The First Amendment and The Parsonage Allowance

By Edward A. Zelinsky

Edward A. Zelinsky is the Morris and Annie Trachman Professor of Law at the Benjamin N. Cardozo School of Law of Yeshiva University. For research assistance on this report, he thanks Lee Pickett and Steven Tremblay, both of the Cardozo class of 2014.

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I. Introduction

In Freedom From Religion Foundation Inc. v. Lew (FFRF),1 the U.S. District Court for the Western District of Wisconsin held section 107(2) unconstitutional under the First Amendment. Section 107(2) excludes from gross income cash housing allowances furnished to ministers of the gospel. In this litigation,2 the Freedom From Religion Foundation Inc. (FFRF) and its two co-presidents raise First Amendment3 and equal protection4 claims. FFRF thus resurrects the constitutional controversy about section 107 raised, but not resolved, in the celebrated Warren litigation.5

This report explores the district court’s opinion in FFRF granting summary judgment to FFRF and its two co-presidents. The district court concluded that for purposes of the well-known Lemon6 test, section

2The Freedom From Religion Foundation Inc. had earlier asserted just the First Amendment challenge to section 107 in Freedom From Religion Foundation Inc. v. Geithner in the Eastern District of California. See 644 F.3d 836 (9th Cir. 2011), aff’d in part and vacating in part 715 F. Supp.2d 1051 (E.D. Cal. 2010).
4Id. at paras. 38-48 (arguing that section 107 violates equal protection by excluding from gross income clerical housing and housing allowances while not excluding housing and housing allowances provided to secular employees). The FFRF complaint incorrectly premised its equal protection claim on “the Equal Protection Clause of the United States Constitution.” Id. at 10 (paragraph A of prayer for relief). The equal protection clause of the 14th Amendment applies only to the states. The federal government’s equal protection obligations are grounded in the due process clause of the Fifth Amendment. United States v. Windsor, 133 S. Ct. 2675, 2695 (2013) (“The liberty protected by the Fifth Amendment’s Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws.”).
5Warren v. Commissioner, 114 T.C. 343 (2000) (holding that the exclusion under section 107(2) is limited to the amount used to provide a home, not the fair market rental value of the home); 282 F.3d 1119 (9th Cir. 2002) (appointing amicus curiae and requesting supplemental briefing); 302 F.3d 1012 (9th Cir. 2002) (appointing amicus curiae).
107(2) has neither secular purpose nor secular effect, and thus runs afoul of the establishment clause of the First Amendment. In reaching that conclusion, the court relied on Texas Monthly Inc. v. Bullock and discounted Walz v. Tax Commission. Critical to the court’s reasoning was the assertion of the Texas Monthly plurality that “every tax exemption constitutes a subsidy.”

For three interrelated reasons, the district court’s opinion in FFRF is unpersuasive. First, section 107 has a secular purpose and a secular effect. It manages the church-state entanglement that is inevitable when the modern government decides whether to tax the modern church. Moreover, section 107 accommodates the autonomy of religious institutions and actors by declining to tax clerical housing and housing allowances. It avoids the two other entangling alternatives in this area — namely, enforcing the income taxation of clerical housing and housing allowances or making eligibility determinations at the margins of section 119, the general exclusion for employer-provided housing. Section 107 should be understood not as subsidizing the church, but as separating the church from the state. The economic benefit of tax exemption should be seen as a byproduct of that separation.

Second, the district court in FFRF places too much weight on the plurality opinion in Texas Monthly (accepted by only three justices) while giving short shrift to the Supreme Court’s earlier opinion in Walz (joined by a six-justice majority). A more careful reading of Texas Monthly and Walz indicates that consistent with the First Amendment, Congress can exempt from taxation churches and religious actors to avoid church-state entanglement and to accommodate the autonomy of religious institutions and actors. That is what section 107 does. Texas Monthly is the Supreme Court’s most recent treatment of the First Amendment status of tax exemptions for religious institutions, but Walz is the more convincing treatment of that status.

Third, the district court accepted the premise of the Texas Monthly plurality that tax exemptions are always subsidies. Often tax exemptions are subsidies comparable to direct expenditures. However, in many settings they are not. In constitutional terms, section 107 is more convincingly perceived not as a subsidy but, according to Walz, as managing the inevitable entanglement caused by taxation and as accommodating the autonomy of religious institutions and actors. In a world of imperfect choices, section 107 separates rather than subsidizes. The economic benefit provided by section 107 is a side effect of that separation.

As a matter of tax policy, there is a strong argument for taxing all cash income, including parsonage allowances. However, as a constitutional matter, section 107 reflects a permitted, though not compelled, choice to accept one form of church-state entanglement over others and to accommodate the autonomy of churches and religious personnel by excluding their housing and housing allowances from clergy members’ gross incomes. For First Amendment and equal protection purposes, this is a plausible choice with a secular purpose and a secular effect in an area in which there are no disentangling alternatives.

Accordingly, on appeal, the Seventh Circuit should sustain section 107(2) as a constitutionally permitted, although not constitutionally compelled, accommodation of religious autonomy under Walz.

II. Background

A. The Statutes

Section 107 excludes from gross income housing provided to “minister[s] of the gospel.” Section 107(1) excludes housing provided in kind to clergy. Section 107(2) excludes from gross income cash housing allowances, which have come to be called parsonage allowances. In contrast to section 107, which is limited to ministers, section 119 provides a general exclusion from gross income for employer-provided housing.

In several respects, section 107 is more generous than section 119. Section 119 excludes from gross income only housing provided in kind, not cash housing allowances. Further, the general exclusion applies only if the recipient of housing qualifies as an employee of the housing provider, the housing is located on the employer’s business premises, and the housing is furnished for “the convenience of the employer.”


12 Id. at 1665-1667.

13 For more detailed background, see id. at 1645-1648; Zelinsky, “Dr. Warren,” supra note 5, at 116-117.

14 Section 107(1) excludes from a minister’s gross income “the rental value of a home furnished to him as part of his compensation.”

15 Section 107(2) excludes from minister’s gross income “the rental allowance paid to him as part of his compensation, to the extent used by him to rent or provide a home.” See also Rev. Rul. 87-32, 1987-1 C.B. 131 (“parsonage allowance”).

16 Section 119(a)(2).
The section 107 exclusion is more liberal in important ways. It applies to a minister of the gospel\(^{17}\) regardless of whether that minister has an employee-employer relationship with the housing provider. And, as noted, section 107 excludes cash parsonage allowances\(^{18}\) as well as housing provided in kind.\(^{19}\) Further, unlike section 119, section 107 does not require excluded housing to be located on the employer’s premises or to be provided for the employer’s convenience.

**B. FFRF’s Complaint**

FFRF identifies itself as a nonprofit membership organization that advocates for the separation of church and state.\(^{20}\) The organization and its two co-presidents contend that the income tax exclusion authorized by section 107 violates the establishment clause of the First Amendment as well as the federal government’s equal protection obligation. According to FFRF, section 107 violates the establishment clause “because it provides preferential tax breaks exclusively to ministers of the gospel.”\(^{21}\) FFRF also argues that section 107 impermissibly entangles the federal government and religious actors:

In order to administer and apply section 107, moreover, 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; or whether a full-time cantor in the Jewish faith qualifies as a minister of the gospel. These and other determinations result in “excessive entanglement” between church and state contrary to the Establishment Clause.\(^{22}\)

FFRF grants its co-presidents cash compensation denoted as housing allowances.\(^{23}\) Because those individuals cannot exclude the allowances from gross income under section 107, they claim that the code provision violates their equal protection rights.\(^{24}\)

**C. The District Court’s Opinion**

In First Amendment terms,\(^{25}\) the district court’s opinion in FFRF is framed by Lemon and Texas Monthly, while discounting Walz. Although FFRF’s complaint attacks both section 107’s exclusion of in-kind housing provided to clergy and of cash parsonage allowances, the district court only addressed (and declared unconstitutional) the latter.\(^{26}\) As to the cash housing allowances, the district court concluded that for purposes of the Lemon test, section 107(2) has neither a secular purpose nor a secular effect. The district court addressed neither FFRF’s entanglement argument\(^{27}\) nor its equal protection argument.\(^{28}\)

The core of the district court’s opinion is its application of Lemon and Texas Monthly and its rejection of Walz. Lemon is the source of the well-known three-part test, summarized as follows in FFRF:

> Under Lemon, government action violates the establishment clause if (1) it has no secular purpose; (2) its primary effect advances or inhibits religion; or (3) it fosters an excessive entanglement with religion.\(^{29}\)

In addition to relying on Lemon, the district court explicitly held that Texas Monthly controlled the outcome of this case.\(^{30}\) In Texas Monthly, a splintered Supreme Court held unconstitutional a Texas state sales tax exemption that was limited to religious publications. There was no majority opinion in Texas Monthly. Analogizing section 107(2) to the Texas sales tax exemption, the district court in FFRF

\(^{24}\)Id. at para. 46.

\(^{25}\)In statutory terms, the district court rejected the government’s contention that FFRF’s co-presidents might qualify as ministers of the gospel and therefore be eligible for section 107(2)’s exclusion for parsonage allowances. Quite properly, Judge Barbara B. Crabb labeled that argument “difficult to take . . . seriously.” Opinion at *11. Id. at *57 (“no reasonable construction of section 107 would include atheists”). The government would be well advised to abandon this hapless argument on appeal.

\(^{26}\)Opinion at *2 (“plaintiffs have not opposed defendants’ argument that plaintiffs lack standing to challenge section 107(1),” and at *62 (dismissing for lack of standing the complaint as to the section 107(1) claim).

\(^{27}\)Id. at *60 (“need not decide whether [section 107(2)] fosters excessive entanglement between church and state”).

\(^{28}\)Opinion at *3 (“This conclusion [that section 107(2) violates the establishment clause] makes it unnecessary to consider plaintiffs’ equal protection argument”).

\(^{29}\)Id. at *22. For further discussion of Lemon, see Zelinsky, “Entangle,” supra note 6, at 1642-1643, 1674.

\(^{30}\)Opinion at *28.
concluded that for purposes of this case, the three-justice plurality opinion in Texas Monthly had only “minimal” differences with the concurrence opinion filed by two justices.31

The district court also deemed Walz irrelevant.32 In Walz, the Supreme Court upheld, against a First Amendment challenge, New York’s property tax exemption for religious institutions. In sustaining the tax exemption, the Walz Court observed that New York exempts from taxation not just church properties but “a broad class of property,” including hospitals, libraries, and other real estate used for charitable purposes.33 Further, the Walz Court justified the tax exemption of religious properties as minimizing entanglement between church and state.34 By recognizing “the autonomy and freedom of religious bodies,”35 New York’s property tax exemption represents “permissible state accommodation to religion,” the Court said.36

The district court in FFRF distinguished the case from Walz on the “obvious”37 grounds that unlike section 107(2), the New York property tax exemption “was not a tax exemption benefiting religious persons only, but a wide variety of nonprofit endeavors.”38

Central to the district court’s opinion in FFRF is its analysis of the purpose of section 107(2) and its income tax exclusion of cash parsonage allowances. In this context, the district court found three flaws in section 107(2). First, it held that “section 107(2) discriminates against those religions that do not have ministers.”39 Second, the district court reasoned:

Section 107(2) creates an imbalance even with respect to those ministers who benefit from section 107(1) because ministers who get an exemption under section 107(2) can use their housing allowance to purchase a home that will appreciate in value and still can deduct interest they pay on their mortgage and property taxes, resulting in a greater benefit than that received under section 107(1).40

Third, the court noted that section 107(2) “applies to religious persons only,”41 with no counterpart exclusion for cash housing allowances paid to “secular employees.”42 Based on those three flaws, the district court concluded that section 107(2) lacks a secular purpose and a secular effect:

A desire to assist disadvantaged churches and ministers is not a secular purpose and it does not produce a secular effect when similarly disadvantaged secular organizations and employees are excluded from the benefit. The establishment clause requires neutrality not just among the various religious sects but between religious and secular groups as well.43

The defendants argued that section 107(2) should be considered in the context of the code’s other income tax exclusions for cash housing allowances, such as the exclusions for housing allowances paid to Americans working abroad44 and to military personnel.45 Rejecting this argument, the district court again turned to the Texas Monthly plurality opinion for the proposition that those other income tax exclusions could save section 107(2) only if they all shared an “overarching secular purpose” — which, the district court said, they do not.46

Also central to the district court’s reasoning is a key premise of the Texas Monthly plurality opinion: that all tax exemptions for religious institutions subsidize religion in a fashion indistinguishable from cash subvention.47

III. Analysis

For three interrelated reasons, the district court’s FFRF opinion is unconvincing and should be reversed by the Seventh Circuit. First, entanglement of church and state is inevitable when the modern government decides whether to tax the modern church. Section 107 manages this entanglement and accommodates religious autonomy and thus has a secular purpose and a secular effect. Tax exemptions like section 107 do not subsidize the church;

32Opinion at *33-*40 (“I conclude that defendants cannot rely on Walz or Winn to preserve section 107(2).”).
33Walz, 397 U.S. at 673. For further discussion of Walz, see Zelinsky, “Benefits,” supra note 31, at 392-394; Zelinsky, “Entangle,” supra note 6, at 1640-1642; Zelinsky, “Dr. Warren,” supra note 5, at 118-120.
34Walz, 397 U.S. at 674-676.
35Id. at 672. As discussed infra, the district court’s opinion discounts this aspect of Walz.
36Id. at 673.
37Opinion at *33.
38Id. at *34.
39Id. at *47-*48 (emphasis in original).
40Id. at *48-*49.
41Id. at *49 (emphasis in original).
42Id.
43Id. at *49-*50 (internal citation and quotation omitted).
44Section 912.
45Section 134.
46Opinion at *52-*54.
47Id. at *38-*41.
they separate the church from the state. The economic benefit provided by the exemption is a byproduct of that separation.

Second, a careful reading of *Texas Monthly* and *Walz* indicates that consistent with the First Amendment, Congress can exempt from taxation churches and religious actors to avoid church-state entanglement and to accommodate the autonomy of religious institutions and actors. While *Texas Monthly* is the Supreme Court's more recent statement on the First Amendment status of tax exemptions for religious institutions, *Walz* is the more convincing statement on that subject.

Third, the district court relies on the premise of the *Texas Monthly* plurality opinion that every tax exemption constitutes a subsidy. However, in constitutional terms, section 107 is more persuasively perceived not as a subsidy but, under *Walz*, as managing the inevitable entanglement caused by taxation and as accommodating the autonomy of religious institutions and actors. Section 107 thus separates rather than subsidizes.

**A. Secular Purpose With Secular Effect**

The district court in *FFRF* analyzes section 107 in isolation from other code provisions and without considering the church-state entanglement that would be caused by taxing clerical housing allowances. However, section 107 cannot be viewed in isolation. As discussed below, without section 107, the tax treatment of church-provided housing would be governed exclusively by section 119. And like section 107, the application of section 119 to religious employers would entail entangling questions to determine if the provision excludes particular housing from gross income.48

If clerical housing and housing allowances were included in the recipients' gross incomes, the enforcement of taxability would similarly enmesh church and state since the tax collector and the taxpayer have an inherently intrusive relationship. There is no disentangling alternative in this area.49 By managing these inevitable church-state entanglements and by accommodating religious autonomy, section 107 has a secular purpose and a secular effect and separates rather than subsidizes. The tax benefit of section 107 is a byproduct of that separation.

If section 107 were repealed legislatively or invalidated by the courts, section 119 would exclusively govern the income tax status of housing provided by religious institutions.50 Like section 107, section 119(a) requires entangling inquiries at its margins to determine who is eligible to exclude housing from gross income: Do the clergy member and the church have an employee-employer relationship? Is the housing provided for the convenience of the religious employer? Is the housing located on the religious employer's business premises? Thus, sections 107 and 119 both involve eligibility-related entanglements. Eliminating section 107 would merely shift the eligibility inquiries to section 119.

Consider, for example, a rabbi who lives in a house owned by the rabbi's congregation. The rabbi often entertains congregants at the house and conducts study sessions there. The house includes a home office where the rabbi prepares his sermons. Suppose further that section 107 no longer excludes the rental value of this house from the rabbi's gross income. Determining if the rental value is included in his income under section 119 would require that the IRS investigate whether vel non the house is the congregation's business premises and whether the house is furnished for the congregation's convenience. These inquiries would entail invasive tasks, such as defining the congregation's business and scouring the congregation's decision-making to determine if the house was provided to the rabbi for the congregation's convenience.

In this context, the IRS would necessarily ask intrusive questions, such as the proper distance of a rabbi's home from his congregation's synagogue and the comparative importance of the time the rabbi spends in his home study relative to his time spent in his office at the synagogue. Thus, striking section 107 would not eliminate entanglement between church and state but would instead shift that entanglement to a different set of eligibility determinations at the borders of section 119.

Suppose that to avoid those eligibility inquiries under section 119, the courts, as they invalidated section 107, also construed section 119 as inapplicable to religious employers. In this alternative scenario, another set of First Amendment quandaries would arise. There would be serious free exercise concerns if an income tax exclusion were interpreted as benefiting everyone except religious employers and their employees.51

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49Id. at 1657-1659.

50Section 119 governs the taxation of housing provided by religious employers to employees who are not ministers covered by section 107. Absent section 107, those ministers could exclude from income only employer-provided housing qualifying under section 119.

51Zelinsky, "Entangle," *supra* note 6, at 1661-1662.
Consider next the possibility that all church-provided housing were declared taxable income. Although that would eliminate entangling entitlement inquiries, it would enmesh the IRS and churches as the IRS enforced the taxation of housing provided by religious institutions. For example, for in-kind housing provided by a religious employer, the IRS, the employer, and the employee could be ensnared in difficult valuation controversies to determine the rental value of that housing. Liquidity issues arise whenever a taxpayer is taxed on noncash income. The relationship between the tax collector and the taxpayer is inherently intrusive.

Suppose that the IRS contends that a clergy member has underpaid his income taxes attributable to the housing provided to him in kind by his church. To collect this deficiency, the IRS might garnish the clergy’s taxable wage income, an intrusion into the church’s internal operations. Suppose that the clergy maintains that he has not underpaid his income taxes but rather asserts that the rental value of the church-provided home is less than what the IRS claims it is. The resulting litigation will enmesh the IRS and the religious actors as they battle over the rental value of the residence provided to the taxpayer-clergy.

The upshot is that there is no disentangling alternative in this area. There are, as FFRF argues, entangling inquiries at the borders of section 107 to determine who is eligible for exclusion under that provision. If section 107 were repealed or invalidated, the locus of entanglement would shift to eligibility determinations for the section 119 exclusion. If Congress or the courts denied religious employers the protection of both sections 107 and 119, other First Amendment concerns would arise because religious employers and their employees would be singled out for taxation while nonreligious employers and employees enjoyed section 119’s income tax exclusion. Taxing clerical housing and housing allowances would replace borderline housing provided to him in kind by his church.

In a world of imperfect choices, section 107 implements a plausible, although not compelled, decision on how to manage the entanglement that is inevitable when the modern income tax confronts housing provided by religious employers. By es-

52Id. at 1657-1659.
53See supra text accompanying note 22 (Complaint, supra note 3, at para. 21).
54Opinion at *47-*49.
The Supreme Court’s equal protection case law in tax settings confirms Bittker’s analysis because the Court reviews tax laws for equal protection purposes under an “especially deferential” standard of rational purpose. Section 107 passes muster under that acquiescent approach. It is rational for Congress to elect the entanglements involved in determining eligibility for income tax exclusion under section 107 over the alternatives—that is, entanglement under section 119 or the enforcement entanglement that would result from taxing clerical housing and housing allowances. It is similarly rational for Congress to respect the autonomy of religious institutions and thereby separate church from state, even though a side effect of that separation is an economic benefit for the church. Tax laws invariably involve the balancing of contending policies.

The FFRF plaintiffs would likely respond that for First Amendment purposes, tax laws should be scrutinized strictly rather than deferentially. However, Walz correctly cautions otherwise: There should be “room for play in the joints” to accommodate the religious sector’s “autonomy.”

The propriety of reviewing tax laws deferentially is confirmed by the futility of scrutinizing section 107 strictly. Suppose that the Seventh Circuit (and ultimately the Supreme Court) were to follow the district court’s lead in FFRF and invalidate section 107(2). As noted above, that approach would merely shift the locus of church-state entanglement from section 107 to section 119 or to the intrusive entanglement inherent in taxing clerical housing allowances. If, to avoid that entanglement, section 119 were closed to religious employers and their employees, yet other First Amendment problems would arise as those sectarian employers and employees were singled out for negative tax treatment. Strict scrutiny of section 107 (or of any similar tax law) does not free us from this loop. Ultimately, tax laws necessarily involve often arbitrary choices from among Bittker’s “debatable distinctions.” Hence, there is a need to permit reasonable legislative judgments to manage the intractable entanglement problems that arise when the modern tax system confronts the modern church.

Another possible retort by critics of section 107 is that the code taxes parsonage allowances and clerical housing under the self-employment tax. They might ask how Congress can decide that the income taxation of clerical housing and housing allowances would unacceptably entangle church and state yet tax the same housing and allowances under the self-employment levy.

The answer is that churches and other religious employers have withholding obligations under the income tax but not under the self-employment tax. The self-employment tax is paid solely by the taxpayer and is not withheld by the church that is paying the parsonage allowance or providing in-kind clerical housing. Here we have another debatable distinction, namely, that the income taxation of parsonage allowances and in-kind housing would create greater church-state entanglement because churches must withhold income taxes owed by their clerical employees, but they do not withhold self-employment taxes, which are solely the responsibility of the clergy member himself.

In short, managing the inevitable entanglement when the modern government elects to tax (or not) the modern church is a secular purpose with a secular effect. The income tax exclusion embodied in section 107(2) is a plausible, although not compelled, choice to manage that entanglement and to accommodate the autonomy of religious institutions and actors. Section 107(2) is best understood not as subsidizing religion, but as separating the IRS from religious institutions and actors. The economic benefit of section 107(2) is a byproduct of that separation.

B. Texas Monthly Versus Walz

There is considerable tension between Texas Monthly (which invalidated a Texas sales tax exemption for religious publications) and Walz (which approved a New York property tax exemption for religious real estate). A careful reading of Texas Monthly and Walz indicates that consistent with the First Amendment, Congress can exempt from taxation churches and religious actors to avoid church-state entanglement and to respect the autonomy of

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57 Walz, 397 U.S. at 669.
59 Section 1402(a)(8).
60 Compare section 3402(a)(1) (employers’ obligation to withhold from wages) with section 1401(a) and (b) (individuals’ obligation to pay self-employment tax).
religious institutions and their personnel. From this vantage, section 107(2) survives constitutional scrutiny as a “permissible state accommodation” of religious autonomy that avoids entangling the church and the state as tax collector. While Texas Monthly is more recent, Walz is more persuasive.

The district court in FFRF came to a contrary conclusion by relying too heavily on the plurality opinion in Texas Monthly while giving short shrift to the earlier opinion in Walz. The district court’s expansive interpretation of Texas Monthly is based on its conflation of the Texas Monthly plurality opinion with the separate concurring opinion written by Justice Harry A. Blackmun and joined by Justice Sandra Day O’Connor. As noted earlier, the district court asserted that for purposes of the FFRF litigation, there are only minimal differences between the plurality opinion and Blackmun’s concur- rence. However, a careful reading of the concur- rence undermines that assertion.

Blackmun and O’Connor agreed with the plurality’s conclusion that the Texas sales tax exemption, which was restricted to religious publications, was unconstitutional. However, they did not endorse the plurality’s sweeping condemnation of all tax exemptions restricted to sectarian institutions and persons. In a nod to the propriety of accommodating the autonomy of religious institutions through tax exemption, Blackmun noted that “the Free Exercise Clause suggests that a special exemption for religious books is required” under the First Amendment. To reconcile the tension between this free exercise imperative for tax exemption with the countervailing implications of the establishment clause, Blackmun embraced a “narrow resolution” of Texas Monthly in contrast to the plurality’s broad critique of all tax exemptions limited to religious actors:

By confining the tax exemption exclusively to the sale of religious publications, Texas engaged in preferential support for the communi- cation of religious messages.

Contrary to the district court’s holding in FFRF, section 107(2) is not about “the communication of religious messages.” Rather, it is about the taxation (or, to be precise, the nontaxation) of clerical housing allowances. Thus, the Texas Monthly concur- rence does not support the district court’s opinion striking down section 107(2). That opinion rests on an interpretation of the First Amendment — that the establishment clause prohibits all tax exemp- tions restricted to religious actors — joined by only three justices in Texas Monthly.

Another critical aspect of the FFRF opinion is the district court’s rejection of Walz despite the solid (six-justice) majority for that decision. As the district court correctly noted, the Supreme Court in Walz situated New York’s property tax exemption of churches within a broad class of similarly exempted property, including hospitals, libraries, and other secular nonprofit organizations. However, Walz also justified the property tax exemption of religious properties because exemption minimizes church-state entangle- ment and recognizes “the autonomy and freedom of religious bodies.” In Texas Monthly, three dissenting justices identified permissible state accommodation as Walz’s central theme. The same number of justices viewed Walz as conditioning tax exemption for churches on the simultaneous exemption of other eleemosynary properties.

We do not know if some or all of the six justices who composed the Walz majority would have abandoned Chief Justice Warren E. Burger’s majority opinion had it only discussed the accommodation justification for exempting religious institutions from property taxation and not noted the other types of secular property New York exempted from taxation. We do know that six justices, including Burger, joined the Walz opinion which, as written, highlights the propriety of tax exemption as a means of accommodating the autonomy of religious institutions and of avoiding church-state entangle- ment. In light of what Walz actually says, the district court’s FFRF opinion unconvincingly discounts Walz and instead treats the plurality opinion in Texas Monthly as controlling. Although Texas Monthly is more recent, Walz is the more persuasive Supreme Court statement on the treatment of the First Amendment status of tax exemptions for religious institutions.

C. Tax Exemptions Are Not Always Subsidies

Critical to both the Texas Monthly plurality opin- ion and the district court’s FFRF opinion is the unqualified assertion that “every tax exemption constitutes a subsidy.” It is a short step from this sweeping premise to the district court’s conclusion that tax exemptions like the section 107 income tax...

62Walz, 397 U.S. at 673.
63Texas Monthly, 489 U.S. at 27.
64Id. at 28.
65Id.
66Opinion at *27-*28.
67Id. at *34.
68Walz, 397 U.S. at 672-673.
69Id. at 674.
70Id. at 672.
71Texas Monthly, 489 U.S. at 29 (Scalia, J., dissenting).
72Id. at 5 (plurality opinion by Brennan, J.).
73Id. at 14; opinion at *38-*41.
exclusion fail First Amendment muster as impermissible subventions of religion. However, that expansive premise is wrong.74

Tax exemptions, deductions, and exclusions often are subsidies, properly analogized to equivalent direct expenditures.75 But sometimes they are not. Tax deductions, exemptions, and exclusions may help to define the tax base. For example, the deduction under section 162(a) for ordinary and necessary business expenses is designed not to underwrite business activity, but to determine the amount of net profits subject to the federal income tax. Other deductions, exemptions, and exclusions may be necessary to make a tax administrable or acceptable to the taxing public.76 For example, the federal tax law excludes imputed income because of the difficulties of taxing that income and the popular resistance likely to arise from taxing it.77

It is therefore inaccurate to say that every tax exemption is a subsidy. And it is thus unpersuasive to dismiss section 107 in conclusory fashion as a subsidy. Undoubtedly, some of the lawmakers who have voted for section 107 over the years have thought of it as a subsidy. However, the First Amendment test for a tax exemption must require more than that.

Section 107 is reasonably understood as advancing important, non-subsidizing goals — namely, to manage the inevitable entanglement that occurs when the modern state decides whether to tax the modern church and to accommodate the autonomy of religious institutions and actors. In a world of imperfect alternatives, section 107 separates church and state through a policy of nontaxation. These are not subsidizing purposes.

IV. Conclusion

As a matter of tax policy, there is a strong argument for taxing cash parsonage allowances. Those allowances are easily valued because they are paid in cash and give the recipient liquidity with which to pay income tax.78 However, the constitutionality of section 107(2) is a different matter.

For the three interrelated reasons discussed in this report, the FFRF opinion is unpersuasive. First, contrary to the district court’s finding, section 107 has a secular purpose and a secular effect. It is best understood not as subsidizing the church, but as separating the church from the IRS in a world of imperfect choices. The economic benefit of tax exemption is a byproduct of that separation. Second, the district court relied too heavily on the plurality opinion in Texas Monthly while giving short shrift to the substantial authority of Walz. And third, tax exemptions are not always subsidies. In constitutional terms, section 107 is more convincingly perceived not as a subsidy, but, under Walz, as managing the inevitable entanglement caused by taxation and as accommodating the autonomy of religious institutions and actors. Accordingly, the Seventh Circuit should reverse the district court’s opinion in FFRF.

78See Zelinsky, “Entangle,” supra note 6, at 1665-1667.