries. In recent years, however, individuals who see its potential as a tax-avoiding device have paid increased attention to the exclusion. The government, seeking to preserve an ever shrinking tax base, has taken strides to narrow the scope of the statute or eliminate it altogether. Given the Supreme Court's recent church-state decisions, section 107 seems destined to receive even greater attention in the coming decade.

This Note analyzes the current section 107—determining its roots, discussing its application and effect, and expressing concern about its future vitality. Part II examines the history of the statute. Part III analyzes current interpretation of the section to determine the criteria that guide the Internal Revenue Service (IRS) and the courts in their application of the statute. Part IV discusses events of the last decade including publicized abuses by mail-order ministries, as well as IRS and judicial decisions, that suggest future changes in the statute's interpretation and application. Part IV also discusses various governmental efforts either to eliminate or to amend the reach of section 107. Finally, Part V examines the constitutionality of section 107 in light of recent Supreme Court decisions. Focusing on the major shift in establishment

3. The application of Social Security to ministers provides a good example. Until 1955, ministers were excluded from the Social Security program absolutely; from 1955 until 1968, they could be covered only if they opted into the program. *Tax Planning for the Clergy*, Tax Ideas (P-H) ¶ 11,018 (Dec. 7, 1988). Ministers currently may opt out of Social Security coverage by filing the appropriate forms. *Id.*

4. I.R.C. § 107 (1990) states:

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.

5. *Id.*

6. A LEXIS search conducted by the Author yielded no cases concerning application of or challenge to the statute from the year of its passage until its revision in 1954. Additionally, no debate or discussion in Congress occurred during this period.

7. See STAFF OF SENATE COMM. ON FINANCE, 101ST CONG., 1ST SESS., DATA AND MATERIALS FOR THE FISCAL YEAR 1990 FINANCE COMM. REPORT UNDER THE CONGRESSIONAL BUDGET ACT 16, 138 (Comm. Print 1989) (showing that the parsonage allowance exclusion resulted in a revenue loss of \$195 million, or .01963% of the total projected budget outlay of \$993 billion, for fiscal year 1990).

clause analysis evident in Supreme Court decisions since 1983, Part V first considers whether the exclusion passes constitutional muster under the Court's old and new tests. Next, this Note specifically examines two recent Supreme Court tax exemption cases and suggests that section 107 fails to meet the enunciated first amendment standards. Finally, this Note concludes that section 107 in its present form faces an uncertain future and suggests that Congress should scrutinize the parsonage allowance exclusion and any other tax relief for ministers to the same degree as benefits enjoyed by any other taxpayer class.

II. BACKGROUND OF THE CURRENT STATUTE

Congress first excluded the rental value of parsonages from gross income in the Revenue Act of 1921.⁸ Section 213(b)(11) of the 1921 Act provided simply that a minister of the gospel could exclude from gross income the rental value of any "dwelling house and appurtenances thereof" (in sum referred to as a "parsonage") provided by a church as part of a compensation package.⁹ Passage of the statute generated no discernible controversy, either in Congress or the courts.¹⁰ The lack of controversy seems understandable given existing tax treatment of churches,¹¹ as well as the general respect held by Congress and the public for churches.¹²

The statute remained substantially unchanged until 1954 when Congress revised the Internal Revenue Code.¹³ Congress made two significant changes to the exclusion: first, it replaced the phrase "dwelling house and appurtenances thereof" with the word "home," effectively broadening the application of the statute thereby to include apartment dwellers.¹⁴ Second, and more importantly, Congress added a new provision that permitted the exclusion from income of a cash rental or housing allowance.¹⁵ This change permitted a minister to designate a specific

8. 42 Stat. 239 (1921) (codified as amended at I.R.C. § 107 (1990)).

9. *Id.*

10. *See supra* note 6.

11. *See* D. KELLEY, *supra* note 1, at 11-12 (discussing the policy underlying the Revenue Act of 1913 not to tax nonprofit corporations, including churches); *see also* Bittker & Rahtert, *The Exemption of Nonprofit Organizations from Federal Income Taxation*, 85 YALE L.J. 289, 357-58 (1976) (stating that the exemption of nonprofit organizations "reflects the application of established principles of income taxation to organizations which, unlike the typical business organization, do not seek profit").

12. For a historical sketch of the growth of religious privileges in western society, leading to tax exemption in twentieth century America, *see* M. LARSON & C. LOWELL, *THE RELIGIOUS EMPIRE* 10-18 (1976).

13. Internal Revenue Code of 1954, Pub. L. No. 591, 1954 U.S. CODE CONG. & ADMIN. NEWS (68A Stat.) 1.

14. *See* I.R.C. § 107; *see also* 1954 U.S. CODE CONG. & ADMIN. NEWS 4017, 4171, 4820.

15. *See* I.R.C. § 107(2). *See generally* H.R. REP. NO. 4275, 83d Cong., 1st Sess., *reprinted in*

portion of compensation as a housing allowance and exclude this amount from income to the extent it actually was used to provide a home.¹⁶ Congress, by this expansion, intended to extend favorable tax treatment to ministers who bought or rented because their churches could not provide homes.¹⁷ Since its 1954 amendment, Congress has made no additional changes to the statute.

In many respects section 107 resembles the better-known and more general section 119, which allows exclusion of the value of meals and lodging that are provided on the business premises of an employer as a convenience to the employer and a condition of employment.¹⁸ Commentators have noted the similarity in purpose and effect, and some have questioned why a separate exclusion for ministerial housing is needed under the Code.¹⁹ This question is difficult; pinpointing an exact reason for the separate exclusion is not easy because of the absence of legislative history or other traditional sources of legislative intent.²⁰ Some commentators have suggested that Congress created the exclusion because ministers might fail to qualify under the section 119 criteria; section 107, on the other hand, guarantees a tax benefit to ministers as a favored class.²¹ Although this conclusion is plausible, especially given Congress's tendency to benefit favored entities,²² the available legislative history does not offer strong support.²³ The commonly encountered

1954 U.S. CODE CONG. & ADMIN. NEWS 4017, 4171.

16. See Treas. Reg. § 1.107-1(c) (as amended in 1963).

17. Representative Peter Mack, author of the bill that expanded § 107, stated:

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

Hearings on General Revenue Revisions Before the House Comm. on Ways and Means, 83d Cong., 1st Sess., pt. 3, at 1576 (1953); see also R. HAMMAR, PASTOR, CHURCH AND LAW 100 (1983).

18. Internal Revenue Code § 119(a) states, in part:

There shall be excluded from gross income of an employee the value of any meals or 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—

(1) in the case of meals, the meals are furnished on the business premises of the employer, or

(2) in the case of lodging, the employee is required to accept such lodging on the business premises of his employer as a condition of his employment.

I.R.C. § 119(a) (1990).

19. See, e.g., M. LARSON & C. LOWELL, *supra* note 12, at 21-23.

20. See *Internal Revenue Hearings on the Proposed Revenue Act of 1921 Before the Senate Comm. on Finance*, 67th Cong., 1st Sess., 497-577 (1921); S. REP. NO. 275, 67th Cong., 1st Sess. (1921); H.R. REP. NO. 350, 67th Cong., 1st Sess. (1921).

21. See, e.g., Comment, *Tax Benefits for the Clergy: The Unconstitutionality of Section 107*, 62 GEO. L.J. 1261, 1272 (1974).

22. See B. HOPKINS, *THE LAW OF TAX-EXEMPT ORGANIZATIONS* 3-18 (5th ed. 1987) (describing various tax-exempt entities and exploring various rationales for their favored treatment).

23. See *supra* note 20 and accompanying text.

difficulty of determining whether a minister is an employee of a church or is self-employed also might explain the rationale for the separate provision.²⁴ Because the IRS historically has characterized ministers as self-employed for tax purposes,²⁵ section 119's lodging value exclusion would be unavailable to many who currently benefit under section 107.

Beyond its potential for denying certain ministers favorable treatment, from the perspective of ministers, section 119 differs from section 107 in three other key respects: it allows an exclusion only for housing, a cash housing allowance is not exempt; it has stricter criteria for qualification than section 107;²⁶ and, unlike section 107, section 119 presumes that the value of any employer-provided housing is includible in gross income, thereby shifting to the minister the burden of proving necessity and convenience to the employing church.²⁷ In most circumstances, ministers who live near or on the church premises in church-owned homes would qualify for exclusion under section 119. Ministers who buy or rent homes, however, would lose their currently favorable treatment if forced to rely on section 119.

III. APPLICATION OF THE STATUTE

A. *Minister of the Gospel: Eligibility*

Income tax regulations require that any home or housing allowance excluded from income under section 107 must constitute remuneration for ordinary ministerial services.²⁸ Judicial decisions and IRS rulings²⁹ indicate that a qualifying minister must meet three general tests: (1) function (does this person do what a minister of this particular faith ordinarily does?),³⁰ (2) authority (is this person officially commissioned

24. See generally R. HAMMAR, *supra* note 17, at 21-28.

25. *Id.* at 23.

26. For the value of lodging to be deductible, the employer must require the employee to accept the lodging to perform employment duties properly. This requirement contemplates job situations in which the employee either must be constantly available to the employer or would be unable to perform the job without the lodging. Treas. Reg. § 1.119-1(b) (1985). In addition, regulations specifically disallow the deduction of additional compensation in lieu of lodging. *Id.* § 1.119-1(e).

27. See *Caratan v. Commissioner*, 442 F.2d 606 (9th Cir. 1971).

28. Treas. Reg. § 1.107-1(a) (as amended in 1963).

29. Courts and the IRS historically have defined the phrase "minister of the gospel" without much help from Congress. Congressional documents have referred to the phrase only once since it first appeared in 1921. During hearings on the Revenue Act of 1934, the Senate Finance Committee discussed changing the words "the gospel" to "religion," but took no action. See *Confidential Hearings of the Senate Comm. on Finance on the Revenue Act of 1934*, 73d Cong., 2d Sess. 30-31 (1934).

30. See Treas. Reg. § 1.107-1(a) (as amended in 1963); see also Rev. Rul. 78-301, 1978-2 C.B. 103.

or "set forth" as a minister?),³¹ and (3) base of ministry (is this person recognized as a minister by or affiliated with an identifiable religious body?).³²

Examples of specific services that meet the functional test are (1) performing sacerdotal functions, (2) conducting religious worship, (3) administrating and maintaining religious organizations and their integral agencies,³³ and (4) performing administrative and teaching duties at theological seminaries.³⁴ The first two categories of services qualify for the exemption whether or not they are performed for a religious organization or one of its agencies.³⁵ By comparison, teaching and administrative services qualify only when the minister renders the services for an integral agency of a church or denomination.³⁶

To pass the authority test, a minister must be duly ordained, commissioned, or licensed by a legitimate church or denomination.³⁷ If a church ordains some ministers, and licenses or commissions others, it must recognize the minister as having the status and authority of full ordination and as being qualified to exercise substantially all ecclesiastical duties commensurate with ordination.³⁸ The base of ministry test

31. See, e.g., *Kirk v. Commissioner*, 425 F.2d 492 (D.C. Cir. 1970); Rev. Rul. 59-270, 1959-2 C.B. 44.

32. See Treas. Reg. § 1.1402(c)-5(b)(2) (1968).

33. The IRS will consider, in determining if an institution is an integral agency of the church or denomination, whether (1) the church (or religious organization) incorporated the institution, (2) a church relationship is indicated in the agency name, (3) the church actually controls the institution, (4) the church approves trustees or directors of the institution, (5) the church may remove the trustees or directors, (6) the church requires annual reports of finances or operations, (7) the church provides support to the institution, and (8) the agency would turn over assets of the institution to the church upon dissolution of the institution. Rev. Rul. 72-606, 1972-2 C.B. 78.

34. Treas. Reg. § 1.107-1(a) (as amended in 1963); see also Treas. Reg. § 1.1402(c)-(5)(b)(2) (1968).

35. Treas. Reg. § 1.1402(c)-(5)(b)(2)(iii) (1968); Treas. Reg. § 1.107-1(a) (as amended in 1963).

36. See Rev. Rul. 72-606, 1972-2 C.B. 78; Rev. Rul. 68-68, 1968-1 C.B. 51; Rev. Rul. 63-90, 1963-1 C.B. 27.

37. Neither the Internal Revenue Code nor regulations define "church." For administrative purposes, however, the IRS has formulated certain criteria, at least some of which an organization must meet to be considered a church for tax purposes. These criteria are (1) a distinct legal existence, (2) a recognized creed and form of worship, (3) a definite and distinct ecclesiastical government, (4) a formal code of doctrine or discipline, (5) a distinct religious history, (6) a membership not associated with any other church or denomination, (7) a complete organization of ordained ministers that serve the church's congregations and have completed prescribed courses of study, (8) a literature of its own, (9) established places of worship, (10) regular congregations, (11) regular religious services, (12) schools for the religious instruction of the young, (13) schools for the preparation of its ministers, and broadly, (14) any other facts or circumstances that may bear upon the organization's claim to church status. JOINT COMM. ON TAXATION, 100TH CONG., 1ST SESS., OVERVIEW OF TAX RULES APPLICABLE TO EXEMPT ORGANIZATIONS ENGAGED IN TELEVISION MINISTRIES 2 (Comm. Print 1987). As defined by these criteria, "church" potentially includes synagogues, temples, and similar religious groupings. See B. HOPKINS, *supra* note 22, at 198-206.

38. Rev. Rul. 65-124, 1965-1 C.B. 60; see also Rev. Rul. 78-301, 1978-2 C.B. 103.

requires the minister to be under the authority of an identifiable church, a denomination, or an association of churches.³⁹ If a minister performs services under assignment by such a church or governing body, the minister can qualify for the section 107 exclusion even if the services do not involve religious worship or sacerdotal functions and are not performed for an integral agency⁴⁰ of the church.

Originally, individuals who performed ministerial duties for non-Christian faiths were excluded from the benefits of section 107. Although the IRS always has considered rabbis to be ministers of the gospel for purposes of the tax benefit,⁴¹ the IRS originally denied the benefit to nonordained Jewish cantors on the theory that their duties were not substantially equivalent to those of rabbis.⁴² Eventually, however, the United States Tax Court held that persons in other religions holding a status equivalent to those already benefitting from the exclusion also were entitled to the exclusion.⁴³ Subsequently, the IRS has accorded clerical personnel from non-Christian faiths minister-of-the-gospel status for section 107 purposes. The current IRS test focuses on whether the minister performs services that, according to the tenets and practices of a given faith, relate to conducting religious worship or to performing sacerdotal functions.⁴⁴

As a rule, nonordained staff ministers, such as for music or education, do not qualify for the parsonage allowance exclusion;⁴⁵ it is unclear, however, whether such ministers would qualify if ordained or commissioned, because ordination raises a presumption that one is fulfilling the ordinary duties of a minister of the gospel.⁴⁶ Even if ordained, however, an itinerant evangelist or preacher who ministers to numerous independent congregations may have difficulty passing IRS scrutiny because an itinerant minister is not affiliated directly with a particular congregation.⁴⁷ The IRS and the courts, however, have not

39. See Treas. Reg. § 1.1402(c)-5(b)(2)(i) (1968).

40. *Id.* § 1.1402(c)-5(b)(2)(v).

41. See Rev. Rul. 58-221, 1958-1 C.B. 53.

42. See Rev. Rul. 61-213, 1961-2 C.B. 27 (denying exclusion to nonordained Jewish cantor who performed duties at community center on a part-time basis); *cf.* Rev. Rul. 58-221, 1958-1 C.B. 53 (granting exclusion to cantor whose duties were substantially equivalent to those of rabbi and who the governing body had ordained).

43. Silverman v. Commissioner, 57 T.C. 727 (1972), *aff'd in an unreported decision*, No. 72-1336 (8th Cir. July 11, 1973); see also Salkov v. Commissioner, 46 T.C. 190, 192 (1966).

44. See generally Rev. Rul. 78-301, 1978-2 C.B. 103 (revoking Rev. Rul. 61-213, 1961-2 C.B. 27); *Tax Planning for the Clergy*, *supra* note 3, ¶ 11,018.1.

45. See Kirk v. Commissioner, 425 F.2d 492 (D.C. Cir. 1970); Dressler v. Commissioner, 56 T.C. 210 (1971); Lawrence v. Commissioner, 50 T.C. 494 (1968); Rev. Rul. 65-124, 1965-1 C.B. 60, *modified by* Rev. Rul. 78-301, 1978-2 C.B. 103; Rev. Rul. 59-270, 1959-2 C.B. 44.

46. See Treas. Reg. § 1.1402(c)-5 (1968).

47. See, e.g., Warnke v. United States, No. 85-61 (E.D. Ky. July 17, 1986) (denying exclusion

necessarily disqualified self-styled or self-appointed ministers who lack a formal affiliation with an established religion.⁴⁸

Ministers serving in nonparish roles historically have encountered some difficulty in qualifying for the parsonage exclusion. Administrative ministers⁴⁹—those who do not serve a parish, but who oversee religious organizations or parachurch ministries—have received mixed treatment. Administrative ministers who serve within an established church hierarchy qualify,⁵⁰ as do most ministers who head parochial schools.⁵¹ Those who manage nursing homes⁵² or work for charitable corporations not affiliated with a church,⁵³ however, usually have failed the functional test applied by the IRS. While certain ministers who teach at seminaries have qualified for the exclusion,⁵⁴ college professors, even those teaching religion at church-affiliated universities, usually have not.⁵⁵ A retired minister may exclude a housing allowance under section 107, but only if (1) the minister is a member of a retirement plan operated by a church, a national church organization, or an agency of such an organization; (2) the organization designates the allowance in advance of payment; (3) the allowance applies only to income received under the retirement plan; and (4) income from the plan compensates the minister for past ministerial services.⁵⁶

B. Home

Any amount excluded under section 107 must represent the actual value of a provided home or, in the case of a cash allowance, the actual cost of maintaining a home.⁵⁷ The regulations define "home" as a dwelling place, furnishings, and appurtenances.⁵⁸ A travelling minister may

to a traveling evangelist).

48. See Note, *A Constitutional Challenge to Section 107 of the Internal Revenue Code*, 57 NOTRE DAME LAW. 853, 859 (1982).

49. This title is derived from IRS regulations. See Treas. Reg. § 1.1402(c)-5(b)(2)(iv), (v) (1968).

50. See Rev. Rul. 66-90, 1966-1 C.B. 27.

51. See Rev. Rul. 62-171, 1962-2 C.B. 39. *But see* Priv. Ltr. Rul. 86-46-018 (Aug. 14, 1986) (stating that the minister serving as administrator for a school incorporated as an ecclesiastical corporation did not qualify for exclusion under section 107).

52. See, e.g., Priv. Ltr. Rul. 87-25-047 (Mar. 24, 1987).

53. See Rev. Rul. 78-172, 1978-1 C.B. 35. *But see* Priv. Ltr. Rul. 85-19-004 (Jan. 28, 1985).

54. Compare Rev. Rul. 70-549, 1970-2 C.B. 16 (granting the exclusion to ministers who work for church-supported seminaries) with Rev. Rul. 63-90, 1963-1 C.B. 27 (disallowing the exclusion for ministers who work for seminaries not under the authority of churches or denominations).

55. See *Flowers v. United States*, No. CA-4-79-376-E (N.D. Tex. Nov. 25, 1981) (text in WESTLAW); cf. Rev. Rul. 70-549, 1970-2 C.B. 16 (allowing the exclusion where the church controlled the university as an integral agency).

56. Rev. Rul. 75-22, 1975-1 C.B. 49.

57. R. HAMMAR, *supra* note 17, at 104-05.

58. Treas. Reg. § 1.107-1(b) (as amended in 1963).

exclude the cost of maintaining a home, but not travelling or lodging expenses.⁵⁹ Additionally, the minister must receive the home or allowance from a legitimate religious organization; the IRS strictly disallows any exclusion in cases in which the housing allowance actually represents the return of so-called "contributions" that the minister previously made to the compensating body.⁶⁰ This posture is consistent with the IRS's tough private inurement requirements regarding charitable contributions.⁶¹

C. Amount of Exclusion

1. Parsonage Provided by Church

If a minister has free use of a parsonage, the amount excludible from gross income is limited to the fair rental value of the home, including appurtenances and furnishings, as well as the cost of utilities.⁶² The church need not designate the rental value of the parsonage, as is required with a housing allowance, but regulations do require the church to designate any allowance for utilities.⁶³ The purpose of the fair rental value limit, according to the IRS, is to avoid discrimination against ministers who must pay market value when renting homes.⁶⁴ The IRS provides no precise method for computing fair rental value.⁶⁵

2. Housing Allowance

The minister who receives a monetary housing allowance must meet stricter requirements to qualify for the section 107 exclusion. First, the minister must ensure that the employing church or organization officially designates the allowance amount in advance of payment; otherwise, the IRS will deny the exclusion.⁶⁶ Timing the designation can be critical; while the employer need not make the designation in

59. Rev. Rul. 64-326, 1964-2 C.B. 37.

60. See, e.g., *United States v. Jiggetts*, 850 F.2d 690 (4th Cir. 1988) (affirming conviction of mail-order minister who used church account to pay personal expenses).

61. A contribution qualifies as charitable under the Internal Revenue Code only if no part of the contribution "inures to the benefit of any private shareholder or individual." I.R.C. § 170(c)(2)(C) (1990). For cases that have interpreted this statute in the ministry context, see *Randolph v. Commissioner*, 54 T.C.M. (CCH) 339 (1987), and cases cited therein; *Page v. Commissioner*, 51 T.C.M. (CCH) 1351 (1986), *aff'd*, 823 F.2d 1263 (8th Cir. 1987); *McGahen v. Commissioner*, 76 T.C. 468 (1981).

62. See Rev. Rul. 71-280, 1971-2 C.B. 92.

63. See Rev. Rul. 59-350, 1959-2 C.B. 45.

64. See R. HAMMAR, *supra* note 17, at 106.

65. One commentator has suggested a monthly valuation figure of 1% of the market value of the home. See *Tax Planning for the Clergy*, *supra* note 3, ¶ 11,018.1(4).

66. Treas. Reg. § 1.107-1(h) (as amended in 1963); see also Priv. Ltr. Rul. 85-11-075 (Dec. 19, 1984) (denying exclusion when church made retroactive designation).

advance of the taxable or calendar year, the employer must designate the allowance before paying it to the minister.⁶⁷ The minister will lose the exclusion if the employer fails to designate the allowance in advance because the IRS disallows retroactive designations.⁶⁸ A designation during the taxable year, however, will preserve the exclusion of any subsequent payments made to the minister.⁶⁹ Additionally, the providing organization generally must designate the amount of the allowance in writing⁷⁰ and list all allowances in appropriate organizational records such as the recipient's employment contract, minutes, or a resolution.⁷¹ An adequate designation will distinguish the housing allowance from salary or other remuneration and will state the allowance in terms of a percentage of gross income or a specific dollar amount.⁷² A church may not designate as housing allowance an amount in excess of fair market value.⁷³ This limit prevents an employer from designating the minister's entire salary as a tax-free housing allowance. In addition, the designated allowance may not exceed reasonable compensation for the minister's services to the church; this provision holds special importance for part-time ministers.⁷⁴

Proper designation by the church does not guarantee the minister full exclusion of the housing allowance. Regulations forbid the exclusion from income of any amount of the designated allowance that the minister does not use "to rent or otherwise provide a home."⁷⁵ The IRS has given this requirement a fairly broad interpretation.⁷⁶ The minister may exclude every household expense, except food, personal servants, and automobiles, under the IRS interpretation.⁷⁷ The minister, however,

67. R. HAMMAR, *supra* note 17, at 103.

68. Priv. Ltr. Rul. 85-11-075 (Dec. 19, 1984).

69. R. HAMMAR, *supra* note 17, at 103.

70. Treas. Reg. § 1.107-1(b) (as amended in 1963). *But see* Libman v. Commissioner, 44 T.C.M. (CCH) 370 (1982) (allowing the exclusion, even though not made in writing, because oral designation clearly was established).

71. Treas. Reg. § 1.107-1(b) (as amended in 1963).

72. R. HAMMAR, *supra* note 17, at 103.

73. *See* Marine v. Commissioner, 47 T.C. 609 (1967) (including cost of utilities); Rev. Rul. 71-280, 1971-2 C.B. 92.

74. *See* Rev. Rul. 78-448, 1978-2 C.B. 105.

75. Treas. Reg. § 1.107-1(c) (as amended in 1963).

76. M. LARSON & C. LOWELL, *supra* note 12, at 22. Larson and Lowell state:

In fact, every expense, except food and personal servants, may be covered by the excludable check handed by the congregation to the minister. In practice, of course, the IRS has no means of judging whether the expense payment is reasonable [because such payments are] not reportable either by the church or the recipient. . . . And so while the waitress who sits in the pew is required to report every dime she receives in tips [under I.R.C. § 6053] on pain of severest penalties, the good reverend preaching the gospel to her may enjoy a \$30,000 or \$40,000 salary without owing a penny of income taxes.

Id.

77. R. HAMMAR, *supra* note 17, at 105; *see* Treas. Reg. § 1.107-1 (as amended in 1963).

cannot exclude any amount beyond actual expenses and must document each expense thoroughly.⁷⁸ The minister must include as gross income any portion of the allowance not used for actual housing expenses.⁷⁹

The minister also must adhere to specific reporting requirements to preserve the exclusion.⁸⁰ Ministers exclude the parsonage allowance simply by not reporting it on their tax returns; this means that a church which issues the minister a W-2 form must not report any portion of the excluded allowance.⁸¹ If a minister is treated as self-employed for tax purposes, the church also should reduce the compensation reported on its Form 1099 by the amount of the designated allowance.⁸²

IV. RECENT SIGNIFICANT DEVELOPMENTS

Until recently, the parsonage allowance exclusion received great favor and little scrutiny. Events of the past decade, however, have changed this. Scandals involving certain television ministries⁸³—undoubtedly the most notorious beneficiaries of the exclu-

78. This documentation prepares the minister for IRS audits. *Tax Planning for the Clergy*, *supra* note 3, ¶ 11,018.1(6).

79. Treas. Reg. § 1.107-1(c) (as amended in 1963).

80. R. HAMMAR, *supra* note 17, at 108.

81. *Id.*

82. *Id.* Form 1099 is an information return that an entity must file with the IRS whenever it pays compensation of \$600 or more to a nonemployee, or interest income of \$10 or more to any individual in a given year. *Id.* at 154; see I.R.C. §§ 6041, 6049 (1990). Depending on the payment type, the form will carry a different suffix. Compensation to nonemployees is reported on Form 1099-NEC; interest income is reported on Form 1099-INT. R. HAMMAR, *supra* note 17, at 154. Ministers who qualify as church employees must be issued a W-2 form. *Id.*

83. One of the more notorious scandals involved evangelist Jim Bakker. Bakker founded PTL (standing for "Praise The Lord" or "People That Love") in 1974 in Charlotte, North Carolina. See Ostling, *Of God and Greed: Bakker and Falwell Trade Charges in Televangelism's Unholy Row*, *TIME*, June 8, 1987, at 70 [hereinafter Ostling, *God and Greed*]. PTL's 1986 revenues were estimated to be \$192 million. Neuhaus, *At the Helm of PTL: For the Rev. Jerry Falwell, the Day of Reckoning Dawns Bright*, *PEOPLE*, June 15, 1987, at 30.

Early in 1987, Bakker confessed to having had sex in 1980 with church secretary Jessica Hahn in a Florida hotel. Reports soon followed that between 1980 and 1987, Bakker, through PTL, gave Hahn some \$265,000 in "hush money" to keep the liaison a secret. This revelation crippled Bakker's sizeable ministry—an enterprise that included a syndicated daily Christian talk show, a multimillion dollar amusement park, and a cable television network. See Ostling, *TV's Unholy Row: A Sex-and-Money Scandal Tarnishes Electronic Evangelism*, *TIME*, Apr. 6, 1987, at 61 [hereinafter Ostling, *Unholy Row*].

As the ministry scrambled to survive the fallout from Bakker's confession, television and print media publicized the opulent lifestyle enjoyed by Bakker and his wife, and uncovered evidence that Bakker had misused or squandered ministry funds. One notable example supposedly included money raised to build an addition to the Grand Hotel at Heritage USA, PTL's amusement park. Reportedly, Bakker raised \$50 million for the structure, "but only \$11 million was allotted to construction." Ostling, *God and Greed*, *supra*, at 72. The Bakkers received \$4.8 million in salaries and bonuses from 1984 to 1987, and lived in a private penthouse in the Grand Hotel. *Id.* In addition, the Bakkers reportedly owned a condominium in Florida worth \$440,000, Wadler, *Breaking Faith*,

sion—prompted Congress and the media to scrutinize the finances of several televangelists.⁸⁴ In addition, because of pressures to reduce the deficit and fears of tax base erosion, the government began to police tax statutes more carefully during the 1980s. The increased attention uncovered numerous abuses of the exclusion and prompted efforts to restrict its application or even eliminate it entirely. This section chronicles some of the more significant challenges that faced the parsonage allowance exclusion during the past decade and discusses the immediate and ultimate impact of these challenges.

A. Mail-Order Ministry Abuses⁸⁵

The IRS began to scrutinize "mail-order ministries" in 1978 during a service crackdown on illegal tax protester schemes.⁸⁶ Generally a mail-order ministry is a plan in which a promoter, in the name of a church, sells certificates of ordination or licensure through the mail in exchange for donations.⁸⁷ Recipients of these credentials then become "ministers," establish their own "churches" or religious foundations, and operate the entities as tax-exempt organizations.⁸⁸ By funnelling income

Two TV Idols Fall: They Preached to Millions, but Their Sins Brought Jim and Tammy Bakker to Ruin, PEOPLE, May 18, 1987, at 81, and a California home worth \$650,000. *Jim, Tammy Bakker Reportedly Shopping for Home in Newport*, L.A. TIMES, Nov. 11, 1987, pt. 2, at 3, col. 1 (Orange County ed.). Outraged viewers deserted PTL and donations plummeted. Reports of Bakker's seven-figure salary and the ministry's millions of dollars in tax-free income prompted Congress to investigate the financial dealings of television ministries. See *TV Preachers' Testimonial on Hill: To Right the Wrong of PTL*, BROADCASTING, Oct. 12, 1987, at 73. The scandal forced PTL into bankruptcy, see *In re Heritage Village Church and Missionary Fellowship, Inc.*, 92 Bankr. 1000 (Bankr. D.S.C. 1988) (approving final plan), and resulted in Bakker's conviction for 24 counts of fraud and conspiracy. See Sanders, *The Wrath of "Maximum Bob": Jim Bakker's Stiff Punishment Raises Questions over Sentencing*, TIME, Nov. 6, 1989, at 62.

Although Bakker excluded from income at least two valuable homes under § 107, the exclusions were never an issue at Bakker's trial or PTL's bankruptcy disposition. The PTL affair, however, did serve to expose § 107's existence and demonstrate its potential for abuse to a large, previously uneducated, segment of the public. For more information on the PTL scandal, see Brand, *An "Outrageous" Ministry: Jim Bakker Accused of Financial and Sexual Misdeeds*, TIME, May 4, 1987, at 82; Ostling, *God and Greed*, supra, at 70-71; Ostling, *Unholy Row*, supra, at 60.

84. Interestingly, Jimmy Swaggart is the only television minister that became involved in a reported § 107 case during the 1980s. See *Swaggart v. Commissioner*, 48 T.C.M. (CCH) 759 (1984) (denying exclusion for allowance not actually spent to provide a home to Swaggart).

85. For two excellent full-length treatments of the mail-order ministry problem, see Casino, *"I Know It When I See It": Mail-Order Ministry Tax Fraud and the Problem of a Constitutionally Acceptable Definition of Religion*, 25 AM. CRIM. L. REV. 113 (1987) and Scialabba, Kurtzman & Steinhart, *Mail-Order Ministries Under the Section 107 Charitable Contribution Deduction: The First Amendment Restrictions and the Minister's Burden of Proof, and the Effect of TRA '86*, 11 CAMPBELL L. REV. 1 (1988).

86. For an explanation of the IRS crackdown, see *ILLEGAL TAX PROTESTERS THREATEN TAX SYSTEM*, REPORT BY THE COMPTROLLER GEN. OF THE U.S. (1981).

87. Gen. Couns. Mem. 37,247 (1977).

88. See Casino, supra note 85, at 113.

through the newly created church, the minister can avoid paying substantial amounts of income tax.

The mail-order minister usually contributes large amounts of money to the church organization, itemizing and deducting these contributions from adjusted gross income under Internal Revenue Code section 170.⁸⁹ The church then pays the minister's living expenses as a part of its operation and may provide the minister a housing allowance that the minister then excludes under section 107.⁹⁰ Through this arrangement mail-order ministers evade paying taxes on a large portion of their taxable income.

Courts, predictably, have been hostile to mail-order ministries. Since the IRS escalated efforts to prosecute mail-order ministries as tax-protest "schemes,"⁹¹ courts uniformly have denied these organizations tax-exempt status.⁹² Numerous mail-order ministers have been convicted for tax fraud, including taking fraudulent deductions under section 107.⁹³

Despite the effectiveness of the recent crackdown on mail-order ministries, the IRS has not scrutinized traditional churches, apparently because these groups satisfy the current criteria for legitimacy.⁹⁴ At least one commentator has questioned the validity and consistent application of these criteria, however, and has concluded that the IRS treats large, powerful churches favorably while small, obscure, or doctrinally

89. An individual may deduct amounts that do not exceed 50% of the taxpayer's "contribution base," an amount that equals adjusted gross income as computed without regard to any net operating loss carryback to the taxable year under I.R.C. § 172. I.R.C. §§ 170(b)(1)(A), (F) (1990).

90. Courts in mail-order ministry cases have required evidence that claimed parsonage allowances are "reasonable," a word that does not appear in § 107. *See, e.g.,* Holloway v. United States, Civil No. S-88-0156-MLS-EM (E.D. Cal. Oct. 16, 1989) (LEXIS, Genfed library, Dist file); Van Cleve v. United States, No. C-85-1053 SC (N.D. Cal. Oct. 24, 1986) (text in WESTLAW).

91. *See* Casino, *supra* note 85, at 121-23. Bruce Casino uses the word "scheme" repeatedly to describe mail-order ministries. *See id.* at 114, 121-22.

92. *See, e.g.,* United States v. Turner, 799 F.2d 627 (10th Cir. 1986) (stating that "the efforts of this defendant to avoid accurate reporting and payment of federal income tax was to create a sham"); Brown v. Commissioner, 51 T.C.M. (CCH) 1321, 1322 (1986) (referring to one especially prolific mail-order ministry, the Universal Life Church, as the "center of . . . highly abusive tax scams").

93. *See, e.g.,* United States v. Day, No. 87-1288 (9th Cir. Nov. 7, 1988) (text in WESTLAW) (affirming conviction under I.R.C. § 7201 for willful evasion of tax through filing of fraudulent tax returns); United States v. Jiggetts, Nos. 87-5075(L), 87-5076, 87-5133 (4th Cir. June 16, 1988) (text in WESTLAW) (affirming convictions for conspiracy to defraud the government under 18 U.S.C. § 371, and for tax evasion).

94. In criticizing these criteria, listed *supra* note 37, Bruce Casino has stated, "In general, the criteria tend to apply to large, formal, well-established churches but not to smaller and less traditional or established denominations. Indeed, because they discriminate between religious organizations, they probably violate the first amendment." Casino, *supra* note 85, at 140. Casino proposes a two-pronged test for determining whether an organization is a religion: (1) possession of a "sincerely held belief in a sacred or transcendent reality," and (2) organization with the purpose and practice of expressing that belief. *Id.* at 139.

unique churches face disproportionate examination for tax violations.⁹⁵ Given the Supreme Court's new approach to taxation of religious organizations,⁹⁶ however, all churches and ministers probably will face increased scrutiny in the future.

B. *The Treasury's Attempt to Eliminate Section 107*

In fulfillment of campaign promises to make federal taxation fairer and simpler, President Ronald Reagan in 1984 began his campaign for a complete overhaul of the tax system.⁹⁷ To determine what areas the administration changes should target, the President asked the Treasury Department to devise a tax reform plan; this plan would serve as a basis for Congress's revision of the Internal Revenue Code.⁹⁸ After several months, the Treasury unveiled its report to the President.⁹⁹ Among its many recommendations for change was a proposal to eliminate the parsonage exclusion.¹⁰⁰

Constituents reacted to the department's proposal to eliminate section 107¹⁰¹ swiftly and unfavorably. Within two months of the report's release, the Treasury had received more than 150 letters from clergy stating support for the preservation of section 107.¹⁰² Generally the letters asserted that the elimination of section 107 ultimately would force churches to pay higher salaries to ministers, because churches plan remuneration taking the parsonage exclusion into consideration and adjust compensation and benefits accordingly.¹⁰³ The nation's clergy lobbied not only the Treasury; some religious leaders appealed to Presi-

95. Casino has opined that courts apply a double standard, stating that "[u]sually without examining the nature of services provided for the benefit received, the courts conclude that [in mail-order ministry cases] there is private inurement, while such is not found in the payment of benefits to ministers of traditional denominations." Casino, *supra* note 85, at 157. In addition, Casino asserts that if the same private inurement test that is applied to mail-order ministries was applied to all churches, "undoubtedly the tax status of many monestaries [sic], convents and religious orders would be jeopardized." *Id.*

96. See *infra* notes 212-32 and accompanying text.

97. President Reagan officially proposed the overhaul for the first time in his 1984 State of the Union Address. See STATE OF THE UNION MESSAGE, H.R. DOC. NO. 162, 98th Cong., 2d Sess. 3-5 (1984).

98. *Id.* at 5.

99. OFFICE OF THE SECRETARY OF THE TREASURY, TAX REFORM FOR FAIRNESS, SIMPLICITY, AND ECONOMIC GROWTH: THE TREASURY DEP'T REPORT TO THE PRESIDENT (1984).

100. *Id.* vol. 1 at 73, vol. 2 at 49-50.

101. Interestingly, the report advocated more controversial changes. See, e.g., *id.* vol. 2 at 62-68 (proposing to eliminate the deduction for state and local taxes).

102. See *Focus on Treasury: Incoming Treasury Letters*, 26 TAX NOTES 13 (Jan. 7, 1985) (20 letters received); *id.* at 123 (Jan. 14, 1985) (11 letters received); *id.* at 313 (Jan. 28, 1985) (83 letters received); *id.* at 407 (Feb. 4, 1985) (57 letters received).

103. See, e.g., *id.* at 123 (Jan. 14, 1985) (discussing letter of William Rusch, which argued "that increasing the tax burden of the clergy would force churches to redirect some of their resources from charitable projects to salaries for the clergy").

dent Reagan himself to spare the parsonage exclusion.¹⁰⁴ Ultimately, this lobbying achieved its desired effect; the President's final tax reform proposal did not contain the controversial elimination of section 107,¹⁰⁵ and the Treasury conceded defeat on the issue.¹⁰⁶ Although Congress did not enact the Treasury Department's suggestion, the Department's efforts were significant because they represented the first official governmental attempt to eliminate the parsonage allowance exclusion. This change in governmental attitude foreshadowed other governmental and judicial attempts to restrict section 107.

C. Dalan and the Renewed Enforcement of Section 265

Section 265 of the Internal Revenue Code states that when any part of a taxpayer's income is not subject to tax, the IRS will disallow a corresponding percentage of deductions otherwise available to the taxpayer.¹⁰⁷ Seemingly, this statute would apply to ministers who receive a tax-free housing allowance. If a minister were to receive a housing allowance equivalent to two-thirds of her total salary, then two-thirds of her deductions would be disallowed.¹⁰⁸ In practice, however, the IRS has not been entirely logical in applying this rule to ministers. Particularly, the IRS has demonstrated inconsistency in interpreting two classes of deductions: interest and taxes that a minister incurs with respect to purchasing a home, and business and professional expenses incurred by a minister who receives a housing allowance.

Sections 163 and 164 of the Internal Revenue Code permit a taxpayer to deduct home mortgage interest and real estate taxes, if the taxpayer itemizes deductions.¹⁰⁹ In 1962 the IRS issued a revenue ruling stating that a minister could itemize and deduct the interest and taxes incurred in buying and maintaining a home, even if these same items already were excluded from income under section 107 as part of a rental allowance.¹¹⁰ In effect, the IRS approved a double deduction for minis-

104. See, e.g., *id.* at 225-26 (Jan. 21, 1985) (noting letter from Jewish leader); *id.* at 1079-80 (Mar. 18, 1985) (noting letter from Church of Christ representative).

105. See THE PRESIDENT'S TAX PROPOSALS TO THE CONGRESS FOR FAIRNESS, GROWTH, AND SIMPLICITY (1985).

106. See *Focus on Treasury: Tax Reform Proposal*, 28 TAX NOTES 623 (Aug. 5, 1985).

107. I.R.C. § 265 states in pertinent part that "[n]o deduction shall be allowed for . . . [a]ny amount otherwise allowable as a deduction which is allocable to one or more classes of income . . . wholly exempt from the taxes imposed by this subtitle." I.R.C. § 265(a)(1) (1990).

108. See Hammar, *Little-Known Tax Legalities*, 10 LEADERSHIP 70, 70 (providing a numeric example).

109. The Internal Revenue Code, as amended in 1986, permits the deduction of qualified residence interest, a term that the Code defines in detail in I.R.C. § 163(h)(3) (1990). The Code also allows the deduction of property taxes, with certain exceptions. See I.R.C. §§ 164(a)(1), (c), (d) (1990).

110. See Rev. Rul. 62-212, 1962-2 C.B. 41.

ters who own their homes.¹¹¹

Twenty years later, the IRS attempted to reverse this position. In Revenue Ruling 83-3¹¹² the agency eliminated the double tax benefit, holding that ministers no longer could deduct interest and taxes to the extent that these amounts were excluded from gross income under the housing allowance. The IRS based this ruling on a revised interpretation of section 265; the new position seemed to track the statutory wording more accurately.¹¹³ Congress, responding to an appeal from clergy, killed the ruling before it became official. To do this, Congress added a provision to the 1986 Internal Revenue Code that prohibited the IRS from denying any deduction for mortgage interest or property taxes because a portion of a minister's salary was tax exempt.¹¹⁴ The amendment represents the current congressional position on the matter. The IRS has not questioned or attempted to limit the new statute.

Ministers who receive a cash housing allowance have fared more poorly in their fight to preserve complete deduction of business and professional expenses. In 1965 the Tax Court in *Deason v. Commissioner*¹¹⁵ disregarded the 1962 revenue ruling and upheld the original application of section 265 when it disallowed a pastor's deduction of the full amount of his unreimbursed automobile expenses.¹¹⁶ Consistent with its 1962 ruling, however, the IRS ignored the *Deason* decision. Instead, the agency issued tax enforcement manuals that explicitly instructed personnel not to enforce the *Deason* court's interpretation of section 265, but to allow deduction of the full amount of allowable business and professional expenses regardless of any tax-exempt income.¹¹⁷ This enforcement decision prevailed for twenty-four years until the issue rose again in the case of *Dalan v. Commissioner*.¹¹⁸ In *Dalan* the Tax Court followed the *Deason* court's proportional disallowance of de-

111. This is the terminology used by church lawyer Richard Hammar. See R. HAMMAR, *supra* note 17, at 105. In allowing the double deduction the IRS apparently disregarded the effect of § 265, and assumed that § 107 controlled. See Rev. Rul. 62-212, 1962-2 C.B. 41.

112. Rev. Rul. 83-3, 1983-1 C.B. 72.

113. *Id.*; cf. I.R.C. § 265 (1990). After originally preparing to enforce the new rule beginning in 1983, then postponing implementation three separate times, the IRS set a final effective date for the ruling of Jan. 1, 1987. See Rev. Rul. 85-96, 1985-2 C.B. 87.

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

115. 41 T.C. 465 (1964).

116. *Id.*

117. See Hammar, *supra* note 108, at 70; *Tax Planning for the Clergy*, *supra* note 3, ¶ 11,018.1(6).

118. 55 T.C.M. (CCH) 370 (1988).

ductions.¹¹⁹ Faced with two clear decisions against its longstanding policy, the IRS stopped instructing its agents not to enforce the Tax Court interpretation of section 265,¹²⁰ suggesting that the IRS will enforce the *Dalan* position.¹²¹

Dalan's impact upon ministers who receive a housing allowance seems clear: only part of their allowable business and professional expenses will be deductible, depending on the percentages of their incomes that are represented by a tax-free housing allowance. The effect upon a minister who is provided a parsonage by a church is not as clear, but similar restrictions are likely. Ministers in either situation, however, may be able to minimize the adverse impact of *Dalan* through expense reimbursement schemes set up with their respective churches.¹²²

The increased attention focused on these interests and tax deductions, as well as deductions for business and professional expenses, should send a signal to clergy. Courts appear ready to interpret Code sections that expressly favor ministers strictly and, depending on the facts and the reach of their power, to bring clergy into parity with other taxpayers. In addition, the IRS apparently will enforce such decisions. Congress, on the other hand, may legislate to maintain a preferred tax status.¹²³

V. CONSTITUTIONAL CONCERNS ABOUT SECTION 107

A. *The Establishment Clause*

All reasonable exemptions from taxation are a result of legislative grace.¹²⁴ Section 107 is no exception to this rule; a minister has no constitutional right to the exemption it provides.¹²⁵ The Constitution, in fact, provides a formidable barrier to favorable tax treatment for ministers, or any other religious parties, in the establishment clause of the first amendment.

The establishment clause forbids any law respecting an establishment of religion.¹²⁶ This language prohibits more than the establishment of a state church or state religion; it also forbids what the Supreme Court has labeled as "three main evils": sponsorship, financial

119. *Id.* at 371.

120. *See Tax Planning for the Clergy, supra* note 3, ¶ 11,018.1(6).

121. *See id.*; *see also* Hammar, *supra* note 108, at 70.

122. Suggestions appear in Hammar, *supra* note 108, at 70, and in *Tax Planning for the Clergy, supra* note 3, ¶ 11,018.1(6).

123. *See, e.g., supra* text accompanying note 114.

124. *See* Parker v. Commissioner, 365 F.2d 792, 795 (8th Cir. 1966), *cert. denied*, 385 U.S. 1026 (1967).

125. *See* Comment, *supra* note 21, at 1262.

126. U.S. CONST. amend. I.

support, and active involvement of the government in religious activity.¹²⁷ When balanced with the first amendment's accompanying clause preventing the government from impairing the free exercise of religion,¹²⁸ the establishment clause commands an attitude of governmental neutrality toward religion.¹²⁹

Part V of this Note first analyzes section 107 to determine whether the statute is consistent with this command. This analysis traces development of the two key tests used by the Supreme Court since 1970 for determining constitutionality under the establishment clause. Part V then evaluates whether section 107 meets the criteria of either test, and concludes that a properly framed establishment clause challenge to the statute quite likely would succeed.

1. The *Lemon* Test¹³⁰

The Supreme Court began to develop a test for determining whether tax statutes violated the establishment clause in the early 1970s. In *Walz v. Tax Commission of New York*¹³¹ a property owner sought an injunction to prevent the granting of property tax exemptions to religious organizations using property solely for religious worship.¹³² The Supreme Court, in an opinion by Chief Justice Warren Burger, upheld the exemption, concluding that (1) the tax exemption did not establish, sponsor, or support religion,¹³³ and that (2) the statute did not effect "excessive government entanglement" with religion.¹³⁴

The following term, in *Lemon v. Kurtzman*,¹³⁵ Chief Justice Burger refined the *Walz* language and developed the tripartite test that guided the Court's next decade of establishment clause jurisprudence. At issue in *Lemon* were statutes that ordered state aid for nonpublic schools—including those affiliated with religious institutions—to fund the teaching of secular subjects either directly or through reimbursement.¹³⁶ To be constitutional, the Court held, each statute (1) must have a secular legislative purpose, (2) must have a principal or primary

127. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (quoting *Walz v. Commissioner*, 397 U.S. 664, 668 (1970)).

128. U.S. CONST. amend. I.

129. *Zorach v. Clauson*, 343 U.S. 306, 314 (1952).

130. For additional discussion of pre-1982 application of the *Lemon* test (named after *Lemon v. Kurtzman*, 403 U.S. at 602, the case in which the Supreme Court first used it), see Comment, *supra* note 21, at 1264-72 and Note, *supra* note 48, at 853-59.

131. 397 U.S. 664 (1970).

132. *Id.* at 666.

133. *Id.* at 674.

134. *Id.*

135. 403 U.S. at 602.

136. *Id.* at 607-10.

effect that neither advances nor inhibits religion, and (3) cannot foster an excessive entanglement of the government in religion.¹³⁷ While the Court did not find that the statutes had improper purposes or unacceptable primary effects, because the challenged laws would require state surveillance and inspection so great as to constitute excessive entanglement,¹³⁸ the Court found that the statutes failed the third prong of the test and struck them as unconstitutional.

Until the early 1980s the Court applied the *Lemon* test to analyze alleged violations of the establishment clause.¹³⁹ During the next fourteen years, the Court struck down statutes providing public funds to repair private schools,¹⁴⁰ a law requiring the Ten Commandments to be posted in classrooms,¹⁴¹ and a statute granting churches the power to prevent issuance of liquor licenses to businesses within five hundred feet of a church.¹⁴²

Under the *Lemon* analysis, section 107 probably would be found to violate the establishment clause. The statute does not articulate a secular purpose, nor does the sparse legislative history express or imply one. Because the statute on its face appears to confer a benefit on the basis of religion, the Court would be forced to imply a legitimate purpose to constitutionalize the exemption. Commentators have suggested two possible secular purposes for section 107. First, Congress may have intended, consistent with the logic in *Walz*, to prevent government entanglement with churches and ministers that would result from a tax on parsonages or rental allowances. That government entanglement actually may be greater because of the exemption weakens this hypothesis.¹⁴³ Alternatively, Congress could have intended to confer a tax benefit to an economically deprived group.¹⁴⁴ Wages for clergy in 1954 were approximately nine percent below the national labor force average.¹⁴⁵ Such an implied purpose is unlikely, however, given the many other equally under-compensated groups. Congress may condition re-

137. *Id.* at 612-13.

138. *Id.* at 621-22.

139. *See, e.g.,* *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984); *Hunt v. McNair*, 413 U.S. 734, 741 (1973); *Tilton v. Richardson*, 403 U.S. 672, 684-89 (1971). As Justice Lewis Powell stated, "[T]he *Lemon* test has been applied consistently in Establishment Clause cases since it was adopted in 1971. In a word, it has been the law." *Wallace v. Jaffree*, 472 U.S. 38, 63 n.3 (1985) (Powell, J., concurring).

140. *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973).

141. *Stone v. Graham*, 449 U.S. 39 (1980).

142. *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982).

143. *See Note, supra* note 48, at 862-63.

144. At least one commentator has suggested, and rejected, this possibility. *See Comment, supra* note 21, at 1268.

145. *See id.* (discussing the income data presented in the legislative history of the 1954 amendment).

ceipt of a tax benefit on the recipient's occupation, but when this occupation must be religious for the benefit to attach, Congress hardly can describe its purpose as secular.¹⁴⁶

Section 107 probably would fail the second prong of *Lemon*, as well. While a statute that incidentally benefits religion, such as a statute granting benefits to a wide class including churches,¹⁴⁷ does not violate the establishment clause,¹⁴⁸ a benefit conferred directly on a minister is more problematic. The granting of a tax exemption to a minister is in effect a government subsidy and, consequently, results in a higher after-tax salary for the minister. In addition, the exemption indirectly benefits the minister's church by enabling it to pay the minister a lower salary. Section 107 will pass muster only if the benefitting class is broad enough to make this economic benefit to the church incidental. Because the statute seems to confer a primary benefit that may advance religion, it also fails *Lemon's* second prong.

Finally, section 107 appears to fail *Lemon's* requirement that it not cause an excessive entanglement of government and religion. Treasury regulations detail the requirements that a minister must meet to qualify for the parsonage exclusion; the IRS and the courts have devoted an ever increasing amount of time and litigation to determining whether various taxpayers meet these criteria.¹⁴⁹ In addition, the IRS often must determine whether a minister's housing allowance is reasonable—an extremely fact-sensitive, and therefore, painstaking process—and whether it was paid legitimately and not as a sham to cover private inurement of charitable contributions. Preservation of the statute, even if it were to pass *Lemon's* first two prongs, would require constant government analysis and regular litigation—entanglement that is arguably excessive. Elimination of the statute, on the other hand, would decrease the level of government involvement in religious affairs.

2. A Period of Transition

In the early 1980s, some members of the Supreme Court began expressing dissatisfaction with the *Lemon* test. The Court's opinion in *Larson v. Valente*¹⁵⁰ first revealed this dissatisfaction. In *Larson* mem-

146. *See id.*

147. *See Walz v. Tax Commission of New York*, 397 U.S. 664, 672-73 (1970).

148. *Lynch*, 465 U.S. at 683; *Nyquist*, 413 U.S. at 771.

149. A LEXIS search conducted by the Author on Mar. 6, 1989 revealed that approximately 54 federal cases have interpreted and applied § 107's phrase "minister of the gospel" since the 1954 revision of the Internal Revenue Code, and that 36 of these have been decided since 1980. A symptom of the IRS's greater time commitment is found in its 1989 announcement that it no longer will issue advance rulings for certain interpretations of § 107. Rev. Proc. 89-54, 1989-2 C.B. 633.

150. 456 U.S. 228 (1982).

bers of the Unification Church challenged a Minnesota statute that required religious organizations to meet certain registration and reporting requirements if they received half or less of their total contributions from members or affiliated organizations. The Court, in an opinion by Justice William Brennan, held that the *Lemon* test was unnecessary to decide the establishment issue presented by the case.¹⁵¹ *Lemon*, according to Justice Brennan, was useful only when analyzing laws that confer a benefit to all religions, not laws that discriminate among religions.¹⁵²

In *Marsh v. Chambers*¹⁵³ the Court upheld a Nebraska law that provided for a publicly paid chaplain to open each legislative session with prayer.¹⁵⁴ The Court did not apply *Lemon* in its analysis. Instead, Chief Justice Burger wrote that the unique and longstanding position of legislative prayers in United States history had made them a part of the fabric of American society, and thus, the prayers had validity beyond their religious significance.¹⁵⁵ While noting that "historical patterns [alone] cannot justify contemporary violations of constitutional guarantees,"¹⁵⁶ the Court concluded that legislative prayer by state-paid chaplains presented no serious establishment threat.¹⁵⁷ Justice Brennan dissented, finding that the law constituted a clear violation of the establishment clause.¹⁵⁸

Marsh foreshadowed a major change in establishment clause jurisprudence. It failed, however, to indicate either the source or the content of the test that soon would replace the *Lemon* approach. The source would be Justice Sandra Day O'Connor, and the content would be the theory of endorsement.

3. The Endorsement Test

In *Lynch v. Donnelly*¹⁵⁹ the Supreme Court addressed the constitutionality of a city's inclusion of a nativity scene as part of a Christmas display. The display, which the city had erected annually for some forty years, was accompanied by secular Christmas symbols, such as Santa Claus. A five to four majority found that the scene did not violate the

151. *Id.* at 252.

152. *Id.*

153. 463 U.S. 783 (1983).

154. *Id.* at 786.

155. *Id.* at 792.

156. *Id.* at 790.

157. *Id.* at 795.

158. *Id.* at 800-01 (Brennan, J., dissenting). Justice Brennan stated that "any group of law students [applying] the principles of *Lemon* to the question . . . would nearly unanimously find the practice to be unconstitutional." *Id.* (Brennan, J., dissenting).

159. 465 U.S. 668 (1984).

establishment clause under the *Lemon* test.¹⁶⁰ Chief Justice Burger, writing for the majority, said the test was merely a useful guide and emphasized that the Court would not limit its establishment clause jurisprudence to any single test.¹⁶¹

Justice O'Connor concurred in the majority opinion, but wrote separately to suggest a clarification of the Court's establishment clause doctrine.¹⁶² The purpose of the clause, Justice O'Connor stated, is to prohibit the government from making affiliation with any religion relevant to a person's standing in the political community.¹⁶³ Government can violate the clause in two ways: by becoming excessively entangled with religious institutions or by endorsing or disapproving any religion.¹⁶⁴ Justice O'Connor proposed that the Court, in lieu of mechanically applying *Lemon's* purpose and effect prongs, should inquire whether the governmental activity seems to endorse or deprecate religion.¹⁶⁵ Under this interpretation of the establishment clause, Justice O'Connor suggested, a government practice that even directly advances or inhibits the practice of religion is valid unless the public would perceive the practice as an endorsement or disapproval of religion.¹⁶⁶

Although Justice O'Connor labeled her *Lynch* concurrence a clarification of the *Lemon* test, she gave her endorsement theory stronger independent status the following term in *Wallace v. Jaffree*.¹⁶⁷ The number of written opinions in *Wallace* reflects the extent of the Court's disagreement over establishment clause standards.¹⁶⁸ In an opinion by Justice John Paul Stevens, the Court applied the first prong of the *Lemon* test to strike down an Alabama statute that authorized a one minute period of silence in all public schools for voluntary prayer or meditation.¹⁶⁹ Chief Justice Burger strongly dissented, rejecting the majority's rigid adherence to the *Lemon* test.¹⁷⁰ In a lengthy dissent Jus-

160. *Id.* at 681.

161. *Id.* at 679.

162. *Id.* at 687 (O'Connor, J., concurring).

163. *Id.* at 692 (O'Connor, J., concurring).

164. *Id.* at 687-88 (O'Connor, J., concurring).

165. *Id.* at 690-91 (O'Connor, J., concurring).

166. *Id.* at 691-92 (O'Connor, J., concurring).

167. 472 U.S. 38 (1985).

168. The Justices also disagreed on how to determine a statute's purpose. Compare *Wallace*, 472 U.S. at 56-60 (Stevens, J.) (stating that the expressed purpose of the legislature cannot be accepted without investigation into its unexpressed motives) with *id.* at 86-88 (Burger, C.J., dissenting) (countering that the purpose expressed by the legislature always should be given great weight and is conclusive in some cases).

169. *Id.* at 41-42, 56.

170. Chief Justice Burger called the majority's adherence to the *Lemon* test "a naive preoccupation with an easy, bright-line approach." *Id.* at 89 (Burger, C.J., dissenting). Justice Byron White wrote a separate dissent agreeing for the most part with Chief Justice Burger. *Id.* at 90 (White, J., dissenting).

tice William Rehnquist proposed a complete abdication of the *Lemon* test.¹⁷¹

Justice O'Connor concurred in the judgment of the Court and fleshed out the endorsement test she had proposed in *Lynch*.¹⁷² She reflected that although the *Lemon* test held promise initially, it had become problematic.¹⁷³ While Justice O'Connor did not advocate complete abandonment of the *Lemon* criteria, she did state that an establishment test must provide more than "a constitutional 'signpost'" to be used only as the predilections of the Court dictated.¹⁷⁴

Justice O'Connor recognized the need for a constitutional framework that could provide consistency in establishment cases.¹⁷⁵ Such a principle, in Justice O'Connor's thinking, would enable the Court to distinguish between statutes and practices that incidentally help or hinder religious belief and laws that convey, or attempt to convey, a message that religion is preferred.¹⁷⁶ The test for making this determination would involve two steps. First, if the legislature expresses a plausible secular purpose for the statute, courts generally should defer to that stated purpose. If, however, the statute's primary purpose is to endorse religion—as indicated by the express language of the statute, its legislative history, or administrative interpretation—the courts should invalidate it as improper.¹⁷⁷ Second, courts must determine objectively whether the text, legislative history, and implementation of the statute show it to be an endorsement of religion.¹⁷⁸ If so, the statute also would be invalid.

Following its expansion in *Wallace*, Justice O'Connor's endorsement test began gaining the support of other Justices. Though a majority of the Court used *Lemon* to strike down a law requiring employers to respect employee Sabbath days in *Estate of Thornton v. Caldor, Inc.*,¹⁷⁹ Justice Thurgood Marshall joined Justice O'Connor's concurring opinion, in which she enunciated and applied her endorsement test.¹⁸⁰ In *School District of Grand Rapids v. Ball*¹⁸¹ a majority of the Court expressly reaffirmed the *Lemon* test,¹⁸² but seemed receptive to Justice

171. *Id.* at 110-12 (Rehnquist, J., dissenting).

172. *Id.* at 67-84 (O'Connor, J., concurring).

173. *Id.* at 68 (O'Connor, J., concurring).

174. *Id.* at 68-69 (O'Connor, J., concurring) (citation omitted).

175. *Id.* (O'Connor, J., concurring).

176. *Id.* at 69-70 (O'Connor, J., concurring).

177. *Id.* at 74-75 (O'Connor, J., concurring); *cf. supra* note 168 (discussing disagreement among the Justices on how to determine a statute's purpose).

178. 472 U.S. at 76 (O'Connor, J., concurring).

179. 472 U.S. 703 (1985).

180. *Id.* at 711-12 (O'Connor, J., concurring).

181. 473 U.S. 373 (1985).

182. *Id.* at 383.

O'Connor's endorsement concept.¹⁸³ In *Corporation of Presiding Bishop v. Amos*¹⁸⁴ a majority of the Court again applied *Lemon*—this time to uphold an application of Title VII's prohibition against religious discrimination in employment—but Justices Brennan, Marshall, and Blackmun conveyed a growing appreciation for the endorsement test,¹⁸⁵ which Justice O'Connor reiterated in her concurring opinion.¹⁸⁶

A unified majority applied the endorsement test for the first time in *County of Allegheny v. ACLU*.¹⁸⁷ *Allegheny* arose from facts reminiscent of those in *Lynch*. The plaintiffs sued the city of Pittsburgh for displaying a nativity scene at the county courthouse and displaying a Jewish menorah next to the city-county office building.¹⁸⁸ A local Roman Catholic group donated and placed the nativity scene; a local Jewish group owned the menorah, but the city erected the displays.¹⁸⁹ Although they disagreed on the status of the menorah,¹⁹⁰ a majority of the Justices employed the endorsement test to determine the constitutionality of the nativity display.

Justice Harry Blackmun, joined by Justices Brennan, Marshall, Stevens, and O'Connor, noted that although the Court had applied *Lemon's* tripartite analysis regularly in past cases,¹⁹¹ in recent cases the Court had begun focusing on whether the challenged government practice had the effect or purpose of endorsing religion.¹⁹² Justice Blackmun then applied the endorsement test, relying heavily on Justice O'Connor's opinions in *Lynch* and *Wallace*.¹⁹³ The majority concluded that the county had crossed the line drawn in *Lynch*—that the government may acknowledge Christmas, but not in a way that endorses the Christian religion.¹⁹⁴ According to Justice Blackmun, *Lynch* and the rest of the Court's establishment jurisprudence demonstrated that the nativity display violated the establishment clause because it amounted

183. *Id.* at 389-90, 392 (citing *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring)).

184. 483 U.S. 327 (1987).

185. *Id.* at 345 n.5 (Brennan, J., joined by Marshall, J., concurring), 346 (Blackmun, J., concurring).

186. *Id.* at 346-49 (O'Connor, J., concurring).

187. 109 S. Ct. 3086 (1989) (plurality decision).

188. *Id.* at 3093, 3097-98 (plurality opinion).

189. *Id.* at 3093 (plurality opinion).

190. Two of the five Justices that invalidated the creche display—Justices Blackmun and O'Connor—joined Chief Justice Rehnquist and Justices White, Scalia, and Kennedy to uphold the constitutionality of the menorah display, although they disagreed on the rationale. *See id.* at 3113-15 (plurality opinion); *id.* at 3122 (O'Connor, J., concurring); *id.* at 3134 (Kennedy, J., concurring in part and dissenting in part).

191. *Id.* at 3100.

192. *Id.*

193. *Id.* at 3101, 3103-05.

194. *Id.* at 3105.

to a governmental endorsement of Christianity.¹⁹⁵

Justice Anthony Kennedy bitterly dissented, joined by Chief Justice Rehnquist and Justices Byron White and Antonin Scalia.¹⁹⁶ While agreeing with the majority that the *Lemon* test was an inadequate guide to deciding establishment cases, Justice Kennedy criticized the majority's adoption of the endorsement test.¹⁹⁷ Justice Kennedy concluded that protecting individuals from "mere feelings of exclusion"¹⁹⁸ would result in the invalidation of scores of previously accepted acknowledgments of religion because any nonreligious observers would receive the clear message that their beliefs failed to conform with the political norm.¹⁹⁹ Alternatively, if the Court preserved longstanding practices that sent such a message, the endorsement test necessarily would be distorted until it was unworkable.²⁰⁰

Majority adoption of the endorsement test in *Allegheny* marked a significant shift in the Supreme Court's establishment clause jurisprudence, and section 107 must pass its scrutiny to be constitutional. Although the result appears less certain than under *Lemon*, section 107 probably would fail the endorsement test. The two-step approach outlined by Justice O'Connor presents an obvious concern: the available legislative history expresses an arguably religious purpose for section 107,²⁰¹ and an objective observer almost undoubtedly would find that the statute endorses religion in practice. It is possible, however, that the refining process accompanying future application of the test will offer opportunity for several possible arguments in favor of the statute, based on elements mentioned in the various Supreme Court decisions from the past decade.

First, long-term acceptance of the parsonage allowance exclusion as a part of the national tax policy may bring it within the *Marsh v. Chambers* guidelines.²⁰² The unbroken practice of granting the exclusion to ministers since 1921 arguably has stemmed from traditional favoritism to the clergy and constitutes a tolerable acknowledgment of beliefs that poses no threat of establishment.²⁰³ Two primary factors upon which *Marsh* rested—timing and effect—undermine this argu-

195. *Id.*

196. *Id.* at 3134-46 (Kennedy, J., concurring in part and dissenting in part).

197. *Id.* at 3134-35, 3141. Justice Kennedy found the endorsement test "flawed in its fundamentals and unworkable in practice." *Id.* at 3141 (Kennedy, J., concurring in part and dissenting in part).

198. *Id.* at 3143 (Kennedy, J., concurring in part and dissenting in part).

199. *Id.* at 3143-44 (Kennedy, J., concurring in part and dissenting in part).

200. *Id.* at 3144 (Kennedy, J., concurring in part and dissenting in part).

201. See *supra* notes 110-14 and accompanying text.

202. See *Marsh v. Chambers*, 463 U.S. 783, 792 (1983).

203. See *id.* at 791.

ment. While legislative prayers began with the first Congress and were found to have no proselytizing effect,²⁰⁴ the parsonage allowance exclusion is a creation of fairly recent origin that clearly seems to benefit persons who proselytize for a living. These differences could be fatal to section 107.

Unlike the nativity scene in *Lynch v. Donnelly*,²⁰⁵ however, section 107 arguably does not have the ultimate effect of endorsing religion, even though advancement of religion is a primary effect.²⁰⁶ One could assert that the endorsement test permits tax breaks based on religious vocation because the test does not preclude government from taking religion into account when it makes law and policy.²⁰⁷ Although more persuasive than an argument based on *Marsh*, this approach probably would fail as well. While the endorsement test does not preclude a consideration of religion in the formation of government policy, it does preclude government from conveying a message that religion or a particular religious belief is favored or preferred.²⁰⁸

Section 107 on its face favors taxpayers with a religious vocation, thereby creating a strong presumption that its purpose is to endorse religious efforts.²⁰⁹ Additionally, because the IRS and courts grant section 107 treatment only to bona fide ministers, similarly situated practitioners in other religions would not qualify for the exclusion.²¹⁰ This result conveys a message that religious workers are favored over secular workers and, therefore, would fail the endorsement test. In short, section 107 appears ripe for invalidation on establishment clause grounds, whether subjected to the *Lemon* tripartite test or to the endorsement analysis used in *Allegheny*.²¹¹ Ironically, two recent Supreme Court

204. *Id.* at 792.

205. 465 U.S. 668 (1984).

206. *See id.* at 692-93 (O'Connor, J., concurring).

207. *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring).

208. *Id.* at 70 (O'Connor, J., concurring).

209. *See generally id.* at 74-75 (O'Connor, J., concurring).

210. *See Texas Monthly, Inc. v. Bullock*, 109 S. Ct. 890, 905-06 (1989) (Blackmun, J., concurring) (suggesting that such differentiation may violate the establishment clause).

211. Of course, any challenging party would need standing, and it is unclear what type of injury would satisfy the "concrete factual" standard of *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982). Logically, a religious practitioner who is denied the exclusion for failing to meet the narrow criteria of a "minister of the gospel," discussed *supra* subpart III(A), suffers an injury by paying tax that qualifying ministers do not.

In *Texas Monthly*, 109 S. Ct. at 895-96, however, the State of Texas disputed an analogous argument. The plaintiff in *Texas Monthly* was a nonreligious periodical that the State had denied a sales tax exemption granted to religious periodicals. In disputing the plaintiff's standing, the State argued that even if the Supreme Court invalidated the exemption, the plaintiff would receive no refund because the State simply would remove the exclusion for religious publications. Therefore, the plaintiff had suffered no injury. *Id.* at 896.

cases involving the constitutionality of tax exemptions for religious entities indicate that an establishment clause challenge to section 107 might be unnecessary.

B. Texas Monthly and Jimmy Swaggart Ministries: Death Knell for the Parsonage Allowance Exclusion?

After a decade of establishment clause jurisprudence that resulted in a new and arguably less restrictive approach to determining violations of the clause, one might expect the Court to look more favorably on tax exemptions granted to religious organizations. Surprisingly, this is not this case. This Note next examines two very recent decisions by the Court that display a critical approach toward these exemptions and do not bode well for the survival of section 107.

In 1989 the Supreme Court struck down a statute that granted a state sales tax exemption to religious periodicals in *Texas Monthly, Inc. v. Bullock*.²¹² A plurality composed of Justices Brennan, Marshall, and Stevens relied primarily on *Walz v. Tax Commission of New York*²¹³ to hold that the statute was too narrow to pass establishment clause scrutiny.²¹⁴ Unlike the property tax exemptions at issue in *Walz*, which benefited not only churches but numerous other philanthropic and non-profit groups, the Texas exemption was aimed to benefit periodicals published or distributed by religious faiths and consisting wholly of doctrinal writings.²¹⁵ Because the statute lacked a secular objective that would justify granting the exemption to nonreligious publi-

Justice Brennan, writing for three Justices, rejected this argument, stating that its adoption "would effectively insulate underinclusive statutes from constitutional challenge." *Id.* (quoting Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 227 (1987)). In addition, Justice Brennan stated:

It is not for us to decide whether the correct response as a matter of state law to a finding that a state tax exemption is unconstitutional is to eliminate it, to curtail it, to broaden it, or to invalidate the tax altogether. . . . A live controversy persists over Texas Monthly's right to recover the [tax] it paid, plus interest. Texas cannot strip appellant of standing by changing the law after taking its money.

Id. Although Justice Brennan wrote only for a plurality, apparently all the Justices assumed that the plaintiff had standing because three Justices concurred in the judgment in favor of Texas Monthly and the dissent focused on the case's merits. *Id.* at 905 (Justices White, Blackmun, and O'Connor, concurring in the judgment), 907 (Justices Scalia and Kennedy and Chief Justice Rehnquist, dissenting).

Even if a plaintiff has standing under *Texas Monthly*, a major stumbling block remains. The amount of any recovery for a successful challenge to § 107 undoubtedly would be far less than the costs of litigation. A plaintiff with limited means or no public interest counsel to absorb the costs of suit, therefore, probably would not initiate a challenge. This fact alone may preserve the parsonage allowance exclusion indefinitely.

212. 109 S. Ct. at 890.

213. 397 U.S. 664 (1970).

214. *Texas Monthly*, 109 S. Ct. at 899.

215. *Id.*

cations,²¹⁶ it unconstitutionally subsidized religious organizations and could not be viewed as anything but state sponsorship of religious belief.²¹⁷ In a concurring opinion Justices Blackmun and O'Connor held that a state may not give a tax benefit to proponents of religion without also giving it to others who actively might advocate disbelief in religion.²¹⁸

The plurality and concurring opinions in *Texas Monthly* raise serious doubts about the constitutionality of section 107. Specifically, section 107 grants a tax break to those who advocate religion for a living, but denies the savings to taxpayers who do not meet the IRS qualifications for a minister of the gospel. Section 107 is drawn and interpreted narrowly and does not embrace a broad class of beneficiaries that might legitimize it under a *Walz* analysis. As such, section 107 arguably represents a subsidy directed exclusively to religious beneficiaries, which does not remove any state-imposed deterrent to the free exercise of religion²¹⁹ and may provide unjustifiable awards of assistance to religious interests.²²⁰ Justice Scalia, in his *Texas Monthly* dissent, sensed the possible impact of the decision; he implied that section 107, along with some forty-five particular state statutes, would fall as a casualty of the majority's "judicial demolition project."²²¹

In *Jimmy Swaggart Ministries v. Board of Equalization of California*²²² the Court firmly established that regardless of whether narrowly drawn tax exemptions for religious organizations are valid, they are not mandated constitutionally. In *Jimmy Swaggart Ministries* an evangelistic association contended that state taxes levied on the sales of religious materials violated the free exercise and establishment clauses of the first amendment.²²³ The association relied on two older Supreme Court decisions, *Murdock v. Pennsylvania*²²⁴ and *Follett v. McCormick*,²²⁵ for

216. *Id.* at 901.

217. *Id.* at 899-900.

218. *Id.* at 905-06 (Blackmun, J., joined by O'Connor, J., concurring).

219. *See id.* at 899.

220. *Id.*

221. *Id.* at 908-09 & n.3, 907 (Scalia, J., dissenting).

222. 110 S. Ct. 688 (1990).

223. *Id.* at 693.

224. 319 U.S. 105 (1943). In *Murdock* Jehovah's Witnesses were convicted for violating a city ordinance that required all persons canvassing or soliciting within the city to pay a fee and procure a license. The Court reversed the convictions, stating that "[t]his form of religious activity occupies the same high estate under the First Amendment as do worship in the churches and preaching in the pulpits," and held that the city could not require a license or fee for the activity. *Id.* at 109.

225. 321 U.S. 573 (1944). The Court in *Follett* held that a city could not force "one who earns his livelihood as an evangelist or preacher in his home town" to pay a flat fee and obtain a license to sell books, even though the ordinance required all booksellers to procure the license. *Id.* at 576-77.

its argument that a state may not impose a sales tax on the distribution of religious material by a religious organization.²²⁶

The Court unanimously rejected the association's reading of *Murdock* and *Follett*, stating that those cases concerned imposition of flat license taxes²²⁷ that operated as impermissible prior restraints on the exercise of religious liberty.²²⁸ By contrast, the tax at issue in *Jimmy Swaggart Ministries* was not flat, applying neutrally to all retail sales and representing only a small fraction of any given sale. Imposed in this manner, the sales tax did not infringe the right to disseminate religious information, ideas, or beliefs, per se. Rather, it taxed only the privilege of making retail sales; this taxation presented no constitutionally significant burden to the ministry.²²⁹

The Court additionally held that the tax presented no establishment clause problem because a generally applicable tax has an undeniably secular purpose, neither advances nor inhibits religion, and is by its essence neutral and nondiscriminatory on questions of religious belief.²³⁰ Thus, the Court held, the sales tax in *Jimmy Swaggart Ministries* did not call into question the core values of the establishment clause.²³¹ Even assuming that collecting, recording, and paying the tax caused a government entanglement with religion, as the ministry contended, the Court held that any entanglement failed to rise to a constitutionally significant level.²³²

Jimmy Swaggart Ministries threatens section 107 in two important respects. First, the decision clearly establishes that the first amendment in no way mandates tax exemptions for religious organizations. Second, by holding that a generally applicable tax imposed on religious organizations does not call into question the core values of the free exercise and establishment clauses, the Court may have eliminated any constitutional defense to the eradication of section 107. The federal income tax, like the California state sales tax upheld in *Jimmy Swaggart Ministries*, is generally applicable and presents no unique burden to ministers. This fact probably removes any legitimate basis for maintenance

226. *Jimmy Swaggart Ministries*, 110 S. Ct. at 693.

227. A "flat" tax, in the words of the Court, "is fixed in amount and unrelated to the scope of . . . activities . . . or to their realized revenues." *Murdock*, 319 U.S. at 113. License taxes are a common example. *See id.*

228. *Jimmy Swaggart Ministries*, 110 S. Ct. at 694.

229. *Id.* at 695-96. The Supreme Court recently used the same rationale in ruling that a generally applicable, religion-neutral criminal law that prohibited the religious use of peyote by Native Americans did not violate the free exercise clause. *See Employment Div. v. Smith*, 110 S. Ct. 1595 (1990).

230. *Jimmy Swaggart Ministries*, 110 S. Ct. at 698.

231. *Id.*

232. *Id.*

of the parsonage allowance exclusion.

VI. CONCLUSION

Currently, section 107 offers significant tax savings to a minister who satisfies IRS criteria. The exclusion's vitality, however, appears threatened. The IRS's recently enhanced scrutiny of section 107 deductions—requiring churches to meet strict private inurement criteria²³³ and ministers to document their credentials and expenses within narrow parameters—may foreshadow future attacks on deductions that have an exclusively religious basis. Although the parsonage allowance exclusion will continue to benefit prudent institutions and clergy, the continuation of this benefit is uncertain.

The crackdown on mail-order ministries, the treasury's attempts to eliminate section 107, and the judicial attitude evidenced in *Dalan* may suggest a coming increase in restrictions on the exclusion. The IRS could impose certain restrictions, such as requiring evidence of a reasonable relationship between services rendered by the minister and the amount of cash allowance provided, without implicating constitutional concerns.²³⁴ More critically, recent establishment clause decisions indicate that the Supreme Court could invalidate the exclusion if it is challenged properly. The Supreme Court, with its adoption of the endorsement test and its decisions in *Texas Monthly* and *Jimmy Swaggart Ministries*, appears ready to scrutinize tax breaks for ministers as strictly as those for any other benefitted class. In short, change seems inevitable. The parsonage allowance exclusion may not die, but it certainly faces a restricted future.

Matthew W. Foster

233. See *supra* note 61.

234. Bruce Casino, in the mail-order ministry context, has made this exact proposal. See Casino, *supra* note 85, at 157.