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DO RELIGIOUS TAX EXEMPTIONS ENTANGLE IN VIOLATION OF THE ESTABLISHMENT CLAUSE? 

Edward A. Zelinsky*

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Section 107 of the Internal Revenue Code excludes from gross income the value of in-kind housing and cash parsonage allowances provided to “minister[s] of the gospel.” During the course of the celebrated Warren litigation, several commentators (including me) predicted that, if that litigation were dismissed, a subsequent challenge would eventually be mounted to the constitutionality of Section 107. This prediction has come to fruition. Warren was dismissed in 2002 and now, in Freedom from Religion Foundation v. Geithner, the Freedom from Religion Foundation (FFRF), for itself and its members, argues that Section 107 and the income tax exclusion that section grants to “minister[s] of the gospel” violate the Establishment Clause of the First Amendment.

However, we did not predict that, when the constitutionality of Section 107 was again questioned in court, the case would have implications for a new federal law mandating that individuals maintain “minimum essential” health care coverage for themselves and their dependents. The individual health care mandate established by the Patient Protection and Affordable Care Act (PPACA) and the Health Care and

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4 715 F. Supp. 2d 1051 (E.D. Cal. 2010); see also Freedom from Religion Found. v. Geithner, 644 F.3d 836 (9th Cir. 2011) (affirming in part and reversing in part with respect to clergyman’s motion to intervene).
5 U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion . . . .”)
Education Reconciliation Act (HCERA) of 2010\(^9\) contains two religious exemptions.\(^10\) One of these exemptions incorporates a pre-existing religious exemption from the federal self-employment tax.\(^11\) These sectarian exemptions raise the same First Amendment issues as does the Code’s exclusion of clerical housing from gross income. In First Amendment terms, Section 107, the federal health mandate’s religious exemptions, and the religious exemptions from the Federal Insurance Contributions Act (FICA) and the self-employment taxes raise the possibilities of unconstitutional subsidization of religion and of excessive entanglement between church and state.

I write to evaluate the claim that Section 107 is unconstitutional because of the entanglement it causes and to explore the implications of that claim for the religious exemptions from the new federal health care mandate, as well as the religious exemptions from the taxes financing Social Security. While the constitutionality \textit{vel non} of the new health care mandate has been controversial,\(^12\) commentators have largely ignored the issue of the constitutionality of the health mandate’s two religious exemptions.

I ultimately reject the indictment of Section 107 as impermissibly entangling church and state. For the same reasons, I also conclude that the religious exemptions of the Social Security taxes and of the individual health mandate pass First Amendment muster. Extensive contact between modern tax systems and religious institutions is unavoidable. Whether religious entities and actors are taxed or exempted, there are no disentangling alternatives, just imperfect trade-offs between different forms of entanglement.

If religious institutions and actors are taxed, they are subjected to the inherently intrusive relationship between the tax collector and the taxpayer. If religious institutions and actors are not taxed, there are inevitable tensions policing the borderlines of exemption. In the contemporary tax context, there is no way to prevent significant entanglement between mega-churches and mega-governments. Rather, the inevitable choice is between borderline entanglement and enforcement entanglement.

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\(^11\) Id. § 1402(g) (West 2012).
\(^12\) Compare Thomas More Law Center v. Obama, 651 F.3d 529 (6th Cir. 2011), with Florida \textit{ex rel} Att’y Gen. v. U.S. Dep’t of Health & Human Serv., 648 F.3d 1235 (11th Cir. 2011), \textit{cert. granted} 132 S. Ct 604 (2011); see also CONG. RESEARCH SERV., \textit{REQUIRING INDIVIDUALS TO OBTAIN HEALTH INSURANCE: A CONSTITUTIONAL ANALYSIS}, at R40725 (2010), \textit{available at} http://assets.opencrs.com/rpts/R40725_20090724.pdf. The CRS has discussed the constitutional issues surrounding the religious exemptions of the individual health care mandate. \textit{Id.} at 20–25.
Section 107 and the exclusion from gross income it grants to clerical recipients of housing and parsonage allowances are constitutionally permitted, though not constitutionally required, responses to the alternative forms of entanglement inherent in the relationship between modern government and religion. Similarly, the Code’s sectarian exemptions from the individual health care mandate and from the FICA and self-employment taxes are acceptable, though not obligatory, means under the First Amendment of managing the inevitable contacts and tensions between the contemporary state and the religious community. Through these exemptions, Congress plausibly chooses entanglement between church and state at the borders of exemption rather than the entanglement of enforcing tax laws against religious entities and their personnel. Entanglement between church and state is inevitable whether the modern tax law exempts or taxes sectarian institutions and actors. This reality undermines the characterization of Section 107 and other tax exemptions as subsidies of religion since there is a credible, non-subsidizing rationale for each of these Code provisions, i.e., the management of tax-related entanglement between church and state, given the inexorable and imperfect trade-off between enforcement entanglement and borderline entanglement.

However, that a particular tax exemption is constitutionally permitted does not mean that it is a good idea in terms of tax policy. As a matter of such policy, the exclusion of Section 107(2) for cash parsonage allowances stands on weaker ground than does the exclusion of Section 107(1) for in-kind housing provided to “minister[s] of the gospel.” The church-state entanglement inherent in taxing noncash income is particularly acute in light of the valuation and liquidity problems of taxing such noncash income. In contrast, the taxation of cash parsonage allowances, unlike the taxation of housing provided in-kind, does not involve quandaries of valuation or of taxpayer liquidity and is thus less entangling as a constitutional matter and more practicable as a matter of tax policy.

The advisability of the parsonage allowance has recently come into particular focus as a result of three developments: the investigation of “media-based ministries” by the staff of Senator Grassley, former rank-
The first five parts of this Article establish the background for my analysis. The first part describes the Supreme Court’s Establishment Clause decisions concerning religious entanglement. These cases highlight the inevitable choice between borderline entanglement and enforcement entanglement. The second part of this Article outlines Code Section 107, which excludes from ministers’ gross incomes housing and housing allowances, and Code Section 119, which more generally excludes from employees’ incomes certain employer-provided housing. The third part of this Article explores the religious exemptions from the two taxes which finance Social Security benefits, the FICA tax on wages, and the federal self-employment tax. The fourth part of this Article discusses the religious exemptions of the new federal health insurance mandate on individuals while the fifth part describes the Warren litigation and FFRF’s complaint against Section 107.


17 Grassley Staff Memo, supra note 14, at 15 (noting that among “issues for consideration” are “[s]hould the parsonage allowance be limited to a single primary residence or to a specific dollar amount?”).
Against this background, the sixth part of this Article concludes that Section 107 is not a tax “subsidy” because it serves a nonsubsidizing purpose, i.e., the management of tax-related entanglement between church and state by eschewing enforcement entanglement at the price of borderline entanglement. The seventh part of this Article contends that invalidating Section 107 will not reduce church-state entanglement, but will merely shift the nature of such entanglement from policing the borderlines of exemption to the enforcement of housing-related income tax against religious employers and individuals. The entanglement problems of taxing noncash income, such as housing provided to clerical employees, are particularly acute given the valuation and liquidation quandaries of taxing in-kind income. These problems reinforce the decision embodied in Section 107 to opt for the difficulties of borderline entanglement over the costs of enforcement entanglement. The eighth part of this Article places the discussion in the context of Section 119 and highlights the extent to which repealing Section 107 would, in significant measure, refocus the tax law upon the enmeshing questions involved in determining the boundaries of Section 119. The ninth part of this Article rejects the possibility of holding Section 107 unconstitutional while simultaneously forbidding Section 119's exclusion to religious employers and their employees. Among its other defects, this approach would entangle the Internal Revenue Service (IRS) and religious entities in determining which employers are religious and therefore barred from Section 119. There is, moreover, a serious problem under the Free Exercise Clause if only religious employers and their workers are precluded from Section 119 and its income tax exclusion of employer-provided housing.

The tenth part of this Article concludes that, while Section 107 is constitutional as a permissible approach to managing entanglement between the IRS and religious entities and their ministers, Section 107(2) is not persuasive as a matter of tax policy. The recipients of cash parsonage allowances have liquidity to pay income tax; there are no valuation problems taxing cash. Hence, as a matter of tax policy, parsonage allowances should be taxed. In First Amendment terms, taxing cash compensation does not enmesh church and state as severely as would the taxation of clerical housing provided in-kind. The repeal of Section 107(2) is preferable to the alternatives of capping the dollar amount of the parsonage allowance or limiting the allowance to a single clerical home.

The eleventh part of this Article concludes that, just as Section 107 is constitutional as a permissible means of managing the inevitable church-state entanglement trade-offs under the modern income tax, the religious exemptions under the individual health mandate, the FICA tax, and the self-employment tax are all constitutionally permitted,
though not constitutionally required. In these contexts also, the inevitable choice is between the problems of borderline entanglement and the quandaries of enforcement entanglement. Through these tax exemptions, Congress has reasonably and constitutionally opted to avoid the difficulties of enforcing the tax law against religious actors and institutions by accepting the problems of policing the borders of tax exemption for such actors and institutions.

The final part of this Article briefly places my conclusions into the context of controversy over the three-part *Lemon* test\(^{18}\) and the Supreme Court’s recent decision in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*.\(^{19}\) One of the three elements of the *Lemon* First Amendment test is entanglement. Whatever the value in other settings of the concept of entanglement, that concept is of limited (typically no) use in assessing the First Amendment status of tax laws since, given the realities of modern tax systems, there are no disentangling alternatives. In the tax context, the only choices are to tax sectarian institutions and actors (and thus incur the problems of enforcement entanglement) or to exempt such institutions and actors (and thus experience the problems of borderline entanglement).

While the constitutionality *vel non* of Section 107 is important in and of itself, more is at stake in *Freedom from Religion Foundation* than the First Amendment status of the federal income tax exclusion for clerical housing and parsonage allowances. The ultimate issue raised by this litigation is whether federal, state and local tax statutes can, consistent with the First Amendment, contain religious exemptions. If Section 107 unconstitutionally entangles church and state as FFRF argues, so too do the statutory exemptions from the new federal health care mandate as do the sectarian exemptions from the Social Security taxes. By the same token, if Section 107 passes First Amendment muster (as I conclude it does), the religious exemptions of the individual health care mandate and of the self-employment and FICA taxes are likewise constitutional. These exemptions permissibly implement the plausible (though not compelled) choice to incur the problems of borderline enforcement rather than the difficulties of enforcement entanglement, a reasonable choice in a world of imperfect trade-offs between entangling alternatives. Whether the government chooses to tax religious actors and institutions or to exempt them, there are no disentangling alternatives.


\(^{19}\) 132 S. Ct. 694 (2012).
I. THE SUPREME COURT’S ENTANGLEMENT DECISIONS: BORDERLINE ENTANGLEMENT V. ENFORCEMENT ENTANGLEMENT

The history of contemporary First Amendment entanglement law starts with *Walz v. Tax Commission*. The majority opinion in *Walz* focused on enforcement entanglement, the intrusion into internal church operations which results when the church is taxed and upon the protection of religious institutions’ autonomy when those institutions are excluded from the tax base. Justice Harlan’s concurrence in *Walz* highlights the borderline entanglement stemming from religious exemptions, the entanglement which flows from the need to define and police the boundaries of such exemptions. These two opinions—the first focusing upon sectarian autonomy, the second concentrating on borderline enforcement—illustrate the entangle ment concerns at play when analyzing the constitutionality of Section 107 and the religious exemptions of the individual health care mandate and of the self-employment and FICA taxes.

In *Walz*, an owner of taxable real property mounted a First Amendment challenge to New York’s property tax exemption for “real or personal property used exclusively for religious . . . purposes.” In a majority opinion for himself and five of his colleagues, Chief Justice Burger declared such exemption constitutional as reflecting “a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.” Chief Justice Burger placed the tax exemption for religious property in the context of the exemptions simultaneously extended to “a broad class of property owned by non-profit, quasipublic corporations which include hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups.” He also observed that the purpose of New York’s “property tax exemption is neither the advancement nor the inhibition of religion.” Rather, New York “has an affirmative policy that considers these groups as ben-

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22 *Id.* at 666–67 (quoting N.Y. CONST. art. XVI, § 1).

23 *Id.* at 669.

24 *Id.* at 672–73.

25 *Id.* at 672.
eficial and stabilizing influences in community life and finds this classification useful, desirable, and in the public interest.”26

Moreover, while tax exemption yields “an indirect economic benefit” to the exempted religious institutions, such exemption also minimizes “entanglement” between the government and those institutions.27 The tax exemption of church property, wrote Chief Justice Burger, recognizes “the autonomy and freedom of religious bodies”28 and “creates only a minimal and remote involvement between church and state and far less than taxation of churches. It restricts the fiscal relationship between church and state, and tends to complement and reinforce the desired separation insulating each from the other.”29

Concurring, Justice Brennan justified the tax exemption of churches under the First Amendment because of the “nonreligious” benefits churches provide to the community as part of “a range of other private, nonprofit organizations.”30 Echoing Chief Justice Burger’s concern about possible entanglement between churches and the tax collector, Justice Brennan also declared that tax exemptions, in contrast to cash subsidies, “constitute mere passive state involvement with religion and not the affirmative involvement characteristic of outright governmental subsidy.”31 Taxing churches, no less than exempting them, “involve[s] [the government] with religion.”32

In his concurrence, Justice Harlan, like his colleagues, noted the “broad and divergent groups”33 covered by New York’s property tax exemption. Since that exemption is “so sweeping,” Justice Harlan wrote, the exemption’s “administration need not entangle government in difficult classifications of what is or is not religious.”34

While both Chief Justice Burger and Justice Harlan applied to their respective concerns the “entanglement” moniker, they raised different considerations. Chief Justice Burger’s entanglement concerns are enforcement-related, focused on the internal “autonomy” of religious institutions. Taxation is inherently intrusive, as anyone who has undergone a tax audit understands.35 Exempting religious institutions and their personnel from taxation “separat[es]” and “insulat[es]” govern-

26 Id. at 673.
27 Id. at 674–76.
28 Id. at 672.
29 Id. at 675.
30 Id. at 687–88.
31 Id. at 691.
32 Id.
33 Id. at 696.
34 Id. at 698.
35 Professors Crimm and Winer agree. NINA J. CRIMM & LAWRENCE H. WINER, POLITICS, TAXES, AND THE PULPIT: PROVOCATIVE FIRST AMENDMENT CONFLICTS 176 (2011) (“Anyone who has been subject to an IRS audit appreciates how intrusive it can be.”).
ment and sectarian institutions from each other, thereby respecting the internal autonomy of such institutions.36

Justice Harlan, by contrast, focused on the entanglement problems at the borderlines of exemption. The breadth of the New York property tax exemption reassured Justice Harlan that those problems were manageable in Walz. However, Justice Harlan’s analysis suggests that a narrower tax exemption than New York’s might fail First Amendment scrutiny as requiring excessively intrusive activity to police the exemption’s boundaries.

One year after Walz, that decision’s “excessive entanglement” standard became one of the three components37 of the famous Lemon test. In Lemon v. Kurtzman,38 the Supreme Court, in an opinion by Chief Justice Burger, struck on First Amendment grounds Pennsylvania and Rhode Island statutes channeling financial assistance to nonpublic education. In particular, the Court declared that the statutes “involve[d] excessive entanglement between government and religion.”39 While the funds given by these states to religious schools were restricted to secular subjects, “[a] comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed... These prophylactic contacts will involve excessive and enduring entanglement between state and church.”40 This is the same entanglement concern that the Chief Justice expressed in Walz, namely, the enforcement-related intrusion of the government into internal church autonomy as the government administers the law. In Lemon, the laws in question unconstitutionally impaired sectarian autonomy by requiring the states to audit religious schools to determine such schools’ compliance with the restrictions on the government funds the religious schools received.

Lemon also invoked as an entanglement problem the possibility of political divisiveness along sectarian lines: “Here we are confronted with successive and very likely permanent annual appropriations that benefit relatively few religious groups. Political fragmentation and divisiveness on religious lines are thus likely to be intensified.”41

Chief Justice Burger distinguished in two ways the Rhode Island and Pennsylvania statutes stricken in Lemon from the New York property tax exemption upheld in Walz. The former required regular, annual

36 Walz, 397 U.S. at 675.
38 403 U.S. 602 (1971).
39 Id. at 614.
40 Id. at 619.
41 Id. at 623.
appropriations of public monies and thus heightened the danger of sectarian political conflict. Moreover, the property tax exemption for churches has a long tradition. This history suggested to the Chief Justice that such exemption carries less potential for sectarian political division than the new statutes recently adopted by the Ocean and Keystone states. These two factors—history and annual appropriations—indicate that the entanglement caused by Section 107 is not excessive. These factors are also at play when analyzing the constitutionality of the religious exemptions of the individual health care mandate and of the Social Security taxes. In addition, Lemon’s concern about ongoing administrative entanglement between church and state cautions against taxing religious institutions since taxation invariably involves continuing enforcement activity by the tax collector and continuing compliance activity by the religious taxpayer.

The Burger and Harlan opinions in Walz identified the major themes that reappeared in Texas Monthly, Inc. v. Bullock when the Court addressed the First Amendment status of Texas’s sales tax exemption for religious literature: the economic value of tax exemption, the purpose for and effect of such exemption, the dangers of entangling the tax collector and religious actors. In Texas Monthly, Justice Brennan, writing for a three-justice plurality, struck the Texas sales tax exemption because it was limited to sales of religious publications.

The facts in Texas Monthly were as straightforward as they were in Walz: For a three year period, Texas imposed sales and use taxes on the sale of secular publications like Texas Monthly magazine while exempting from such taxes the sale of religious periodicals and books. Texas Monthly, Inc., the publisher of Texas Monthly, collected and paid the taxes and then sued for a refund, claiming that the exemption for sales of religious publications violated the Establishment Clause of the First Amendment.

For himself, as well as Justices Marshall and Stevens, Justice Brennan interpreted Walz as upholding the New York property tax exemption for churches only because the benefits of such exemption “flowed to a large number of nonreligious groups as well.” Equally critical for Justice Brennan was the proposition that “[e]very tax exemption constitutes a subsidy.” Since exemption is subsidization, such subsidization cannot, consistent with the Establishment Clause, be directed “exclusively to religious organizations.”

42 Id. at 622.
45 Id. at 5–6.
46 Id. at 11.
47 Id. at 14.
48 Id. at 15.
As to the entanglement considerations so prominent in *Walz*, Justice Brennan opined in *Texas Monthly* that the Texas sales tax exemption for religious periodicals “produce[s] greater state entanglement with religion than the denial of an exemption”\textsuperscript{49} since the state must determine which publications are religious and thus qualify for sales tax exemption. This is Justice Harlan’s borderline version of entanglement, the concern that a narrowly drawn exemption restricted to religious institutions engenders conflict as institutions seek to qualify for the exemption. The state must police the boundaries of the exemption and determine which entities qualify for it.

The fourth and fifth votes\textsuperscript{50} in *Texas Monthly* came from Justices Blackmun and O’Connor who concurred separately. Concluding that “[t]he Free Exercise Clause suggests that a special exemption for religious books is required” while “[t]he Establishment Clause suggests that a special exemption for religious books is forbidden,”\textsuperscript{51} Justice Blackmun proposed the “narrow resolution” of *Texas Monthly*: “[B]y confining the tax exemption exclusively to the sale of religious publications, Texas engaged in preferential support for the communication of religious messages.”\textsuperscript{52} Such “preference for the dissemination of religious ideas offends our most basic understanding of what the Establishment Clause is all about.”\textsuperscript{53}

In a blistering dissent joined by Chief Justice Rehnquist and Justice Kennedy, Justice Scalia found *Walz* “utterly dispositive” of Texas Monthly’s First Amendment challenge to the Texas sales tax exemption for sales of religious literature.\textsuperscript{54} Effectively dismissing as dicta *Walz*’s discussion of the exemption New York simultaneously extended to secular eleemosynary institutions in *Walz*, Justice Scalia opined, “[t]he Court did not approve an exemption for charities that happened to benefit religion; it approved an exemption for religion as an exemption for religion.”\textsuperscript{55}

The First Amendment “principle of permissible accommodation”\textsuperscript{56} permits exemptions limited to religious actors to preclude enforcement-related entanglement of church and state: “[I]t is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious

\textsuperscript{49} Id. at 20.
\textsuperscript{50} Justice White expressed no opinion on the Establishment Clause question, finding the Texas sales tax exemption a content-based exemption, barred by the Press Clause of the First Amendment. Id. at 26.
\textsuperscript{51} Id. at 27.
\textsuperscript{52} Id. at 28.
\textsuperscript{53} Id.
\textsuperscript{54} Id. at 36.
\textsuperscript{55} Id. at 38.
\textsuperscript{56} Id. at 39.
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missions.” Such entanglement-avoiding exemptions, Justice Scalia argued, may “single[] out religious entities for a benefit, rather than benefiting a broad grouping of which religious organizations are only a part.”

In Texas Monthly, Justice Brennan declared that the Texas sales tax exemption “appears, on its face, to produce greater state entanglement with religion than the denial of an exemption.” In Walz, Chief Justice Burger advanced the opposite claim, that tax exemption “creates only a minimal and remote involvement between church and state and far less than taxation of churches.” At one level, these seemingly contradictory assertions can be reconciled by the nature of the specific taxes each justice confronted. Because of valuation disputes and liquidity concerns, ad valorem property taxation (like the taxation of in-kind fringe benefits) arguably is more entangling than is sales taxation, aimed at cash transactions.

At another level, however, there is no easily applied metric for determining whether policing tax exemption borderlines generates greater entanglement between church and state than does taxing sectarian institutions and actors. Thus, the tension between Chief Justice Burger’s Walz opinion and Justice Brennan’s opinion in Texas Monthly highlights the reality that, in the context of tax exemptions for religious institutions and actors, there are no disentangling alternatives. There is only the choice between borderline entanglement and enforcement entanglement.

II. CODE SECTIONS 107 AND 119

Section 107 excludes from the gross income of a “minister of the gospel”

(1) the rental value of a home furnished to him as part of his compensation; or

(2) the rental allowance paid to him as part of his compensation, to the extent used by him to rent or provide a home and to the extent

57 Id. (quoting Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 335 (1987)).
58 Id. (quoting Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints, 483 U.S. at 333).
59 Id. at 20.
such allowance does not exceed the fair rental value of the home, including furnishings and appurtenances such as a garage, plus the cost of utilities.

Cash payments excluded from a clergyman’s gross income pursuant to Section 107(2) have come to be denoted as “parsonage allowance.”

For purposes of Section 107, the U.S. Tax Court has construed the term “minister of the gospel” to include a full-time cantor in a conservative synagogue. However, the Tax Court denied the parsonage allowance exclusion to a Baptist “minister of education” on the grounds that he was not a “minister of the gospel.”

To qualify for the Section 107 exclusion, it is not enough that a recipient of in-kind housing or of a cash parsonage allowance be a “minister of the gospel.” In addition, the regulations construing Section 107 specify that the clerical recipient must receive his housing or cash allowance as compensation for performing services “ordinarily” associated with a religious ministry. In particular, the Treasury regulations restrict the Section 107 exclusion to the value of a home or a parsonage allowance which constitutes “remuneration for services which are ordinarily the duties of a minister of the gospel.” Such duties “include performance of sacerdotal functions, the conduct of religious worship, the administration and maintenance of religious organizations and their integral agencies, and the performance of teaching and administrative duties at theological seminaries.”

Thus, for example, an ordained rabbi was denied the parsonage allowance exclusion because his service as “the national director of Interreligious Affairs for the American Jewish Committee . . . was not a ministerial function” for purposes of Section 107. Similarly, a Baptist minister employed by the Christian Anti-Communism Crusade was denied the exclusion because “the preaching of anticommunism [is not] the conduct of religious worship.” Likewise, the Treasury regulations conclude that a clergyman is not performing services in the exercise of his ministry when he teaches “history and mathematics” at a secular university.

In contrast, the regulations indicate that duties as a university chaplain “which include the conduct of religious worship, offering spiritual counsel to the university students, and teaching a class in religion”

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64 Silverman v. Comm’r, 57 T.C. 727 (1972).
67 Id.
68 Tanenbaum v. Comm’r, 58 T.C. 1, 9 (1972).
70 Treas. Reg. § 1.1402(c)-5(c)(2) (as amended in 1968).
constitute services in the exercise of a ministry.\textsuperscript{71} Similarly, according to the regulations, a minister performs services in the exercise of his ministry when he works full-time for “the N Religious Board to serve as director of one of its departments.” “The N Religious Board is an integral agency of O, a religious organization operating under the authority of a religious body constituting a church denomination.”\textsuperscript{72} Moreover, a minister performs services in the exercise of his ministry when he is assigned full-time by his church “to perform advisory service to Y Company in connection with the publication of a book dealing with the history of M’s church denomination.”\textsuperscript{73}

Much of this regulatory framework implements the ministerial exemption from the self-employment tax and is incorporated by reference\textsuperscript{74} for purposes of Section 107 and that section’s exclusion of housing and housing allowances provided to “minister[s] of the gospel.” Consequently, if these regulations unduly entangle for purposes of Section 107, they also unconstitutionally entangle for purposes of the self-employment tax under which these regulations are promulgated.

To be excludable from gross income under Section 107(2), a parsonage allowance must be designated as such “in an employment contract, in minutes of or in a resolution by a church or other qualified organization or in its budget, or in any other appropriate instrument evidencing such official action.”\textsuperscript{75} In addition, the allowance must be used “(1) for rent of a home, (2) for purchase of a home, and (3) for expenses directly related to providing a home.”\textsuperscript{76} Outlays for “food and servants” do not qualify for exclusion.\textsuperscript{77} The parsonage allowance cannot “exceed the fair rental value of the home, including furnishings and appurtenances such as a garage, plus the cost of utilities.”\textsuperscript{78}

Although housing and parsonage allowances provided to ministers are excludable from such ministers’ gross incomes for income tax purposes, such housing and allowances are subject to the self-employment tax.\textsuperscript{79}

In contrast to Section 107 and its exclusion for in-kind housing and cash parsonage allowances limited to “minister[s] of the gospel,” Code

\begin{footnotes}
\item[71] Id. § 1.1402(c)-5(b)(2)(iii).
\item[72] Id. § 1.1402(c)-5(b)(2)(iv).
\item[73] Id. § 1.1402(c)-5(b)(2)(v).
\item[74] Id. § 1.107-1(a) (as amended in 1963) (“In general, the rules provided in § 1.1402(c)-5 will be applicable to such determination.”).
\item[75] Id. § 1.107-1(b) (as amended in 1963).
\item[76] Id. § 1.107-1(c) (as amended in 1968).
\item[77] Id.
\item[79] Id. § 1402(a)(8) (West 2012).
\end{footnotes}
Section 119 provides a general income tax exclusion for housing furnished in-kind by employers to their respective employees. To qualify for this exclusion from gross income, “lodging” must be “furnished” to “an employee . . . by or on behalf of his employer for the convenience of the employer.” In addition, to qualify for the Section 119 exclusion, “the employee [must be] required to accept such lodging on the business premises of his employer as a condition of his employment.”

Unlike Section 107, which excludes from gross income both in-kind housing and cash parsonage allowances furnished to “minister[s] of the gospel,” “Section 119 applies only to . . . lodging furnished in kind.”

III. THE RELIGIOUS EXEMPTIONS OF THE FICA AND SELF-EMPLOYMENT TAXES

The Federal Social Security system pays retirement, death, disability, and medical benefits to individuals who pay the taxes financing such benefits. These benefits are funded through two federal taxes, one levied on employees’ wages and one assessed on self-employment income.

In the case of an individual who is an employee covered by the Social Security system, the employee and the employer jointly pay these taxes, commonly denoted as FICA taxes. Specifically, if an individual earns “wages” (a statutorily defined term) from his “employment” (also a statutorily defined term), the employer withholds FICA taxes...
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from the individual’s pay and remits to the federal government this
withheld tax, along with an equal tax payment from the employer.

A self-employed person pays a Social Security tax mimicking the
combined FICA payments of an employee and her employer. In
particular, an individual who conducts a “trade or business” pays a Social
Security tax on her “self-employment income.” The statutory rate of
this self-employment tax equals the combined FICA rates paid by
employers and employees.

There are extensive exemptions from the FICA and self-
employment taxes for persons who oppose on religious grounds insurance
programs like the Social Security system. These religious tax ex-
emptions raise the same First Amendment entanglement issues as the
income tax exclusion for housing and housing allowances paid to “min-
ister[s] of the gospel.”

Section 1402(g) authorizes immunity from the federal self-
employment tax for “member[s] of a recognized religious sect” who, by
reason of their adherence to the “established tenets or teachings of such
sect,” are “conscientiously opposed to acceptance of the benefits of any
private or public insurance.” This exemption was adopted by Congress in 1965
and requires the member claiming exemption to apply for
and prove his eligibility for the exemption. As part of the application
process, the individual claiming this exemption from the self-
employment tax must waive his eligibility for Social Security benefits.

91 Id. § 3102 (2006).
92 Labor economists generally agree that, for the long run, the economic incidence of the
FICA taxes paid by employers falls in significant measure upon employees in the form of lower
cash wages and less employment. See, e.g., RONALD G. EHRENBERG & ROBERT S. SMITH, MOD-
ERN LABOR ECONOMICS: THEORY AND PUBLIC POLICY 86–89 (7th ed. 2000) (“[A] comprehensive
review of these studies led to at least a tentative conclusion that most of a payroll tax is
eventually shifted to wages . . . .”).
94 Id. § 1402(a).
95 Id. § 1402(b).
96 Today, the tax rate on self-employed income equals 15.3% of which 12.4% is allocated to
the Social Security program paying retirement, death and disability benefits and 2.9% is allocat-
ed to hospital coverage, conventionally known as Medicare. I.R.C. § 1401 (2006). For FICA
purposes, the employer and employee each pay taxes on wages of 7.65% for a total of 15.3% of
the employee’s wages. The employer and the employee each pay a FICA tax of 6.2% allocated to
retirement, death and disability benefits and 1.45% for Medicare. I.R.C. §§ 3101, 3111 (West
2012).
97 However, the subsidy analysis may be different because the tax relief generated by the
religious exemptions of the FICA tax, the self-employment tax and the individual health care
mandate are offset by a corresponding loss of Social Security benefits and of health care cover-
age.
99 Id. § 1402(g) (West 2012).
One of the religious exemptions from the new federal health insurance mandate incorporates Section 1402(g).102

Section 1402(e) also excuses from the federal self-employment tax “a duly ordained, commissioned, or licensed minister of a church or a member of a religious order” or “a Christian Science practitioner” if such minister, member or practitioner “is conscientiously opposed to, or because of religious principles [] is opposed to, the acceptance . . . of any public insurance” and if he applies for recognition of his status as such an opponent of public insurance.103 Since they contribute no taxes to the Social Security system, ministers and members of orders who oppose “public insurance” on religious grounds do not earn Social Security benefits.104 The regulations to which FFRF objects on entanglement grounds are in significant measure promulgated under Section 1402(e) and incorporated into Section 107 by reference.105

For FICA tax purposes, the term “employment” excludes “service performed by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry.”106 In addition, the term “employment” for FICA purposes excludes services performed “by a member of a religious order in the exercise of duties required by such order” unless the order elects Social Security coverage for its members.107

As a result of these statutory provisions, clergymen who are not opposed to Social Security pay self-employment tax since, as a statutory matter, they are not engaged in “employment” for FICA tax purposes but are instead deemed to be conducting a “trade or business” under the self-employment tax.108 For these clergymen, self-employment income includes any housing as well as cash parsonage allowances they receive.109 Clergymen religiously opposed to Social Security pay no FICA taxes because, as a statutory matter, they are not engaged in “employment”110 nor do they pay self-employment taxes because of the Section 1402(e) exemption.

102 Id. § 5000A(d)(2)(A) (West 2012).
103 Id. § 1402(g) (West 2012).
104 42 U.S.C. § 411(c) (West 2012) provides that, for Social Security purposes, a minister or member of an order exempt from self-employment taxes under I.R.C. § 1402(e) (West 2012) does not conduct a “trade or business.” Consequently, such minister or member does not have “net earnings from self-employment” for the calculation of Social Security benefits and thus has no “average indexed monthly earnings” to generate Social Security benefits. 42 U.S.C. §§ 411(a), 415(a)–(b) (West 2012).
105 Treas. Reg. § 1.107-1(a) (as amended in 1963) (“In general, the rules provided in § 1.1402(c)-5 will be applicable to such determination.”).
107 Id.; see also id. § 3121(r).
108 Id. § 1402(a)(8).
109 Id.
110 Id. § 3121(b)(8)(A).
In the wake of United States v. Lee, discussed infra, Congress also exempted from FICA tax obligations employers and employees who satisfy the terms of Section 1402(g), i.e., those who are “member[s] of a recognized religious sect” who, by reason of their adherence to the “established tenets or teachings of such sect,” are “conscientiously opposed to acceptance of the benefits of any private or public insurance.” Like the exemption from the self-employment tax under Section 1402(g), this exemption from FICA tax obligations requires the sect member asserting the exemption to apply for and prove his eligibility. As part of the application process, the individual claiming this religious exemption from FICA taxation must waive his entitlement to Social Security benefits.

A church or “church-controlled organization” which “is opposed for religious reasons to the payment of the” employer’s FICA tax obligation may elect for its employees’ earnings to be treated as nonemployment income for FICA purposes. As a result of this election, such church employees are deemed for self-employment tax purposes to be conducting a “trade or business” and thus owe self-employment taxes on their earnings and accrue Social Security benefits.

IV. THE RELIGIOUS EXEMPTIONS OF THE FEDERAL HEALTH MANDATE

Starting in 2014, PPACA and HCERA require most U.S. residents to carry “minimum essential” health care coverage for themselves and their dependents. This new individual health coverage mandate contains two religious exemptions. One religious exemption from the new health mandate incorporates the self-employment tax exemption of Section 1402(g) to excuse from the health mandate sect members opposed to insurance on religious grounds. This sectarian exemption from the individual health coverage mandate is similar to a religious

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112 See infra notes 182–91 and accompanying text.
113 I.R.C. § 1402(g)(1) (West 2012).
114 Id. § 3127(b) (2006).
115 Id.
116 Id. §§ 3121(b)(8)(B), 3121(w) (West 2012).
117 Id. § 1402(c)(2)(G).
exception under the Massachusetts state health law\(^\text{121}\) that pioneered the individual health insurance mandate.

The federal health care mandate also exempts from its coverage any “member of a health care sharing ministry” if the members of such ministry “share a common set of ethical or religious beliefs and share medical expenses... in accordance with those beliefs.”\(^\text{122}\)

V. **WARREN AND THE FFRF COMPLAINT**

*Warren v. Commissioner* arose from the IRS’s insistence that a parsonage allowance was excludable from a minister’s gross income only up to an amount equal to the fair market rental value of the minister’s home. The annual fair market rental value of Rev. Warren’s home was approximately $58,000.\(^\text{123}\) Substantially more, approximately $85,000 per year, was designated and paid to him as parsonage allowance and was actually spent on “mortgage, utilities, furnishings, landscaping, repairs, and maintenance and real property taxes and homeowner’s insurance premiums.”\(^\text{124}\) The U.S. Tax Court held that Rev. Warren’s entire parsonage allowance of $85,000 was excludable from his gross income. The IRS appealed to the U.S. Court of Appeals for the Ninth Circuit, contending, as it had in the Tax Court, that Rev. Warren\(^\text{125}\) could only exclude from his gross income $58,000 of his parsonage allowance, reflecting the fair rental value of Rev. Warren’s home.

Circuit Judge Reinhardt ignited a political firestorm when he sua sponte questioned Section 107’s constitutionality: “[I]t is possible that any tax deduction that Rev. Warren receives under § 107(2) would con-

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\(^\text{123}\) Warren v. Comm'r, 114 T.C. 343, 344 (2000). *Warren* actually involved three different years in each of which somewhat different numbers were at stake.

\(^\text{124}\) Id. at 345.

stitute an unconstitutional windfall at the public’s expense.”¹²⁶ The resulting controversy engendered much commentary.¹²⁷

Congress responded by unanimously¹²⁸ amending Section 107(2) to include prospectively the limit advocated by the IRS.¹²⁹ As a result, Section 107(2) today restricts any minister’s parsonage allowance to “the fair rental value of the [minister’s] home.” Simultaneously, Congress declared that this rule did not apply retrospectively, i.e., did not apply in Warren.¹³⁰

This legislation terminated the Warren litigation by making the case moot. However, this termination came at a significant price, namely, embedding into Section 107(2) the difficult-to-administer requirement that the church, the minister, and the IRS determine “the fair rental value of the [minister’s] home.”

In large measure, the FFRF complaint reprises the central theme advanced during the Warren litigation by the opponents of Section 107, namely, that Section 107 unconstitutionally subvents religion. The complaint filed by FFRF asserts that Section 107 unconstitutionally “subsidize(s), promote(s), endorse(s), favor(s), and advance(s) churches, religious organizations, and ‘ministers of the gospel.’”¹³¹

¹²⁶ Warren v. Comm’r, 282 F.3d 1119, 1121 (9th Cir. 2002).
¹²⁸ J. Christine Harris, President Signs Bill Clarifying Housing Allowance for Clergy, 95 TAX NOTES 1280 (2002).
¹³⁰ Id. § 2(b).
¹³¹ Complaint, supra note 6, ¶ 34. The U.S. Supreme Court’s decision in Arizona Christian School Tuition Organization v. Winn, 131 S. Ct. 1436 (2011), suggests that the FFRF taxpayer-plaintiffs lack standing to pursue their claims in the federal courts. In Winn, a five-justice majority held that Arizona taxpayers had no standing to mount an Establishment Clause challenge to state “tax credits for contributions to school tuition organizations, or STOs. STOs use these contributions to provide scholarships to students attending private schools, many of which are religious.” Id. at 1440. By denying taxpayers standing to challenge in the federal courts tax benefits in the form of tax credits, Winn indicates that the FFRF taxpayers also lack standing in the federal courts to challenge tax benefits in the form of the income tax exclusion provided by I.R.C. § 107 (2006).

However, as California taxpayers, the FFRF plaintiffs have strong claims to standing to challenge the parsonage allowance in the California courts. With minor modifications, CAL. REV. & TAX. CODE § 17131.6 (West 2012) incorporates I.R.C. § 107 and its parsonage allowance exclusion into the California income tax. The FFRF plaintiffs, as California taxpayers, have a robust claim to standing to challenge section 17131.6 in the California courts. Moreover, taxpayers in other states have standing to contest their respective states’ parsonage allowances. Thus, even if the current litigation is dismissed for lack of standing in the federal courts, it is inevitable that equivalent litigation challenging the constitutionality of the parsonage allowance will be heard in one or more state courts.

CAL. CIV. PROC. CODE § 526a (West 2012) authorizes actions to stop “any illegal expenditure of waste of, or injury to, the estate, funds, or other property of a county, town, city or
However, in an important respect, the FFRF complaint goes beyond the subsidy argument advanced by the earlier opponents of Section 107. Pressing beyond the claim of unconstitutional subvention, the FFRF also asserts that Section 107 causes "excessive entanglement" between church and state because "the IRS and the Treasury must make sensitive, fact-intensive, intrusive, and subjective determinations dependent on religious criteria and inquiries" to enforce Section 107 and its exclusion from gross income.\(^{132}\) Supportive commentators bolster the FFRF's argument that Section 107 contravenes the First Amendment because of the entanglement Section 107 causes between the IRS and the religious community.\(^{133}\) Part of the regulatory framework to which FFRF and these commentators object implements one of the religious exemptions from the self-employment tax\(^{134}\) and is incorporated under Section 107 by reference.\(^{135}\)

\(^{132}\) Complaint, \textit{supra} note 6, ¶ 35.


\(^{134}\) I.R.C. § 1402(e) (West 2012).

\(^{135}\) Treas. Reg. § 1.107-1(a) (as amended in 1963) ("In general, the rules provided in § 1402(c)-5 will be applicable to such determination.").
VI. ENTANGLEMENT, SUBSIDIZATION, AND THE NORMATIVE TAX BASE

Walz undermines the characterization of Section 107 as a tax subsidy since it points to a plausible, nonsubsidizing rationale for Section 107, i.e., a congressional decision to choose the problems of borderline entanglement rather than the costs of enforcement-related entanglement. The characterization of any tax provision as a subsidy is only compelling if there is first established a normative baseline of taxation from which that provision is deemed to subsidize. Only with such a baseline established can the “subsidy” moniker be meaningfully applied to provisions that deviate from that baseline. Walz suggests that a normative income tax may properly contain an exclusion like Section 107 to avoid enmeshing church and state in the inherently intrusive enforcement of the tax law. From this baseline, Section 107 is not a tax subsidy but, rather, is part of a normative tax.

Professor Bittker cogently observed over a generation ago: “The assertion that an exemption is equivalent to a subsidy is untrue, meaningless, or circular, depending on context, unless we can agree on a ‘correct’ or ‘ideal’ or ‘normal’ taxing structure as a benchmark for which to measure departures.”

Despite all of the ink which has subsequently been spilled on this topic, no one has ever refuted Professor Bittker’s insight that a tax exemption can only be convincingly labeled as a subsidy if there is prior agreement on the contours of a normative tax from which to measure subsidization.

Consider, for example, the exclusion under the federal income tax of the income from self-performed services. Consider, in particular, the failure to tax the income my neighbor generates by growing his own tomatoes in his home garden.

Those tomatoes constitute an “economic benefit” to my neighbor. He could readily realize the cash value of that benefit by selling his tomatoes at the local farmers’ market at a not insignificant price. When he instead eats those tomatoes, my neighbor’s consumption constitutes

138 See, e.g., MICHAEL A. LIVINGSTON & DAVID S. GAMAGE, TAXATION: LAW, PLANNING AND POLICY 126–27 (2d ed. 2010) (“[N]o one really expects the imputed income from goods or services to be taxed . . . .”).
139 United States v. Drescher, 179 F.2d 863, 865 (2d Cir. 1950).
income according to the widely accepted Haig-Simons definition of income.\textsuperscript{140} The Internal Revenue Code confirms that “gross income means all income from whatever source derived”\textsuperscript{141}—with no exception for home-grown tomatoes. Similarly, the leading judicial definition of income—“accessions to wealth, clearly realized, and over which the taxpayers have complete dominion”\textsuperscript{142}—makes no exception for the tomatoes raised by my neighbor.

Nevertheless, few, if any, think that my neighbor should report on his Form 1040 the value of his homegrown tomatoes or that the IRS should collect federal income tax on account of such tomatoes. Concerns about valuation, taxpayer liquidity, public acceptability, and enforceability\textsuperscript{143} impel the conclusion that, notwithstanding the theoretical argument that homegrown tomatoes generate income, the Code’s definition of income should not be pressed that far.

Does it make sense to characterize the failure to tax homegrown tomatoes as a tax subsidy? Professor Bittker’s insight indicates “no.” Income from self-performed services is excluded from the income tax base, not to subsidize such services, but because such exclusion is a proper feature of a baseline tax, considering such tax policy criteria as taxpayer liquidity, valuation, enforceability, and public acceptability. Only if a particular item is properly characterized as part of the normative income-tax base can its exclusion from that base be convincingly deemed a “subsidy.”

Similarly, before Section 107 can be labeled as a tax “subsidy,” it is necessary to agree that a normative income tax should include the value of in-kind housing and cash housing allowances provided to “minister[s] of the gospel.” If Section 107 appropriately manages the enforcement-related entanglement of church and state, then the exclusion from income of clerical housing and parsonage allowances, like the exclusion of self-performed services, is part of a normative baseline tax rather than a tax subsidy.

In contrast, Justice Brennan’s plurality opinion in \textit{Texas Monthly} declares that “[e]very tax exemption constitutes a subsidy”\textsuperscript{144} and that

\textsuperscript{140} The much-celebrated Haig-Simons definition of income includes as one of its components “the market value of rights exercised in consumption.” This indicates that my neighbor has income when he eats his homegrown tomatoes. Indeed, the Haig-Simons definition suggests that my neighbor has income as his tomatoes mature and thereby increase “the value of the store of property rights” represented by those tomatoes. \textit{Henry Simons, Personal Income Taxation} 50 (1938). For discussion of the Haig-Simons definition of income, see \textit{William A. Klein et al., Federal Income Taxation} 48–49 (15th ed. 2009).

\textsuperscript{141} \textit{I.R.C. § 61(a)} (2006).


\textsuperscript{144} \textit{Texas Monthly Inc. v. Bullock}, 489 U.S. 1, 14 (1989).
any tax exemption aimed solely at religious entities and actors unconstitutionally subvents religion. From these premises, Section 107, the religious exemptions from the individual health care mandate, and the sectarian exemptions from the self-employment and FICA taxes all subsidize religion in violation of the Establishment Clause.

VII. REPEALING SECTION 107: SWAPPING BORDERLINE ENTANGLEMENT FOR ENFORCEMENT ENTANGLEMENT

The contemporary opponents of Section 107 argue that Section 107, rather than minimizing entanglement, itself enmeshes the federal tax collector and religious institutions. At first blush, these opponents marshal strong support for their concerns since policing the borders of Section 107’s income tax exclusion involves entangling concerns about eligibility for that exclusion. The FFRF complaint succinctly observes that, “to administer and apply” Code Section 107, the IRS and the Treasury must make sensitive, fact-intensive, intrusive, and subjective determinations dependent on religious criteria and inquiries, such as whether certain activities constitute “religious worship” or “sacerdotal functions”; whether a member of the clergy is “duly ordained, commissioned, or licensed”; or whether a Christian college or other organization is “under the authority of” a church or denomination. These and other determinations result in “excessive entanglement” between church and state contrary to the Establishment Clause.145

This is in large measure a challenge, not to Section 107 itself, but to the Treasury regulations which implement it. The regulations are the source of such concepts as “religious worship,”146 “sacerdotal functions,”147 and “duly ordained, commissioned, or licensed.”148 However, even if there were no regulations, defining “minister of the gospel” would, as a statutory matter, present the kind of borderline entanglement concerns which troubled Justice Harlan and which were controlling for the Texas Monthly plurality, namely, the need to define who is and who is not such a minister.

Thus, viewed in isolation, those who attack Section 107 on entanglement grounds mount a powerful case since difficult issues must be resolved to police the boundaries of that provision to determine who is eligible for that section’s income tax exclusion. However, for two rea-

145 Complaint, supra note 6, ¶ 35.
146 Treas. Reg. § 1.107-1(a) (as amended in 1963).
147 Id.
148 Id. § 1.1402(c)-5(a)(2) (as amended in 1968); see also id. § 1.107-1(a) (as amended in 1963) (“In general, the rules provided in § 1.1402(c)-5 will be applicable to such determina-

sons, Section 107 and its borderline enforcement quandaries cannot be viewed in isolation. First, if Section 107 is overturned by the courts (or repealed by Congress), much housing provided to clergymen will generate taxable income to them and thus will create problems of enforcement entanglement as the IRS collects housing-related taxes from these clergymen and the churches for which they work. Second, as I discuss in the next Part, if Section 107 is stricken as unconstitutional, many religious institutions and clergy receiving employer-provided housing will default to the general provisions of Section 119.149 When this happens, the upshot will be the borderline entanglement problems of determining clerical employees’ eligibility for Section 119’s income tax exclusion for employer-furnished lodging.

Consider first the possible invalidation of Section 107 as violating the First Amendment. This would cause the federal income taxation of many clergymen who receive currently nontaxable housing from their churches. Taxation is inherently intrusive. It inflicts compliance costs upon taxpayers and engenders conflict between taxpayers and the tax collector. If, for example, the rental value of church-provided housing must be included in a clergyman’s income, that value must be calculated, both so that the clergyman can report it on his Form 1040 and so that the employing church can withhold the appropriate income tax from the clergyman’s paychecks. Such rental values are not easily determined and would be a source of conflict among the IRS, the religious institutions furnishing housing to their clerical employees, and the ministers receiving such employer-provided housing. To use Chief Justice Burger’s formulation from Lemon, the relationship between the tax collector and the taxpayer constitutes “comprehensive, discriminating, and continuing state surveillance.”150

If a church does not withhold the income tax attributable to the rental value of the lodging the church provides to its employees (or does not withhold enough), the IRS must then enforce the wage withholding statute151 against the church. Ultimately, this can result in liens152 on and levies against153 church property. Even short of this level of conflict, if Section 107 no longer excludes employer-provided housing from the income of clerical employees, the IRS would need to audit churches to confirm the accuracy of the amounts they report for their clerical employees as housing income as well as the adequacy of the church’s tax withholding from the wages it pays.

149 Indeed, Section 119 today governs the income tax status of housing provided by religious employers to those employees who do not qualify as “minister[s] of the gospel” for purposes of Section 107.
152 Id. §§ 6320–6327.
153 Id. §§ 6330–6344 (West 2012).
The church-state entanglement that would arise from the taxation of noncash, housing-based income would be particularly acute in light of the potential valuation disputes among the IRS, religious employers, and clerical employees (e.g., What is the fair rental value of a church-owned house?) and the fact that taxpayers receiving such noncash compensation (e.g., clergymen living in church-owned housing) may be illiquid and thus not have the funds to pay tax on such noncash compensation. Congress has plausibly decided that these valuation and liquidity problems, while acceptable for purposes of the self-employment tax, should be avoided in the context of the income tax.

It is, in short, an illusion to believe that abolishing Section 107 would eliminate church-state entanglement. By making church-provided housing taxable, the invalidation of Section 107 would replace the borderline entanglement of that provision (determining who is eligible for the exclusion) with enforcement entanglement (making sure the correct income tax is paid on clerical housing). In the taxation of the housing furnished to clergy, it was plausible for Congress to choose the quandaries of borderline entanglement over the prospect of enmeshing religious institutions and their clergy in the income taxation of such housing. In this setting, there is no disentangling alternative.

VII. SWAPPING ONE BORDERLINE ENTANGLEMENT FOR ANOTHER: SECTION 107 V. SECTION 119

Moreover, if Section 107 were to be invalidated by the courts on First Amendment grounds, some (perhaps much) housing provided to clergymen would then be subject to Section 119 and its income tax exclusion for employer-provided housing. The enforcement of Section 119 entangles church and state at the borderlines as does Section 107. In particular, Section 119 and its general lodging exclusion to sectarian entities and individuals require four entangling inquiries to assess at the borderlines of Section 119 whether that provision applies.

First, who is an “employee”? Section 119 and its exclusion for employer-provided housing only apply if the recipient of such housing is an “employee.” As Professor Dyer pointed out during the Warren litigation, some clergy are employees of their congregations, others are clearly not, and yet others “fall anywhere within that broad range.” Determining whether any particular clergymen is an “employee” for purposes of Section 119 necessitates an entangling assessment of the religious doctrine and practice of the clergymen’s particular church.

154 Id. §§ 1402(a)(8).
155 Dyer, supra note 127, at 1811.
Second, is housing provided “for the convenience of the [religious] employer”? Assessing this requirement of Section 119 entails examination of the policies and practices of the religious institution furnishing housing to ascertain whether the institution provides such housing to its clerical employee “to enable him properly to perform the duties of his employment” or, rather, to compensate such employee. This, in turn, requires an intrusive inquiry into the purposes of those who govern the religious employer, including possible inquisition into their internal deliberations.

Third, what is the particular church’s “business”? Section 119 only excludes the value of lodging employers provide on their respective “business premises.” This element of the statute necessitates a determination of the employing church’s “business” which, in turn, requires the IRS to assess the church’s policies and practices. Consider, for example, the members of a religious order who live at a homeless shelter they operate for their order. Is maintaining this shelter the order’s “business” for purposes of Section 119?

Fourth, what are the church’s “premises”? Consider a rabbi expected to entertain his congregants on a regular basis at the home provided to him by the congregation and to hold study groups there. Is this home the “premises” of the congregation for purposes of Section 119?

Thus, striking Section 107 under the First Amendment’s Establishment Clause would not end the entangling borderline inquiries the IRS must make of churches which provide housing to their ministers. Rather, striking Section 107 on constitutional grounds would shift the focus from the entangling borderline questions posed by Section 107 (Is a clergyman a “minister of the gospel”?) to the entangling borderline inquiries posed by Section 119 (Is a clergyman an employee? Is housing provided for his religious employer’s convenience? Is this housing part of the church’s “business premises”?). It is plausible for Congress to prefer as less intrusive and more easily administered the borderline entanglement posed by Section 107 rather than the borderline entanglement posed by Section 119. Consequently, Section 107 is properly part of a normative income tax rather than a subsidizing provision.

Michael L. Gompertz disagrees. Calling on the courts to strike Section 107 as unconstitutional, Mr. Gompertz argues that “there is usually no business need for the minister to live on church property,” that “the requirements of section 119 would almost never be met” by clergymen, and that “it would not be difficult for the IRS to determine whether section 119 is applicable to a clergymen.”

156 Treas. Reg. § 1.119-1(b) (as amended in 1985).
157 Gompertz, supra note 133, § B.3, at 83.
158 Id.
159 Id.
In making these assessments, Mr. Gompertz sub silentio engages in the kind of entangling inquiries he criticizes in the context of Section 107. To determine that “there is usually no business need for the minister to live on church property,” Mr. Gompertz must define the business of the church, must determine the needs of that business, and must decide the contours of the church’s property. These inquiries under Section 119 enmesh the church and the tax collector as much as the determination whether a clergyman is a “minister of the gospel” for purposes of Section 107.

Confronted with these choices, Congress plausibly selected Section 107 as its preferred method of managing entanglement between church and state in the context of housing provided to clergymen. To be sure, that choice is neither inevitable nor does it eliminate entanglement between the IRS and religious institutions since the Section 107 exclusion eliminates enforcement entanglement at the price of borderline entanglement. However, striking Section 107 would not eliminate entanglement between church and state either. Rather, invalidating Section 107 would, in some cases, replace entanglement at the borders of Section 107 with the enforcement-related entanglement of church and state as the IRS would collect the income taxes attributable to clerical housing. In other instances, repealing Section 107 would shift the enmeshing inquiries about eligibility for exemption from the entangling inquiries posed at the boundaries of Section 107 to the similarly entangling questions which mark the boundaries of Section 119.

VIII. A BROADER POSSIBILITY: NEITHER SECTION 107 NOR SECTION 119 APPLIES TO RELIGIOUS EMPLOYERS

This analysis raises another, broader possibility, namely, that the Establishment Clause forbids both Section 107 and the application of Section 119 to churches and their personnel. At first blush, such an expansive construction of the First Amendment promises to eliminate both the entangling inquiries necessary to enforce the borders of Section 107 and the entangling inquiries needed to police eligibility for Section 119 since, under this alternative, neither provision could apply to religious employers or their personnel.

For three reasons, this approach is ultimately unsatisfactory. First, troubling Free Exercise concerns arise if Section 119 is construed as available to all employers except religious institutions. “[T]he protections of the Free Exercise Clause pertain if the law at issue discriminates

160 U.S. CONST. amend. I (“Congress shall make no law . . . prohibiting the free exercise thereof . . . ”).
against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons.” 161 Such discrimination would occur in violation of the First Amendment’s Free Exercise clause if Section 119 is interpreted as benefiting all employers other than religious entities.

Second, if, in a world without Section 107, the courts also declare that Section 119 cannot apply to religious institutions and their employees or if Congress legislates to that effect, it will then be necessary to determine which institutions and employees fall within this Section 119 ban by virtue of their sectarian nature and which do not. Again, entangling borderline inquiries would arise if the IRS were required to determine which employers are religious (and thus outside the purview of Section 119) and which are secular (and thus covered by that provision). The prospect of eliminating church-state entanglement again proves illusory.

Third, if neither Section 107 nor Section 119 precludes the income taxation of the value of housing provided to clergy, then the IRS, to enforce that taxation, would be required to intrude into internal church autonomy to ensure that ministers include in their gross incomes the value of the housing provided to them. The upshot would be the kind of enforcement entanglement against which Chief Justice Burger cautioned in Walz and Lemon, i.e., continuing government intervention into internal church operations. As noted above, taxation—particularly the taxation of hard-to-value, illiquid income provided in in-kind—is inherently intrusive.

Thus, at the end of the day, the search for disentangling tax alternatives is unavailing, both in the context of the general relationship between the modern state’s tax system and contemporary religious entities and, more specifically, in the context of the tax treatment of clerical housing. When taxes and churches collide, there are no disentangling alternatives, only imperfect trade-offs between different forms of entanglement. If the current regulations under Section 107 are jettisoned, it will then be necessary to decide at the borders of Section 107 who is a “minister of the gospel” for purposes of that provision and who is not. If Section 107 itself is stricken as violating the First Amendment’s Establishment Clause, similar borderline issues will arise in determining if Section 119 applies to church-provided housing. Were clerical housing to be taxed as income, the enforcement of the Code against churches and their employees would produce the enforcement entanglement inherent in the relationship between the tax collector and taxpayers and would thus impair the autonomy of religious entities by intruding the IRS into their internal operations. If neither Section 119 nor Section 107

excluded from clerical incomes the rental value of employer-provided housing, there would be both enforcement entanglement (as the IRS taxes housing provided in-kind to clergy) and borderline entanglement (to determine which employers are secular and therefore remain covered by Section 119 and its income tax exclusion).

There is no obvious metric to determine which of these alternatives is more or less entangling than the others. However, the two factors cited by Chief Justice Burger in Lemon reinforce the conclusion that Section 107 is a plausible pick from among the imperfect choices available. First, like the property tax exemption upheld in Walz, Section 107’s exclusion for in-kind housing and cash parsonage allowances is a long-established provision of the Code. What is now Section 107(1) was added to the Internal Revenue Code in 1921. Section 107(2) was enacted in 1954. While there is no precise yardstick to determine when laws are old enough to merit Lemon’s history-based presumption of constitutionality, Section 107 is not a recent addition to the federal tax statute.

Moreover, unlike the Rhode Island and Pennsylvania laws which required annual appropriations from those states’ respective legislatures, Section 107 is a classic tax provision, embedded into a permanent tax code. There is accordingly less formal opportunity for religiously-divisive legislative battles over Section 107 than there is with a prototypical spending program, dependent on annual appropriations.

Reinforcing these Lemon factors is the reality that taxing noncash income (like clerical housing) is particularly intrusive as the IRS and taxpayers dispute the value of such in-kind income and as the taxpayers receiving such noncash income must find cash from other sources to discharge their tax liabilities.

In short, Section 107 is a constitutionally permissible means of managing the entanglement problems inherent in the income tax treatment of housing provided to “minister[s] of the gospel.” In the modern tax setting, there is no easy way to disentangle mega-churches from mega-governments. Section 107 is a plausible, though not an obligatory, choice from among the imperfect alternatives available. In a world of trade-offs, Section 107 embodies the constitutionally permissible acceptance of the problems of policing the borderlines of a tax exemption.

164 Zelinsky, supra note 21, at 400–03.
165 In practice legislatures tend to make budgeting changes at the margins, using the prior year’s spending as an accepted baseline. The classic statement of budgetary incrementalism is found in AARON WILDAVSKY, THE POLITICS OF THE BUDGETARY PROCESS 13 (1964) (“Budgeting is incremental. The largest determining factor of the size and content of this year’s budget is last year’s budget. Most of the budget is a product of previous decisions.” (emphasis omitted)). For Professor Wildavsky’s later comments on budgetary incrementalism, see AARON WILDAVSKY, THE NEW POLITICS OF THE BUDGETARY PROCESS 405 (1988).
rather than embracing the enforcement entanglement inherent in taxing
the housing churches provide to their ministers.

To the contrary is Justice Brennan’s plurality opinion in Texas
Monthly. For Justice Brennan, any tax exemption restricted to religious
institutions or actors is a subsidy that contravenes the Establishment
Clause. From this vantage, Section 107 is an unconstitutional subven-
tion targeted exclusively at religion.

In conventional terms, Justice Brennan’s Texas Monthly opinion is
of no precedential force since only three justices adhered to it. Rather, in
conventional terms, Justice Blackmun’s Texas Monthly concurrence
controls as “the narrowest grounds” advanced for the majority’s deci-
sion in Texas Monthly. Justice Blackmun carefully described his con-
currence as a “narrow resolution” of the case, focused on the availability
of the challenged sales tax exemption “exclusively to the sale of religious
publications.” From this limited holding, Texas Monthly is restricted
to cases involving religious publications and thus has no relevance to
Section 107 and its exclusion of clerical housing and parsonage allow-
ces.

For two reasons, Justice Brennan’s Texas Monthly opinion should
not be dismissed in this fashion. First, Chief Justice Burger’s Walz opin-
ion, while permitting New York to exempt religious property from taxa-
tion to avoid entangling church and state, also places New York’s ex-
emption for religious property in the context of simultaneous
exemption for a wide range of charitable, eleemosynary, and educational
properties. We do not know if Chief Justice Burger’s five concurring
colleagues would have joined his Walz opinion without reference to that
broader context.

Second, in Texas Monthly, the dissent and the plurality opinion
each garnered the same support. Three justices read Chief Justice Bur-
ger’s majority opinion in Walz as permitting exclusively religious tax
exemptions to avoid church-state entanglement while three justices
adhered to Justice Brennan’s reading of Walz as approving religious tax
exemptions only as part of broad exemptions including other charitable
and secular eleemosynary institutions.

The problem with the Texas Monthly plurality opinion is its con-
tention that, by eliminating the Texas sales tax exemption for religious
publications, the Court abolished entanglement between church and
state. Not so. Texas Monthly merely shifted church-state entanglement

166 Marks v. United States, 430 U.S. 188, 193 (1977) (“When a fragmented Court decides a
case and no single rationale explaining the result enjoys the assent of five Justices, the holding
of the Court may be viewed as that position taken by those Members who concurred in the
judgments of the narrowest grounds.” (internal quotation marks omitted)); see also United
States v. Santos, 553 U.S. 507, 523 (2008) (“Since his vote is necessary to our judgment, and
since his opinion rests upon the narrower ground, the Court’s holding is limited accordingly.”).

from the eligibility determinations at the borders of the sales tax exemption to enforcement entanglement as the state collected tax from religious publications. There is no obvious metric for ranking which of these alternatives enmeshes the tax collector and religious institutions least. This suggests that the choice is properly a legislative, rather than judicial, task. Thus, in the final analysis, Section 107 is saved from First Amendment challenge by Walz and Walz’s approval of religious tax exemptions as permitted means of managing entanglement between church and state, a plausible choice given that no disentangling alternative exists.

IX. SECTION 107(2) AS A MATTER OF TAX POLICY

That Section 107 is constitutional does not mean that Section 107 is compelling as a matter of tax policy. In terms of tax policy, there is no persuasive case for Section 107(2) and its exclusion of cash parsonage allowances. In First Amendment terms, taxing cash income is less entangling than taxing in-kind compensation holding all else equal since, when taxing cash, there are no valuation issues and the taxpayer has the liquidity to pay the tax.

The normative arguments for excluding in-kind fringe benefits from employees’ gross incomes depend upon such tax policy criteria as valuation, liquidity, enforcement, and public acceptability. Valuing in-kind benefits is often difficult. When a benefit is provided in-kind, the benefit itself generates no cash for the employee to pay the tax which would result from including the benefit in the employee’s gross income. In light of these valuation and liquidity concerns, it may be difficult for the IRS to enforce the income taxation of in-kind benefits. The taxation of noncash income is poorly understood by taxpayers and often resented by them. The public acceptability of any particular tax provision is an important consideration in a democracy whose tax system requires taxpayers to self-report their respective incomes. From a First Amendment perspective, taxing cash compensation (like the parsonage allowance) enmeshes the taxpayer and the tax collector less than does the taxation of otherwise equivalent in-kind income.

While these considerations underpin the normative argument for excluding from employees’ gross incomes the value of employer-provided housing furnished in-kind, these considerations do not justify

168 On the distinction between normative income tax provisions, designed to implement the proper tax base, and subsidizing provisions, intended to encourage particular activities, see Edward A. Zelinsky, Efficiency and Income Taxes: The Rehabilitation of Tax Incentives, 64 TEX. L. REV. 973, 978 (1986).
169 Zelinsky, supra note 143.
Section 107(2) and its exclusion from gross income of cash parsonage allowances. Such allowances raise neither valuation nor liquidity issues since the ministers receiving such allowances are paid in cash and can defray their tax liabilities (or have their liabilities withheld) from such cash. It is easier for the IRS to enforce the taxation of cash income than in-kind income. Taxing parsonage allowances would not offend the popular intuition equating income with cash since such allowances take the form of cash.

The historic justification for Section 107(2) was to establish tax parity between ministers receiving tax-free housing in-kind and ministers receiving cash parsonage allowances. Since the former pay no income tax on the lodging provided to them in kind, Congress decided in 1954 that the latter should not report as gross income the housing provided to them in the form of cash allowances.

However, the Code does not create equivalent tax parity between an employee who is provided tax-free housing by his employer under Section 119 and an otherwise similar employee who is paid cash compensation and must purchase his own residential accommodations with after-tax dollars. There is no compelling argument for establishing tax parity among those ministers who receive in-kind housing and those who receive cash housing allowances as the Code creates no similar parity for nonclerical employees receiving taxable cash and nontaxable employer-provided lodging.

The best retort is that repealing Section 107(2) and its income tax exclusion for parsonage allowances will cause churches to furnish to their clergy tax-free in-kind lodging rather than taxable cash allowances. If Congress repeals Section 107(2), the argument goes, a church previously paying a parsonage allowance to a minister to rent his home could, after such repeal, pay the rent itself and then provide the rented home to the minister in-kind and income tax-free.

Such behavior is likely to occur at the margins if Congress repeals Section 107(2). By the same token, at the margins, there are some employers which today provide housing to afford their employees the Section 119 exclusion and which would not provide that housing if Section 119 were repealed. As long as some in-kind fringe benefits are tax-favored, employers will have an incentive to offer such benefits to their workers in lieu of cash compensation.

Ironically, the amendment to Section 107(2) that Congress adopted in 2002 during Warren to strengthen the case for Section 107(2) had the opposite effect. The 2002 amendment makes Section 107(2) less persuasive as a matter of tax policy by requiring the determination of “the fair

170 H. REP. NO. 83-1337, at 4040 (1954) (“Your committee has removed the discrimination in existing law by providing that the present exclusion is to apply to rental allowances paid to ministers to the extent used by them to rent or provide a home.”).
rental value” of the minister’s home. This limit, now embodied in the statute, increases the compliance costs of the church and the minister who must ascertain this limit annually. This limit also compounds the enforcement burden of the IRS, which, on audit, must ascertain this limit as well. From the perspective of normative tax criteria, this increase in taxpayer compliance costs and the IRS’s enforcement burden was an unfavorable development.

Important voices call for the amendment of Section 107(2) to place a dollar cap on that section’s exclusion or to limit the parsonage allowance exclusion to one residence per minister. Whatever the merits of those proposed reforms, they do not address the underlying unpersuasiveness of the parsonage allowance exclusion as a matter of tax policy.

In short, the current exclusion from clerical gross incomes of parsonage allowances is a constitutionally permitted choice, given the trade-offs and imperfect alternatives in this area, but is not constitutionally compelled. As a matter of tax policy, Section 107(2) is inadvisable since parsonage allowances, paid and received in cash, pose neither valuation nor liquidity challenges for taxpayers or the tax system.

X. THE CONSTITUTIONALITY OF THE RELIGIOUS EXEMPTIONS FROM THE SOCIAL SECURITY TAXES AND THE INDIVIDUAL HEALTH CARE MANDATE

The constitutional controversy surrounding Section 107 has broad implications. If Section 107 unconstitutionally entangles church and state, so too do the two religious exemptions from the new federal individual health care mandate as do the religious exemptions from the self-employment and FICA taxes. By the same token, if Section 107 is constitutionally permissible in light of the trade-off between borderline entanglement and enforcement entanglement, so too these other exemptions are imperfect but constitutionally acceptable choices. The latter is the more compelling conclusion given the absence of disentangling alternatives.

Consider first the entangling borderline inquiries required by Section 1402(g) and its sectarian exemption from the self-employment tax. Section 1402(g) applies if an individual is “conscientiously opposed” to

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172 Even if cash parsonage allowances were included in clergymen’s gross incomes, clergy earning modest compensation would pay little or no federal income tax as a result of the standard deduction, personal exemptions and earned income credit. I.R.C. §§ 32, 63(c), 151 (West 2012).
insurance. To so qualify, an individual must be a “member of a recognized religious sect.” The determination whether this threshold eligibility standard is met requires three borderline inquiries enmeshing the IRS and the individual claiming this exemption: that individual’s membership status in a “sect,” the “religious” nature of the “sect” of which he is a member, and the “recognized” status of that religious sect. Once this threshold is crossed, eligibility for exemption under Section 1402(g) further requires examination of the “established tenets or teachings of such sect” as well a determination that the individual asserting exemption is “conscientiously opposed to acceptance of the benefits of any private or public insurance.”

Viewed in isolation, these inquiries (like the entangling borderline questions raised by Section 107) enmesh along religious lines the IRS and the individual claiming exemption from the self-employment tax under Section 1402(g). However, at the second step of the analysis, the dilemma of entanglement in the modern era recurs: If Section 1402(g)’s religious exemption is stricken on First Amendment grounds or is repealed by Congress, the entangling borderline inquiries required to determine eligibility under Section 1402(g) would disappear, but would be replaced by governmental intrusions into religious individuals’ personal autonomy as the IRS enforces the self-employment tax against such individuals. If the self-employment tax applies to an individual, the IRS must audit to assess his compliance with that tax. The audit process is inherently intrusive. If the IRS finds that an individual fails to pay the self-employment tax, the IRS is obligated to collect the tax from this individual and possibly to assess fines against such individual. If (absent Section 1402(g)) an individual declines to pay the tax and fines as a matter of religious scruple, the IRS would be required to take enforcement action against this individual’s income and assets to collect a tax that violates this individual’s religious beliefs.

Thus, if Section 1402(g) were to be declared unconstitutional or were to be repealed by Congress for purposes of the self-employment tax, the IRS’s focus would, in the context of those religiously opposed to Social Security, shift from the borderline inquiries raised by the Section 1402(g) exemption (e.g., Is an individual a “member of a recognized religious sect”? to the intrusions into personal autonomy that are inherent in enforcing any tax. Borderline entanglement will have been traded for enforcement entanglement.

Similar observations about Section 1402(g) apply in the context of the individual health care mandate that incorporates that section. Policing eligibility for this sectarian exemption from the new federal mandate will require entangling inquiries to determine whether an individual claiming the exemption, as a “member” of a “recognized religious sect,”
qualifies for the exemption. Absent this exemption and its borderline entanglements, there will be church-state conflict in forcing individuals who are religiously opposed to health insurance to carry such insurance. If, as FFRF maintains, for Establishment Clause purposes, Section 107 requires excessive entanglement between church and state, so too this religious exemption from the new federal health care mandate violates the Establishment Clause insofar as that exemption incorporates Section 1402(g). For First Amendment purposes, the questions which must be determined to assess an individual's eligibility for mandate exemption via Section 1402(g) are indistinguishable from the inquiries under Section 107 to which FFRF objects.

However, nullifying this mandate exemption would not eliminate religious entanglement between the IRS and individuals who reject health insurance on sectarian grounds. Rather, repealing this exemption would transform the nature of such entanglement from the enmeshing borderline inquiries necessary to determine eligibility for mandate exemption under Section 1402(g) to the intrusions necessary to enforce the health care mandate against those religiously opposed to it.

In short, if Section 107 unconstitutionally entangles the IRS with religious entities and actors in violation of the First Amendment, so too does Section 1402(g), which requires similar determinations of religious practice and belief to ascertain if that section applies. More convincingly, Section 1402(g) (both for the self-employment tax and the health care mandate) embodies a constitutionally reasonable acceptance of the borderline entanglements of eligibility determination over enforcement entanglements. Given the inevitable trade-offs in these areas, it is constitutional to permit (but not require) Congress to pick between the problems of enforcement entanglement and the difficulties of borderline entanglement. There is, again, no disentangling alternative.

Similar observations pertain to Section 1402(e)'s exemption from the self-employment tax. Section 1402(e), it will be recalled, exempts from this tax “a duly ordained, commissioned, or licensed minister of a church or a member of a religious order” or “a Christian Science practitioner” if such minister, member or practitioner “is conscientiously opposed to, or because of religious principles [] is opposed to, the acceptance . . . of any public insurance.” The IRS and those claiming eligibility for this exemption are enmeshed in such boundary-defining questions as the claimants' ministerial status and the “religious principles” to which such claimants adhere. Without this exemption in the Code, the IRS would be required to enforce the self-employment tax against individuals despite their religious opposition to “public insur-

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173 Id. § 5000A(d)(2) (West 2012) (incorporating I.R.C. § 1402(g) (West 2012)).
“ance” such as the Social Security system financed by the self-
employment tax.

Two of the regulatory provisions explicitly challenged by the FFRF in its complaint as excessively entangling are provisions which implement the 1402(e) exemption from the self-employment tax. Specifically, FFRF brands as unconstitutional in the context of Section 107 the need for the IRS to determine “whether a member of the clergy is ‘duly ordained, commissioned, or licensed’”174 as well as the need to ascertain “whether a Christian college or other organization is ‘under the authority of’ a church or denomination.”175

The first of these tests (“duly ordained, commissioned, or licensed”) comes from Section 1402(e) itself and is repeated in the regulations implementing that section.176 The second of these tests (“under the authority”) comes from the regulations implementing the Section 1402(e) exemption from the self-employment tax.177 Both of these tests are incorporated by reference into the regulations under Section 107.178 If, as FFRF contends, these tests unconstitutionally entangle church and state in the context of Section 107, they also unconstitutionally entangle in the context of Section 1402(e), the Code provision under which these tests are directly promulgated. By the same token, if these borderline tests are reasonable choices in the context of Section 1402(e) (as I conclude they are), these tests are equally reasonable choices in the context of Section 107 as, by these tests, Congress opts for the problems of borderline entanglement over enforcement entanglement.

Consider as well the other exemption from the new federal health insurance mandate for members of a “health care sharing ministry.”179 Under this exemption, a member of such a ministry need not carry “minimum essential coverage” if the members of such ministry “share a common set of ethical or religious beliefs and share medical expenses . . . in accordance with those beliefs.”180 Paradoxically, this exemption from the new individual health care mandate is both less and more susceptible to constitutional challenge than is the mandate exemption which incorporates Section 1402(g).

On the one hand, the health care ministry exemption applies, not just to ministries based on “religious beliefs,” but also to health care ministries bottomed on “ethical,” presumably secular, “beliefs.” Thus, this exemption looks less like the narrow Texas sales tax exemption,
restricted to religious publications and stricken in Texas Monthly, and resembles more the broader New York property tax exemption, available to certain secular properties and upheld in Walz.

On the other hand, the health care ministry exemption from the federal coverage mandate is a totally new innovation to the Internal Revenue Code and thus lacks the Lemon-based presumption of history. The other religious exemption from the federal health care mandate incorporates Section 1402(g), which was added to the Code in 1965. Since Section 1402(g) has been part of the federal tax law for almost half a century, it is entitled to a presumption of constitutionality by virtue of its age. That history-based presumption should also apply to the health mandate exemption incorporating Section 1402(g). The mandate exemption based on Section 1402(g) is an incremental extension of prior law that acknowledges that, just as those religiously opposed to insurance are not to be required to pay the self-employment tax financing Social Security, they should not be required to comply with the new federal obligation to carry health insurance.

In contrast, the other mandate exemption for members of qualifying health care ministries makes no reference to Section 1402(g) or any other prior law. Like the Rhode Island and Pennsylvania statutes invalidated in Lemon, this mandate exemption is a totally new enactment that enjoys no history-based presumption of constitutionality.

Hence, the broader implications of the FFRF’s constitutional challenge to Section 107(2) and the parsonage allowance established by that section: If the FFRF is correct that that tax exclusion violates the First Amendment by impermissibly entangling the IRS and religious institutions and personnel, so too the First Amendment proscribes the religious exemptions of the FICA and self-employment taxes as well as the religious exemptions of the new federal health insurance mandate.

I conclude otherwise. Given the inherent trade-offs between borderline entanglement and enforcement entanglement, these religious tax exemptions are permissible responses to the inexorable problems of church-state entanglement under modern tax systems. However, these exemptions are not constitutionally required. Congress can constitutionally opt for the problems of enforcement entanglement by eschewing these kinds of exemptions.

Instructive on this point is Lee. Mr. Lee, a member of the Old Order Amish religion, employed other members of his faith to work on his farm and in his carpentry shop. He did not pay the FICA tax.

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183 Id. at 254.
184 Id.; see also I.R.C. § 3101 (2006).
imposed on employers nor did he withhold the FICA tax employees are required to retain from their employees’ wages. Mr. Lee’s noncompliance with the FICA tax stemmed from his religious beliefs forbidding participation in and the financing of public insurance like Social Security.

Ruling against Mr. Lee, the U.S. Supreme Court held that the federal “Government’s interest in assuring mandatory and continuous participation in and contribution to the social security system is very high.” That interest, the Lee Court concluded, outweighed Mr. Lee’s offsetting interest in protecting his religious beliefs: “Because the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax.”

If Mr. Lee had no employees, he would have qualified for Section 1402(g) and its exemption from the self-employment tax. Section 1402(g) is a congressional “effort toward accommodation” that plausibly “drew a line” between, on the one hand, employers who religiously oppose Social Security but must pay FICA tax and, on the other hand, self-employed persons who reject Social Security on religious ground and are consequently excused from paying the self-employment tax. Lee, written by Chief Justice Burger for himself and seven of his colleagues, follows the trail of permissive accommodation marked by Walz. In cases like Mr. Lee’s, Congress elected not to accommodate. In the framework of this Article, Congress elected in Mr. Lee’s case for the problems of enforcement entanglement—making Mr. Lee pay FICA tax for himself and his employees despite their religious objections to Social Security—rather than the quandaries of borderline entanglement.

Subsequent to Lee, Congress reversed this choice and enacted the religious exemption of Section 3127 to overturn Lee. Section 3127 now exempts from FICA taxation employers and employees described in Section 1402(g), i.e., employers and employees who are “member[s] of a recognized religious sect” who, by reason of their adherence to the “established tenets or teachings of such sect,” are “conscientiously opposed to acceptance of the benefits of any private or public insur-

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185 Lee, 455 U.S. at 254; see also I.R.C. § 3111 (West 2012).
186 Lee, 455 U.S. at 257.
187 Id. at 258–59.
188 Id. at 260. In Employment Division v. Smith, 494 U.S. 872, 880 (1990), the Court cited Lee for the proposition that the First Amendment does not require exemption from “a neutral, generally applicable regulatory law that compel[s] activity forbidden by an individual’s religion.”
189 Lee, 455 U.S. at 261 n.11.
190 Id. at 261.
191 Justice Stevens concurred in a separate opinion. Id. at 261.
The constitutional status of Section 3127, like the constitutional status of the federal health mandate exemption incorporating Section 1402(g), depends upon the constitutional status of Section 1402(g) itself. If Section 1402(g) entails excessive religious entanglement in violation of the Establishment Clause of the First Amendment, so too does Section 3127, which incorporates Section 1402(g). If, on the other hand, Section 1402(g) is, as I contend, a constitutionally permissible approach given the absence of disentangling alternatives when a modern tax system interacts with the contemporary religious community, Section 3127 similarly survives First Amendment scrutiny.

Section 3127 covers situations where both an employer and her employees object on religious grounds to Social Security. Section 3121(b)(8)(B), in contrast, applies when a sectarian employer objects to the payment of FICA taxes but the employees do not share those objections. Consequently, the employees are treated as though they are self-employed and pay the federal self-employment tax while the employer is excused from paying the FICA taxes it would otherwise owe.

Section 3121(b)(8)(B) raises one more time the inexorable choice between borderline entanglement and enforcement entanglement. To be eligible for FICA tax exemption under Section 3121(b)(8)(B), an employer must be a church or “church-controlled organization” that “is opposed for religious reasons to the payment of the” employer FICA tax. Determining qualification for this exemption enmeshes church and state in religiously sensitive inquiries at the boundaries of exemption: Is a particular employer a church or “church-controlled”? Is the church’s opposition to FICA taxation “for religious reasons”?

However, repealing Section 3121(b)(8)(B) would entangle church and state as well. Absent Section 3121(b)(8)(B), the IRS must enforce FICA taxation against churches doctrinally opposed to such taxation. Again, the choice Congress confronts is between imperfect alternatives, i.e., the enmeshment of church and state in determining qualification for exemption or the entanglement of church and state as the IRS enforces FICA taxation against churches opposed to such taxation. In First Amendment terms, Section 3121(b)(8)(B), like the other exemptions of the FICA and self-employment taxes, is a reasonable, though not a compelled, choice to incur the difficulties of patrolling the borders of sectarian tax exemption rather than incur the costs of enforcing taxation against those religiously opposed to it.

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193 Id. § 1402(g).
194 Id. § 3121(b)(8)(B).
XI. A FINAL WORD ON LEMON AND HOSANNA-TABOR

Among the important contemporary First Amendment controversies is the status of what Justice Kennedy labeled “the so-called Lemon test.” Justice Scalia, in a memorable attack on Lemon, observed that “[t]he secret of the Lemon test’s survival, I think, is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will.” Other voices take a different tack including my Cardozo colleague Marci Hamilton.

My take on this debate will, at this point, not surprise the reader: Entanglement, one of the three Lemon factors, is not a useful criterion in the tax context as there are no disentangling alternatives in that context. Whatever the value in other settings of entanglement as an element of First Amendment decision-making, entanglement provides no purchase in evaluating tax exemptions for religious actors and institutions. The invariable choices under a modern tax system are to tax sectarian actors and institutions and thereby incur the problems of enforcement entanglement or to exempt such actors and institutions and thereby incur the quandaries of borderline entanglement.

Though it is not a tax case, the Supreme Court’s recent decision in Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC graphically illustrates the trade-off between enforcement entanglement and borderline entanglement.

In Hosanna-Tabor, a church school terminated the employment of a teacher who had been commissioned as a minister of the church. The minister-teacher sued the church under the Americans with Disabilities Act (ADA). The U.S. Supreme Court unanimously held the church immune from such suit pursuant to a “ministerial exception” compelled by the Free Exercise and Establishment Clauses of the First Amendment.

Chief Justice Roberts’s opinion for the Court vigorously endorses church autonomy in the employment context: both clauses of the First Amendment “bar the government from interfering with the decision of a religious group to fire one of its ministers.” Consequently, legislation like the Act cannot impinge on “the employment relationship be-

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200 Hosanna-Tabor, 132 S. Ct. at 710.
201 Id. at 702.
between a religious institution and its ministers.” To hold otherwise would permit government “interferenc[e] with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs.” To rephrase the Chief Justice’s analysis in entanglement terms, permitting the Act to apply to the relationship between churches and their ministers would lead to constitutionally unacceptable enforcement entanglement between church and state as administrative and judicial institutions enforcing the Act intrude into churches’ “internal governance.”

While a ministerial exception alleviates enforcement entanglement between church and state, it necessarily creates borderline entanglement as the exception requires the determination of who is a minister to whom the exception applies. Here, the Court’s unanimity dissipated. Chief Justice Roberts, for a majority of the Court, declined “to adopt a rigid formula for deciding when an employee qualifies as a minister.” In a carefully limited formulation, he declared that the teacher-minister before the Court was a minister because of her “formal title,” “the substance reflected in that title,” “her own use of that title” including her claim of the parsonage allowance exclusion, and “the important religious functions she performed.” Concurring separately, Justice Thomas instead proposed that, for purposes of the ministerial exception mandated by the First Amendment, the courts should “defer to a religious organization’s good-faith understanding of who qualifies as its minister.” From Justice Thomas’s vantage point, a person is a minister for purposes of the exception if the religious organization “sincerely consider[s]” that person to be a minister.

Justice Alito, joined by Justice Kagan, instead took “a functional approach” under which an individual’s “title is neither necessary or sufficient” to make that individual qualify for the ministerial exception. Instead, under Justice Alito’s functional approach, “ministers” include “those who serve in positions of leadership, those who perform important functions in worship services and in the performance of reli-

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202 Id. at 705.
203 Id. at 706.
204 Id.
205 Id. at 707.
206 Id. at 708.
207 Id.
208 Id.
209 Id.
210 Id.
211 Id. at 710.
212 Id. at 711.
213 Id. at 714.
214 Id. at 713.
religious ceremonies and rituals, and those who are entrusted with teaching and conveying the tenets of the faith to the next generation.\textsuperscript{215}

As this division of opinion indicates, determining who is a “minister” for purposes of the constitutionally compelled “ministerial exemption” will enmesh churches and the courts just as do borderline determinations of who qualifies as a minister for purposes of the parsonage allowance exclusion. Under all three tests unveiled in \textit{Hosanna-Tabor}, there will be enmeshing inquiries at the boundaries of the ministerial exception: What “religious functions” did the alleged minister perform? Is the church “sincere” in its characterization of an individual as a minister? What are “positions of leadership” in a particular religious organization?

In \textit{Hosanna-Tabor}, the Court, by recognizing a First Amendment ministerial exception to the ADA, elected for the judiciary to confront these kinds of entangling questions at the borderline of the exception to protect church autonomy from enforcement entanglement. In the modern world, there is often no disentangling alternative.

\textbf{CONCLUSION}

The controversy over the constitutionality of Section 107 is important and wide-ranging in its implications. If, as contemporary opponents of Section 107 argue, the income tax exclusion that section grants to “minister[s] of the gospel” unconstitutionally entangles church and state, so too do the equivalent religious exemptions from the new federal health mandate and from the FICA and Social Security taxes. I ultimately conclude that this argument is unpersuasive.

In the contemporary tax context, extensive contact between tax systems and religious institutions is inexorable, whether religious institutions and personnel are taxed or exempted. In this setting, there are no disentangling alternatives.

If religious entities and actors are taxed, they are subjected to the inherently intrusive relationship between the tax collector and the taxpayer. If religious entities and actors are not taxed, there are inevitable tensions policing the boundaries of exemption. The choice between borderline entanglement and enforcement entanglement is inherent in the relationship between the modern state’s tax system and contemporary religious institutions and their personnel. By exempting, Congress chooses the problems of borderline entanglement over the quandaries of enforcement entanglement, an imperfect but plausible choice given the inevitable trade-offs between different forms of entanglement.

\textsuperscript{215} \textit{Id.} at 712.
Consequently, Section 107 and its exclusion from gross income for clerical recipients of in-kind housing and parsonage allowances are constitutionally permitted, though not constitutionally required, responses to the problems of entanglement inherent in the relationship between modern government and religion. In the case of housing provided to clergy in-kind, the valuation and liquidity difficulties of taxing noncash income would make the entanglement of church and state particularly acute and make persuasive Congress’s decision in Section 107 to avoid such entangling taxation.

Similarly, the Code’s sectarian exemptions from the individual health coverage mandate and from the Social Security taxes are acceptable, though not obligatory, means under the First Amendment of managing the inevitable contacts and tensions between the tax system of the contemporary state and the religious community. Through these exemptions, Congress elects borderline entanglement at the boundaries of exemption over the enforcement entanglement which results when religious institutions and actors are taxed or when believers are required to purchase health insurance to which they object on religious grounds.

The constitutionality of the parsonage allowance exclusion should not be confused with the exclusion’s advisability as a matter of tax policy. Since such allowances are paid to “minister[s] of the gospel” in cash, there is, as a matter of tax policy, no convincing reason to exclude such allowances from ministers’ gross income as such allowances pose neither valuation difficulties nor liquidity issues for clerical taxpayers. However, in First Amendment terms, Section 107 is a permissible constitutional choice for managing the inevitable entanglement between church and state under modern tax systems.