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Constitutional Challenge to Section 107 of the Internal Revenue Code

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A Constitutional Challenge to Section 107 of the Internal Revenue Code

America's founding fathers sought to avoid the discord, controversy and bloodshed which historically emanated from church-state entanglements.[1] The first amendment to the Constitution of the United States addressed this concern for the separation of church and state by mandating that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."[2]

This note will examine Internal Revenue Code section 107[3] to consider whether it is an affirmative governmental act supportive of religion which violates the establishment clause of the first amendment. Section 107(1)[4] provides that the rental value of a parsonage furnished to a minister is excludable from the minister's gross income. Section 107(2)[5] allows a minister to exclude from gross income the amount of rental allowance that the church allocates and the minister uses to procure a home when a parsonage is not provided. This note first reviews the interpretation of the establishment clause by the Supreme Court of the United States which led to the development of a three-prong test for determining whether a suspect statute is constitutional. The established constitutional standards will then be applied to section 107 to discern the statute's constitutionality.

I. Establishment Clause Analysis

The establishment clause articulates a broad proscription forbidding government from enacting any law "respecting an establishment of religion." The Supreme Court has rejected an "absolutist" or literal construction of the clause as hostile to religion and contrary to the establishment clause's spirit and intent.[6] In *Lemon v. Kurtzman*,[7]

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1 Everson v. Board of Educ., 330 U.S. 1, 8-15 (1947).

2 U.S. CONST. amend I. The establishment clause was applied to the states through the fourteenth amendment. *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

3 I.R.C. § 107 (1976).

4 I.R.C. § 107(1) (1976).

5 I.R.C. § 107(2) (1976).

6 330 U.S. at 18. *See also* Lemon v. Kurtzman, 403 U.S. 602, 614 (1974); Sherbert v. Verner, 374 U.S. 398, 422 (1963) (Harlan, J., dissenting); Zorach v. Clauson, 343 U.S. 306, 312 (1952).

7 403 U.S. 602 (1971).

Chief Justice Burger identified the difficulties encountered in establishing standards for establishment clause analysis, noting that a law *respecting* an establishment of religion may respect the forbidden objective while falling short of its total realization.[8] Thus, the Chief Justice concluded, it is not easy to identify a law respecting the establishment of religion as one that violates the clause.[9] Chief Justice Burger recognized that contemporary establishment clause analysis presupposes an engineer's sense of gradation and a clairvoyant's sense of impact.

Despite the difficulties inherent in establishment clause analysis, the Court developed a three-pronged establishment clause test.[10] First, a challenged statute must have a nonreligious or secular purpose.[11] Second, the principal or primary effect of the statute must neither advance nor inhibit religion.[12] Third, the statute must not produce an "excessive government entanglement with religion."[13] Notwithstanding academic debate over its historical and philosophical purity, the three-prong test currently prevails as the standard for scrutinizing a statute under the establishment clause.[14]

A. *The Secular Purpose Test*

The first prong, the "secular legislative purpose" test, reflects the Court's conclusion that any statute, the purpose of which is to establish, sponsor or support religion, is proscribed as establishing a religion.[15] Purposeful governmental support of or identification with religion is deemed an unconstitutional intrusion into an area from which the establishment clause bars the government.

Determining secular legislative purpose involves extensive judicial discretion. The potential existence of a religiously based purpose will not render a statute unconstitutional.[16] A court will uphold a challenged statute if it can find express or implied secular legislative

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8 *Id.* at 612.

9 *Id.*

10 The three-prong test was recently reaffirmed as the Court's establishment clause standard in Widmar v. Vincent, 102 S. Ct. 269 (1981).

11 *See, e.g.*, Epperson v. Arkansas, 393 U.S. 97 (1968).

12 *See, e.g.*, School Dist. of Abington Township v. Schemmp, 374 U.S. 203 (1963).

13 Widmar v. Vincent, 102 S. Ct. at 275; Committee for Pub. Educ. v. Regan, 444 U.S. 646, 653 (1980); Roemer v. Maryland Pub. Works Bd., 426 U.S. 736, 748 (1976); Tilton v. Richardson, 403 U.S. 672, 678 (1971).

14 Widmar v. Vincent, 102 S. Ct. at 275; *See generally* Ripple, *The Entanglement Test of the Religion Clauses - A Ten Year Assessment*, 27 U.C.L.A. L. REV. 1195 (1980).

15 Walz v. Tax Comm'r, 397 U.S. 664, 668 (1970).

16 McGowan v. Maryland, 366 U.S. 420, 431 (1961).

purpose from the statute's text or legislative history.[17] Generally, the courts will not inquire into the hidden motives that move Congress to exercise its constitutional power.[18]

B. *The Primary Secular Effect Test*

The second prong, the primary secular effect test, reaches beyond the secular legislative purpose test standards. The primary secular effect test provides that a statute violates the establishment clause when its primary effect is to financially aid, advance, or support religion, even though the statute has a secular purpose.[19] Commentators[20] agree with Justice White[21] that "*primary* secular effect" is a misnomer and maintain that the Court affirmatively requires *any* supportive effect to flow incidentally from statutes benefitting broad classes of institutions or individuals. The Court, however, maintains that government services or support provided to all citizens or broad categories of institutions can indirectly or incidentally benefit religion without violating the establishment clause.[22]

When applying the primary secular effect test, courts must ascertain the direct and indirect impact of a statute on a case-by-case basis. If the statute has a valid secular purpose and it benefits a broad class of institutions and individuals, including to some extent religious organizations, the Supreme Court has upheld the statute's constitutionality because it only incidentally impacts upon religion.[23] For example, the Court has sustained government programs providing reimbursement to parents of public and non-public school students for bus transportation to and from school;[24] secular textbooks to children attending public and non-public schools;[25] diagnostic, therapeutic and remedial services;[26] and construction of secular facil-

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17 L. MANNING, THE LAW OF CHURCH-STATE RELATIONS 18 (1980); Note, *Tax Benefits for the Clergy: The Unconstitutionality of Section 107*, 62 GEO. L. J. 1261, 1266 (1974).

18 Sonzinsky v. United States, 300 U.S. 506, 513-14 (1937).

19 Lemon v. Kurtzman, 403 U.S. 602, 614 (1971); Walz v. Tax Comm'r., 397 U.S. 664, 674 (1970).

20 L. MANNING, *supra* note 17, at 145-46; L. TRIBE, AMERICAN CONSTITUTIONAL LAW 840 (1978).

21 Committee for Pub. Ed. v. Nyquist, 413 U.S. 756, 823 (1973) (White, J., dissenting).

22 Widmar v. Vincent, 102 S. Ct. 269, 275 (1981); Wolman v. Walter, 433 U.S. 229, 240-41 (1977); Committee for Pub. Ed. v. Nyquist, 413 U.S. 756, 771 (1973).

23 *See* note 22 *supra*.

24 Everson v. Board of Educ., 330 U.S. 1 (1947).

25 Wolman v. Walter, 433 U.S. 229 (1977); Meek v. Pittenger, 421 U.S. 349, 359 (1975); Board of Educ. v. Allen, 392 U.S. 236 (1968).

26 Wolman v. Walter, 433 U.S. 229 (1977).

ities at public and non-public colleges and universities.[27] Conversely, where a statute has a valid secular purpose that benefits only a limited class of primarily religious institutions or individuals, the Supreme Court has found the statute unconstitutional because the statute's primary effect was to advance religion.[28] This issue arises frequently in government programs designed to aid non-public schools, which are primarily religious affiliates. The Court has struck down programs allowing religious instruction in public schools;[29] tax credits to parents of children attending non-public schools;[30] salary supplements for non-public school teachers;[31] funds for maintaining and repairing non-public school buildings;[32] general instructional material and equipment;[33] and funds for non-public school teacher supervised field trips.[34] The Court will probably continue its case-by-case determination of primary secular effect, relying heavily on the categories delineated in its previous rulings.

The breadth of a statute's benefitted class is important in determining primary secular effect. However, statutes which benefit all religions equally are not sustainable under the establishment clause.[35] In *Everson v. Board of Education*,[36] Justice Black articulated the Court's interpretation that:

> [t]he 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government . . . can pass laws which aid one religion, aid all religions, or prefer one religion over another.[37]

However, disagreement exists over whether the establishment clause was originally intended to prohibit aid to all religions. Some scholars maintain that the establishment clause originally sought only to prohibit the designation or support of a particular state church.[38] The

27 Tilton v. Richardson, 403 U.S. 672 (1971).

28 Lemon v. Kurtzman, 403 U.S. 602 (1971).

29 McCollum v. Board of Educ., 333 U.S. 203 (1948).

30 Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973).

31 *Id.*

32 Meek v. Pittenger, 421 U.S. 349, 377 (1975).

33 *Id.* at 362-63.

34 Wolman v. Walter, 433 U.S. 229 (1977).

35 Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 771 (1973); McCollum v. Board of Educ., 333 U.S. 203, 210 (1948); Everson v. Board of Educ., 330 U.S. 1, 15 (1946).

36 330 U.S. 1 (1947).

37 *Id.* at 15. It is noteworthy that the dissenting Justices in *Everson* agreed with Justice Black's construction. *Id.* at 26-28, 41, 52-53, 60. Subsequent Court opinions have maintained that the Court's opinion on this matter is "firmly established." Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 771 (1973).

38 *See* C. ANTINEAU, A. DOWNEY, & E. ROBERTS, FREEDOM FROM FEDERAL ESTABLISH-

Court's contemporary interpretation of the establishment clause's scope may have exceeded the scope originally envisioned by the founding fathers.[39] Given the Court's current definitive stance, however, the disagreement regarding the establishment clause's proper scope has only parenthetical significance.

C. *The Excessive Entanglement Test*

The third prong, the excessive entanglement test, demonstrates the Supreme Court's belief that the establishment clause erects a constitutional wall, relegating church and state to respective spheres - each unencumbered by the other's functioning.[40] The purpose of disentanglement is to protect against the mutually corrupting influences[41] which the separate spheres have historically experienced when entanglement has occurred.[42] Admittedly, an absolute wall is impossible.[43] Government must accommodate religion in those areas where interaction is inevitable.[44] Consequently, the Court has repeatedly recognized that excessive entanglement is a matter of degree.[45]

The Court has identified two types of statutes that are clearly prone to excessive entanglement challenges. The first type includes statutes the implementation of which requires significant administrative entanglement; the second type includes statutes intruding into areas fraught with actual or potential political divisiveness.[46]

The leading case dealing with administrative entanglement is *Lemon v. Kurtzman*.[47] In *Lemon*, the Supreme Court struck down New York and Rhode Island statutes governing state programs which pro-

MENT 1-29 (1964); Corwin, *The Supreme Court as a National School Board*, 14 LAW & CONTEMP. PROB. 3, 20 (1949).

39 *See* L. TRIBE, *supra* note 20, at 816-19.

40 Wolman v. Walter, 433 U.S. 229, 236 (1977).

41 Lemon v. Kurtzman, 403 U.S. 602, 649 (1971) (Brennan, J., concurring).

42 Walz v. Tax Comm'r, 397 U.S. 664, 673, 675 (1970); Lemon v. Kurtzman, 403 U.S. 602, 614 (1971).

43 *Id.* at 614, 628-29 (Douglas, J., concurring), 646-47 (Brennan, J., concurring); Zorach v. Clauson, 343 U.S. 306, 312 (1952).

44 Lemon v. Kurtzman, 403 U.S. 602, 622 (1971).

45 Meek v. Pittenger, 421 U.S. 349, 359 (1975); Walz v. Tax Comm'r, 397 U.S. 664, 674-76 (1970).

46 Lemon v. Kurtzman, 403 U.S. 602, 622-24 (1971).

47 403 U.S. 602 (1971). In NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979), the Court interpreted the National Labor Relations Act to avoid excessive entanglement. The Court ruled that Congress did not intend that lay teachers at church-operated schools be covered by the National Labor Relations Act. The Court noted that "[i]nevitably the Board's inquiry will implicate sensitive issues that open the door to conflicts between clergy-administrators and the Board, or conflicts with negotiators for unions." *Id.* at 503. While the decision

vided certain educational financial aid, because the primary beneficiaries were parochial schools. The Court reasoned that it must examine the type of institutions benefitted, the nature of the state-provided aid, and the result of the relationship between the government and religious authority before it can determine whether there has been excessive entanglement.[48] The Court concluded that administration of these state aid programs would foster a dangerous "comprehensive, discriminating, and continuing state surveillance . . . ."[49]

Politically divisive entanglement is "[a] broader base of entanglement"[50] objectionable because unnecessary government intrusion into certain highly charged areas has the potential of politically polarizing the public along religious lines.[51] In *Lemon*, the Court emphasized that state aid to parochial schools was an area of governmental action historically and prospectively capable of creating unnecessary political strife.[52] The Court in *Lemon* indicated that a statute's history of controversy is persuasive in political divisiveness analysis.[53] In *Meek v. Pittinger*,[54] the Court explained that programs primarily benefitting church-related schools are potentially politically divisive in their requirements of continuing annual appropriations and subjective determinations of need.[55]

The Court has recognized that entanglement analysis necessarily overlaps with an analysis of secular legislative purpose and primary effect.[56] Excessive entanglement is meant, however, to provide an independent analytic hurdle once the other two tests have been cleared.[57] The inverted gradational analysis articulated in *Walz v. Tax Commissioner* provides an added dimension of complexity.[58] In

merely restricts administrative action, it does display the Court's reluctance to permit the development of grounds upon which the church and state may clash.

48 403 U.S. at 615.

49 *Id.* at 619.

50 *Id.* at 622.

51 One commentator noted that while the Supreme Court has never invalidated a law solely because such a potential was present, it has often noted such potential and acknowledged that the risk of political divisiveness along sectarian lines has figured in a judgment of unconstitutionality. L. TRIBE, *supra* note 20 at 868.

52 403 U.S. at 622-24.

53 *Id.* at 623. *See also* Walz v. Tax Comm'r., 397 U.S. 664, 674 (1970); *id.* at 681 (Brennan, J., concurring).

54 421 U.S. 349 (1975).

55 *Id.* at 372.

56 Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 798 (1973).

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

58 397 U.S. 664 (1970).

Walz, the Court addressed a New York statute that provided a property tax exemption to religious organizations. Chief Justice Burger, writing for the Court, emphasized that both taxing and exempting property owned by religious organizations involved a certain amount of entanglement.[59] However, in finding the property tax exemption constitutional, the Court noted that providing a property tax exemption reduced the degree of entanglement that would otherwise result from taxing religious organizations' property.[60] Admittedly, some entanglement remained in that "the state had a continuing burden to ascertain that exempt property was in fact being used for religious worship."[61] Upon balancing the degree of entanglement involved against the alternatives, however, the Court decided that an exemption should be granted.

II. Section 107

Internal Revenue Code section 107 permits ministers to exempt from gross income either the rental value of a parsonage or a rental allowance provided to obtain housing.[62] Section 107(1) provides that "[i]n 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 . . . ."[63]

The phrase "[m]inister of the gospel," which applies to both sections 107(1) and 107(2), has been interpreted by the Internal Revenue Service (IRS) to include clergy of all faiths.[64] Cases and IRS rulings ostensibly limit section 107 to "duly ordained, commissioned or licensed clergy."[65] However, the cases and rulings do not necessarily disqualify self-styled or self-appointed ministers.[66]

In addition, the minister of the gospel must receive the remuneration "as part of his compensation."[67] The IRS has construed this

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59 *Id.* at 674. The Court noted that the end result - the effect - must not be an excessive entanglement with religion, the test being one of degree. The Court admitted that either taxation or exemption of churches occasions some degree of involvement with religion. *Id.*

60 *Id.* at 674-76.

61 *Id.* In *Lemon*, Chief Justice Burger referred to *Walz*, stating that under the statutory exemption before the Court in *Walz*, the state had a continuing burden to ascertain that exempt property was actually being used for religious worship. 403 U.S. at 614.

62 I.R.C. § 107 (1976).

63 I.R.C. § 107(1) (1976).

64 Abraham A. Salkov, 46 T.C. 190 (1966); Rev. Rul. 58-221, 1968-1 C.B. 53.

65 Kirk v. Comm'r., 425 F.2d 492, 495 (D.C. Cir.), *cert. denied*, 400 U.S. 853 (1970); Rev. Rul. 66-90, 1966-1 C.B. 27; Rev. Rul. 65-124, 1965-1 C.B. 44; Rev. Rul. 57-522, 1957-2 C.B. 50.

66 P. KURLAND, RELIGION AND THE LAW 18 (1961).

67 I.R.C. § 107 (1976).

provision to mean "remuneration for services which are ordinarily the duties of a minister of the gospel."[68] The regulations interpret qualified duties to include performing sacredotal functions, conducting religious worship, administering religious organizations, and teaching at theological seminaries.[69] The IRS has also ruled that a retired clergy member may exclude as compensation for past services the rental value of a parsonage furnished to him.[70]

Section 107(2) provides that "[i]n the case of a minister of the gospel, gross income does not include - (2) the rental allowance paid to him as part of his compensation, to the extent used by him to rent or provide a home."[71]

Applying section 107(2) is more complex than applying section 107(1) because section 107(2) exempts a "rental allowance" received, provided that the amount is designated as such by the church,[72] rather than only in kind provision of housing.[73] Section 107(2) further limits the excludable rental allowance to the amount used.[74] Thus, exemption under section 107(2) may require an examination of a minister's records.[75] In determining the extent to which the rental allowance is used, the IRS has complicated matters by ruling that a minister who purchases rather than rents a home may exclude the home's fair rental value from gross income.[76]

III. Establishment Clause Analysis of Section 107

Many legal scholars might reason that section 107's use of a religiously based classification renders the statute unconstitutional as violating the establishment clause. Professor Kurland[77] maintains that the religion clauses "must be read to mean that religion may not be used as a basis of classification for purposes of government action, whether that action be the conferring of rights or privileges or the

68 Treas Reg. § 1.107-1(a) (1958).

69 *Id.*

70 Rev. Rul. 63-156, 1963-2 C.B. 79.

71 I.R.C. § 107(2) (1976).

72 Treas. Reg. § 1.107-1(b) (1951). *See* Richard Eden, 41 T.C. 605, 607 (1964); Rev. Rul. 72-462, 1972-2 C.B. 76; Rev. Rul 59-350, 1959-2 C.B. 45.

73 The IRS will scrutinize proffered resolutions, minutes, budgets, employment contracts or other indicia to discern church designation of rental allowance. Treas. Reg. § 1.107-1(b) (1957).

74 I.R.C. § 107(2) (1976).

75 Treas. Reg. § 1.107-1(b) (1957).

76 Treas. Reg. § 1.107-1(c) (1963).

77 Philip B. Kurland, Professor of Law, University of Chicago.

imposition of duties or obligations."[78] Section 107 classifies recipients of government benefits on the basis of religion; thus, the statute must be scrutinized under the establishment clause.

Section 107 is divided into two subsections, 107(1) and 107(2), each having a distinct legislative history, intent, and impact. Consequently, this note will treat each subsection separately.

A. *Section 107(1): Rental Value*

The constitutionality of section 107(1) depends upon its compliance with the Supreme Court's three-prong establishment clause test. Section 107(1) does not overtly express a secular legislative purpose.[79] Nor does the legislative history of section 107(1), enacted in 1921, buttress or imply a secular legislative intent.[80] Absent a demonstrable secular legislative purpose the courts must hypothecate a reasonable secular legislative purpose if section 107(1) is to stand.

The courts have accepted the separation of church and state as a tenable secular purpose.[81] Historically, church property in America has been exempt from state property taxation.[82] Congress may have reasoned that taxing a parsonage's value improperly entangles church property in government regulation. Indeed, it appears contradictory to exempt church property from state property taxation on separation grounds while allowing the federal government to tax the same church property's value to ministers.

The second prong of the establishment clause test requires a sustainable enactment to manifest a primary secular effect. The determination of a primary secular effect requires a catalog of all effects incident to section 107(1)'s enactment. The most direct effect of section 107(1) is the conferral of a substantial financial benefit on ministers in the form of a tax exemption.[83] However, section 107(1) also

78 P. KURLAND, *supra* note 66, at 18.

79 Section 107(1) has descended substantially intact from its genesis as section 213(b)(11) of the Revenue Act of 1921. The Committee and Conference Reports for the Revenue Act of 1921 do not mention section 213(b)(11). *See Internal Revenue Hearings on the Proposed Revenue Act of 1921 Before the Senate Committee on Finance*, 67th Cong., 1st Sess. 497-577 (1921); S. REP. NO. 257, 67th Cong., 1st Sess. (1921); H.R. REP. NO. 350, 67th Cong., 1st Sess. (1921).

80 *See* note 79 *supra*.

81 Walz v. Tax Comm'r., 397 U.S. 664 (1970).

82 *Id.* at 676.

83 Section 107(1) effects a tax treatment deferential to ministers. Section 107(1) can be roughly analogized to Internal Revenue Code section 119. Section 119 allows any employee to exclude from gross income the value of lodging furnished on the employer's premises, for the convenience of the employer, and as a condition of employment. The requirements for exemption under section 119 are more stringent than the blanket exemption granted by section 107(1). However, if section 107(1) did not exist, ministers could still claim that their

confers significant indirect benefits to religious organizations.

Churches benefit from section 107(1) by being able to pay ministers lower salaries, commensurate with the tax savings. Thus, section 107(1) confers a benefit similar to a cash grant subsidy on churches. In *Committee for Public Education v. Nyquist*,[84] the Court recognized that a tax deduction is a means of support for establishment clause purposes.[85]

Not only does section 107(1) confer a benefit on religious institutions and individuals, but it places a corresponding burden on the taxpayer to the extent that the taxpayer's weighted tax burden is increased by the amount of the section 107(1) exemption.

Section 107(1) can be construed as effecting a separation of church and state analogous to that in *Walz v. Tax Commissioner*.[86] *Walz* emphasized that potential grounds of confrontation between church and state are to be avoided.[87] Section 107(1) is consistent with the avoidance principle set forth in *Walz* because it eliminates a parsonage's rental value from assessment and conflict. Many parsonages are physically attached to churches. Absent section 107(1), a church would have to segregate the value of church land, buildings, and unitary services such as heating, plumbing, and electricity to determine rental value. Disputes over assessment would inevitably arise. Confrontations would require the production and inspection of a church's, not a minister's, bills, documents, and deeds. In *Walz*, the Court upheld real estate tax exemptions to avoid excessive entanglement.[88] If the courts overrule section 107(1)'s exemption, the same areas of confrontation protected in *Walz* would be exposed.

Walz's "excessive entanglement" analysis generates a secular legislative purpose that the courts could hypothecate to justify section 107(1). In *Walz*, the Court ruled that the indirect support of religion that a property tax exemption provides is only incidental to designing a fiscal relationship with minimal church-state entanglement.[89] The Supreme Court could apply the *Walz* rationale to hy-

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lodging, furnished on the employer's premises, for the convenience of the employer, and as a condition of employment should be exempt under the provisions of section 119. The disparate tax treatment effected by section 107(1) arguably stems from the difficulty of qualification rather than the type of benefit provided. *See* I.R.C. § 119 (1976).

84 413 U.S. 756 (1973).

85 *Id.* at 785-91.

86 397 U.S. 664 (1970).

87 *Id.* at 674. The potential grounds for confrontation in *Walz* included tax assessments and property valuations which are required for computation of a property tax. *Id.*

88 *Id.*

89 *Id.* at 676.

pothecate a secular legislative purpose for 107(1) as insulating church owned property from excessive government entanglement.

The breadth or narrowness of the class of section 107 beneficiares is irrelevant under the *Walz* disentanglement analysis. The Court has indicated that a narrow class of beneficiaries implies a special aid to religion under secular purpose[90] and primary secular effect analyses.[91] The Court has further indicated that the narrowness of a statute's class of beneficiaries is an important factor in politically divisive entanglement analysis.[92] The analytic inquiry in disentanglement is separation, however, not support or foundations of political discord. Whether a statute furthering separation exists alone or as a part of a wider exemption has no qualitative effect on the degree of separation a statute effects.

The third prong of the establishment clause test requires an analysis of the entanglement inherent in section 107(1)'s application. Section 107(1) involves an administrative entanglement to the extent that an individual must establish his or her status as a minister performing ministerial duties.[93] The entanglement inherent in section 107(1) seems no more excessive than the entanglement sustained in the *Walz* case of ascertaining that religiously exempt property is being used for religious worship.[94] The section 107(1) exemption resembles the exemption in *Walz* in that the elimination of section 107(1) would increase rather than diminish the degree of government entanglement.

Section 107(1) does not entrench upon an area likely to stoke the fires of religiously based discord. Section 107(1) does not require a government appropriation or determination of need. Section 107(1)'s low profile existence since 1921 indicates that it is not the type of politically divisive measure that the Court will find objectionable.

B. *Section 107(2): Rental Allowance*

The constitutionality of section 107(2) also depends upon its compliance with the Supreme Court's three-prong establishment clause test. The first prong mandates that section 107(2) evince a secular legislative purpose. No express secular legislative intent is

90 *Id.* at 672-73.
91 Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 823 (1973).
92 *Id.* at 794.
93 Wolman v. Walter, 433 U.S. 229 (1976).
94 *See* text accompanying note 60 *supra*.

discernable from section 107(2).[95] Section 107(2) amended the parsonage exclusion in 1954. The conference report for section 107(2) states that the exclusion of the rental value of a home furnished a minister as part of his salary was unfair to those ministers who must receive larger salaries (which are taxable) to compensate them for their expenses in supplying a home.[96] Section 107(2)'s author indicates that section 107(2) was penned to aid underpaid clergy members.[97] The provision's legislative history portrays it as a countermeasure to the financial benefit that section 107(1) grants to churches having parsonages.

Hypothecating an independent secular legislative purpose for section 107(2) is difficult. Section 107(2) does not separate church property from government regulation. Nor does section 107(2) only incidentally impact religion while promoting or preserving broad public objectives such as health, safety or commerce. Therefore, section 107(2) fails to pass constitutional muster under the first prong of the test.

The second prong of the establishment clause test requires section 107(2) to manifest a primarily secular effect. Section 107(2) directly benefits ministers and religion. The most direct effect of section 107(2) is its significant lowering of a minister's tax burden. Section 107(2) concurrently bestows an economic benefit upon the minister's church, in much the same manner as section 107(1).[98] While the support section 107(2) provides to ministers and religions is qualitatively identical to section 107(1), there is one difference. The IRS has interpreted section 107(2) to allow ministers who purchase homes to exclude the home's fair rental value from gross income.[99] Section 107(2) thus provides ministers with personal benefits beyond any religious considerations by allowing an exemption for funds expended on a home which will appreciate in value.

One cannot perceive section 107(2)'s aggregate benefits as flow-

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95 *See* S. REP. NO. 1622, 83d Cong., 2d Sess. (1954); H. R. REP. NO. 1337, 83d Cong., 2d Sess. (1954); H. R. CONF. REP. NO. 2543, 83d Cong., 2d Sess. (1954).

96 H.R. CONF. REP. NO. 2543, 83d Cong., 2d Sess. 1 (1954).

97 Section 107(2)'s author, Congressman Peter Mack, argued that clergy members were statistically underpaid fighters of godlessness who deserved the congressional support inherent in section 107(2). *Hearings on General Revenue Revision Before the House Comm. on Ways and Means*, 83rd Cong., 1st Sess., pt. 3, 1575-76 (1953).

98 The aid granted by section 107(2) parallels the benefits generated by section 107(1). Section 107(2) allows a church to pay lower salaries and still provide their ministers with a given net income. The taxpayer supports the minister and religion because the taxpayer's weighted tax burden is increased by the amount of the deduction.

99 Treas. Reg. § 1.107-1(c) (1963).

ing from a *Walz* type separation of church and state. Section 107(2) confers its entitlements based exclusively on a minister's religious status. The courts are not likely to ignore the religious support that section 107(2) effects and rule that section 107(2) has the primary effect of establishing equity among the Code's benefits.[100] In *Committee for Public Education v. Nyquist*,[101] the Court reviewed a New York statute governing a tax deduction program. The statute sought to achieve tax parity for parents who supported public schools while being religiously compelled to send their children to parochial schools. The Court struck down the New York statute stating:

> *Special tax benefits*, however, cannot be squared with the principle of neutrality established by the decisions of this Court. To the contrary, insofar as such benefits render assistance to parents who send their children to sectarian schools, *their purpose and inevitable effect are to aid and advance those religious institutions*.[102]

Absent a *Walz* disentanglement justification, section 107(2) should be construed as violating the establishment clause.

A primary non-secular effect of section 107(2) cannot be justified under the guise of tax equity. In *Sloan v. Lemon*,[103] the Court indicated that an equity claim under the equal protection clause cannot sustain a program that violates the establishment clause. In *Sloan*, the parents of children attending sectarian schools argued that they were entitled to receive the same assistance as parents of those children attending non-sectarian schools as a matter of equal protection. The Court stated in *Sloan* that:

> The Equal Protection Clause has never been regarded as a bludgeon with which to compel a state to violate other provisions of the Constitution. Having held that tuition reimbursements for the benefit of sectarian schools violate the Establishment Clause, nothing in the Equal Protection Clause will suffice to revive that program.[104]

Thus, an argument that section 107(2) promotes tax equity should fail.

Section 107(2) may unconstitutionally prefer certain religions

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100 That some churches have parsonages and benefit by section 107(1), while others do not, seems no more of a burning injustice than the fact that certain employers could provide "in kind" tax exempt housing under section 119 but do not. *See* text accompanying note 82 *supra*.

101 413 U.S. 756 (1973).

102 *Id.* at 793 (emphasis added).

103 413 U.S. 825 (1972).

104 *Id.* at 834.

over others. For example, a congregational religion with no permanent or specifically designated ministers would not receive section 107(2)'s financial benefits as would a centralized religion with a designated ministry. Professor Tribe,[105] while not specifically referring to section 107(2), questions the constitutionality of narrow exemption statutes. He reasons that a religious exemption granted to less than all whose views could arguably be deemed religious might support a claim that the government is helping to establish religion by its circumscribed exemption.[106]

Applying section 107(2) does not involve excessive entanglement. The parties to a section 107(2) administrative conflict are limited primarily to the government and an individual minister, not a church. Reviewing a minister's employment contract or a church resolution is certainly no more involved than determining that exempt property is being used for religious worship. Nor has section 107(2) developed into a politically divisive enactment requiring renunciation to prevent political polarization along religious lines.

IV. Conclusion

The establishment clause prohibits governmental acts in support of religion. In general, code section 107 authorizes governmental acts in support of religion in the form of a narrow exemption that directly and indirectly benefits religious institutions and individuals.

Establishment clause analysis reveals that section 107(1) possesses a constitutionally sustainable purpose and effect on disentanglement grounds. *Walz* stands for the proposition that the government should keep its administrative hands off of church property. Entanglement leads to conflict. Section 107(1) has separated church property from government entanglement since 1921 and should be sustained.

Section 107(2), however, fails the establishment clause test. Section 107(2)'s enactment in 1954 was a governmental attempt to equalize the section 107(1) tax benefits for churches without parsonages. It is not the proper role of government to equalize financial benefits among differently situated churches. Rather, any governmental aid to religion must incidentally derive from an act with a

105 Laurence H. Tribe, Professor of Law, Harvard University.

106 *See* L. TRIBE, *supra* note 20, at 840.

secular legislative purpose and a primary secular effect. Since section 107(2) fails this test, it should be struck down as violating the establishment clause.

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