After Warren: Revisiting Taxpayer Standing and the Constitutionality of Parsonage Allowances

Phil Bednar

Follow this and additional works at: https://scholarship.law.umn.edu/mlr

Part of the Law Commons

Recommended Citation
https://scholarship.law.umn.edu/mlr/787
Richard Warren, a Baptist minister, received a housing allowance of approximately $80,000 each year from his church. He claimed the entire amount as a tax exclusion under 26 U.S.C. § 107(2), which at the time stated that rental allowances paid to “minister[s] of the gospel” (i.e., parsonage allowances) are excluded from gross income. The IRS claimed the exclusion amount was excessive because it was greater than his home’s fair market rental value. Neither party raised the issue of whether § 107(2) was unconstitutional. The U.S. Tax

1. Warren v. Comm’r, 302 F.3d 1012, 1013 (9th Cir. 2002).
2. The Internal Revenue Code at § 107 does not define “minister of the gospel.” See 26 U.S.C.S. § 107 (LexisNexis 2002). The corresponding Treasury regulation does not specifically define “minister of the gospel,” although it does provide examples of ordinary duties of ministers, such as “the performance of sacerdotal functions [and] the conduct of religious worship.” See 26 C.F.R. § 1.107-1 (2002). Neither the statute nor the Treasury regulation indicate a preference for a particular religious denomination. See 26 U.S.C.S. § 107; 26 C.F.R. § 1.107-1. If that were the case, courts would treat § 107 as suspect and apply a strict scrutiny test for constitutionality. See Larson v. Valente, 456 U.S. 228, 246 (1982). For purposes of this Comment, the parsonage allowance is interpreted as providing tax benefits to religious organizations as a whole.
3. Warren, 302 F.3d at 1013.
4. Id. at 1013-14. The fair rental value of Reverend Warren’s home was between $50,000 and $60,000 during the years at issue. See Warren v. Comm’r, 114 T.C. 343, 344 (2000).
5. See Warren, 302 F.3d at 1014 (noting that the court brought up the issue of the constitutionality of § 107(2) by requesting supplemental briefing from the parties and amici); see also 148 CONG. REC. H1299 (daily ed. Apr. 16,
Court ruled in Reverend Warren's favor, holding that the § 107(2) parsonage allowance tax exclusion may exceed the home's fair market rental value. On appeal, the Ninth Circuit Court of Appeals appointed Erwin Chemerinsky, a professor at the University of Southern California Law School, as amicus curiae and requested that the parties and amici submit briefs on whether the court should consider the constitutionality of § 107(2). In May 2002, the parties agreed to dismiss the government’s appeal. On the same day, Chemerinsky filed an opposition to dismissal, and seven days later he filed a motion to intervene as a private taxpayer, arguing that intervention should be permitted in his case to bring a larger facial challenge to the constitutionality of § 107(2) and prevent the government from avoiding the corresponding First Amendment issues.

On August 26, 2002, the Ninth Circuit denied Chemerinsky’s motion, concluding that Chemerinsky must bring his case at the federal district court level. As a result, the constitutionality of the tax exclusion for ministers remains at issue. Some have argued that the cash housing allowance tax exclusion for ministers is a violation of the First Amendment's Establishment Clause and a potential source of abuse. Others have argued that not only is this tax exclusion...
constitutional, but also the economic welfare of clergy depends heavily on the tax savings generated by the exclusion. The Ninth Circuit considered the issue important enough to warrant a supplemental briefing from the parties and amici on whether the court should consider the constitutionality of the tax exclusion. Because of the court's ruling, however, this issue will have to be decided on another day. Furthermore, because a taxpayer, even in federal district court, may not necessarily be able to file suit questioning the constitutionality of a federal tax provision, it is uncertain whether any court will decide on the constitutionality of the tax exclusion at issue in Warren.

This Comment picks up where the Ninth Circuit Warren court left off. It analyzes the aftermath of Warren using a background of cases, rules, and commentary, and it argues that not only does a taxpayer have standing to file suit in federal district court questioning the constitutionality of the tax exclusion, but also that the taxpayer's suit will be successful. Part I provides an overview of the parsonage allowance. Part II describes relevant cases and principles relating to taxpayer standing, the First Amendment's Establishment Clause, and tax exemptions for religious organizations. Part III analyzes a taxpayer's ability to bring suit at the federal district court level, and it also addresses the constitutionality of the tax exclusion at issue in Warren. This Comment concludes that the tax exclusion likely violates the First Amendment's Establishment Clause.


13. See 148 CONG. REC. H1299 (daily ed. Apr. 16, 2002) (statement of Rep. Ramstad) ("Clergy members of every faith and denomination rely on the housing allowance. Without it, America's clergy face a devastating tax increase of $2.3 billion over the next 5 years."); see also 148 CONG. REC. S2957 (daily ed. Apr. 18, 2002) (statement of Sen. Baucus) ("[W]e risk losing a long-standing benefit that is terribly important to hundreds of thousands of ministers, priests, rabbis and other clergy all across America.").

14. See Warren v. Comm'r, 282 F.3d 1119, 1119-20 (9th Cir. 2002) (noting the appointment of Chemerinsky as amicus and the court's request for supplemental briefs on the constitutionality of 26 U.S.C. § 107(2)).

15. See infra Part II.A (discussing case precedent regarding taxpayer standing).
I. THE PARSONAGE ALLOWANCE: TAX EXCLUSIONS FOR MINISTERS OF THE GOSPEL

The Internal Revenue Code has historically provided for ministers a tax exclusion pertaining to rental allowances (i.e., parsonage allowances), although the statutory language has changed over time. The parsonage allowance originated from the Revenue Act of 1921, which excluded from gross income “the rental value of a dwelling house and appurtenances thereof furnished to a minister of the gospel as part of his compensation.” Congress revised the allowance in 1954, broadening its scope to include housing allowances paid to ministers who were renting a home. This language from the 1954 revision generally corresponded to 26 U.S.C. § 107(2) when Warren was decided in U.S. Tax Court in 2000. At that point, 26 U.S.C. § 107 stated that gross income for a “minister of the gospel” did not include either: “(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.”

When Warren reached the Ninth Circuit in August 2002, 26 U.S.C. § 107(2) had been amended to include a fair rental value cap on the allowance, limiting the allowance “to the extent used by him to rent or provide a home and to the extent such allowance does not exceed the fair rental value of the home, including furnishings and appurtenances such as a garage, plus the cost of utilities.”

Regulations issued by the U.S. Treasury Department


\[17.\] See S. REP. No. 83-1622, at 16 (1954), reprinted in 1954 U.S.C.C.A.N. 4621, 4646. Congress expanded the parsonage allowance to prevent discrimination against ministers who had received higher (taxable) salaries from their respective churches rather than church-provided housing that fell within the scope of the parsonage allowance as enacted in 1921. See id.


recognize the parsonage allowance as well.\textsuperscript{21} An IRS revenue ruling issued in 1971 recognizes the parsonage allowance but limits it to “an amount equal to the fair rental value of the home acquired . . . plus the cost of utilities.”\textsuperscript{22} Therefore, the tax exclusion for ministers has been supported historically by the federal government, although its scope has been stated differently over time.

The parsonage allowance did not receive a great deal of scrutiny until the late 1970s and early 1980s.\textsuperscript{23} Scandals at that time, coupled with U.S. Treasury Department scrutiny and recent congressional rallying for support, have placed a spotlight on the parsonage allowance.\textsuperscript{24} Upon the Ninth Circuit's constitutional probing in \textit{Warren}, supporters of the parsonage allowance lobbied Congress to devise a means of preserving it.\textsuperscript{25} Congress responded by enacting the Clergy Housing Allowance Clarification Act of 2002, which limits the rental allowance exclusion to the fair rental value of the minister's home.\textsuperscript{26} According to Congress, this limitation would remove First Amendment concerns surrounding the parsonage

\begin{itemize}
  \item \textsuperscript{21} Treasury regulations state that gross income for a “minister of the gospel” does not include: “(1) the rental value of a home, including utilities, furnished to him as a part of his compensation, or (2) the rental allowance paid to him as part of his compensation to the extent such allowance is used by him to rent or otherwise provide a home.” 26 C.F.R. § 1.107-1 (2002).
  \item \textsuperscript{22} Rev. Rul. 71-280, 1971-2 C.B. 92.
  \item \textsuperscript{24} See 148 CONG. REC. H1299 (daily ed. Apr. 16, 2002) (statement of Rep. Ramstad) (advocating support for the parsonage allowance); Foster, supra note 23, at 159-63 (discussing recent scandals and U.S. Treasury Department scrutiny). In the late 1970s, the IRS cracked down on “mail-order ministries” in which individuals purchased certificates of ordination or licensure from promoters who were selling in the name of a church. \textit{Id.} at 160. These individuals became “ministers” of their own “churches” and operated them as tax-exempt entities. \textit{Id.} The mail-order ministers received deductions for their contributions to their respective churches, and they received housing allowances that were excludable under § 107. \textit{Id.} at 161. The mail-order ministers evaded paying taxes on much of their income through this scheme. \textit{Id.} Several mail-order ministers were convicted for § 107 tax fraud. \textit{Id.} Thus, the mail-order minister scandals represented an early stage in governmental scrutiny of § 107. The Treasury Department attempted to eliminate § 107 in the 1980s under President Reagan’s plan to simplify the tax system. \textit{Id.} at 162. Because of swift lobbying support from constituents, the Treasury Department’s proposed plan did not succeed. \textit{Id.} at 162-63.
\end{itemize}
allowance because it would address the issue involved in *Warren* when it was decided in U.S. Tax Court. Presumably, the issue referred to is whether the § 107(2) parsonage allowance is capped at the fair rental value of the minister's home.

II. OVERVIEW OF TAXPAYER STANDING, FIRST AMENDMENT ESTABLISHMENT CLAUSE JURISPRUDENCE, AND THE CONSTITUTIONALITY OF TAX EXEMPTIONS FOR RELIGIOUS ORGANIZATIONS

A taxpayer challenging the constitutionality of the parsonage allowance in federal court must establish standing to sue. *Frothingham v. Mellon* represents the Supreme Court's default position on taxpayer standing, but *Flast v. Cohen* carved out an exception to the *Frothingham* rule. Post-*Flast* cases appear to reduce the scope of this exception.

Because the parsonage allowance's compliance with the First Amendment's Establishment Clause is at issue, discussion of this tax exclusion should be made in the context of major Supreme Court Establishment Clause tests. The Court has applied the *Lemon* test for years, although its significance has been reduced over time as other tests such as the "endorsement test" have been applied. The parsonage allowance tax exclusion should also be examined under Supreme Court case precedent regarding tax exemptions for religious organizations. *Walz v. Tax Commission* and *Texas Monthly, Inc. v. Bullock* are two significant cases in this area.

27. See 148 CONG. REC. H1300 (daily ed. Apr. 16, 2002) (statement of Rep. Ramstad) ("The legislation on the floor today will stop the attack on the housing allowance by resolving the underlying issue in the tax court case."); see also *Warren v. Comm'r*, 302 F.3d 1012, 1014 (9th Cir. 2002).

28. See supra text accompanying note 6. The statute's revision, however, has little impact on the debate over the constitutionality of § 107. See infra Part III.B.1.


30. 262 U.S. 447 (1923).

31. See *Bowen v. Kendrick*, 487 U.S. 589, 618 (1988) ("[W]e have consistently adhered to *Flast* and the narrow exception it created to the general rule against taxpayer standing established in *Frothingham* . . . .").

32. See infra text accompanying notes 64-72 (describing strict application of *Flast* exception).


A. TAXPAYER STANDING: DEFAULT RULE AND EXCEPTION

A plaintiff must establish standing to adjudicate a claim in federal court. The purpose of the standing doctrine is to ensure that the plaintiff has alleged a "personal stake in the outcome of the controversy" resulting in "concrete adverseness." The plaintiff must have suffered an "injury in fact" and there must be a causal link between the harm and the defendant's alleged action. The injury must be "concrete and particularized" and "actual or imminent." Although plaintiffs are usually able to establish standing in traditional cases involving direct injury, problems may occur when plaintiffs make allegations as part of a larger group, such as taxpayers.

The Frothingham v. Mellon decision established a default position against federal taxpayer standing. In this early case, the Court addressed whether a taxpayer had standing to challenge the constitutionality of the Maternity Act. The plaintiff alleged that the federal statute at issue would increase her future tax burden and thus result in a taking of property without due process of law. The Court determined the taxpayer did not have standing, basing its conclusion first on separation of powers principles. The Court stated that when an individual files a claim challenging the constitutionality of a federal law, but lacks a direct or immediately threatened injury, the court is not deciding a judicial controversy. According to the Court, the plaintiff did not suffer such an injury because she was airing a complaint "merely that officials of the executive department of the government are executing

39. Id.
40. See Richard M. Elias, Note, Confusion in the Realm of Taxpayer Standing: The State of State Taxpayer Standing in the Eighth Circuit, 66 MO. L. REV. 413, 416 (2001) ("A plaintiff usually has no problem meeting the standing threshold because a traditional case involves a plaintiff who alleges a direct economic or physical injury.").
41. See Russell W. Galloway, Basic Justiciability Analysis, 30 SANTA CLARA L. REV. 911, 929 (1990) ("As a general rule, individuals do not have standing solely by virtue of their status as federal taxpayers to challenge allegedly unconstitutional conduct by officers of the federal government.").
44. Id. at 486.
45. See id. at 488-89.
46. Id.
and will execute an act of Congress asserted to be unconstitutional.47 Without a judicial controversy and thus a justification for enjoining executive branch officials from executing an allegedly unconstitutional statute, the Court would be encroaching on the powers of a coequal branch of the federal government.48

The Court also based its conclusion on the taxpayer's decision to sue the federal government, as opposed to a municipal government.49 The Court found the plaintiff's status as a federal taxpayer problematic because unlike a municipal taxpayer, a federal taxpayer's interest in the moneys of the treasury is small and uncertain because it is shared with millions of other taxpaying citizens.50 Furthermore, the Court stated that because a federal taxpayer's prediction of the effects of a federal statute on his or her future tax burden is indeterminable, a request for equity-based relief is unjustified.51

Flast v. Cohen carved out an exception to the Frothingham default position against taxpayer standing.52 In Flast, the Supreme Court held that taxpayers challenging the constitutionality of the Elementary and Secondary Education Act of 1965 had standing.53 The taxpayers alleged that federal funds under the Act were directed toward religious schools, thus violating the First Amendment's Establishment and Free Exercise Clauses.54 The Court determined that for a taxpayer plaintiff to have standing, a "logical nexus" must exist between the plaintiff's asserted status and the plaintiff's claim.55 The Court's "logical nexus" test requires the taxpayer to establish the following: a logical link between taxpayer status and the type of legislative program at issue, and a logical link between taxpayer status and the nature of the alleged constitutional violation.56 According to the majority, the taxpayers met both

47. Id. at 488.
48. Id. at 488-89.
49. Id. at 486-87.
50. Id. at 487.
51. Id. The plaintiff sought equity-based relief through an injunction preventing the execution of a federal law (the Maternity Act) because it was allegedly unconstitutional. See id. at 486.
54. Id. at 85-86.
55. Id. at 102.
56. Id.
“logical nexus” test requirements to have proper standing. The taxpayers met the first prong because they were challenging a federal spending program, and they met the second prong because they alleged that Congress, in enacting the Elementary and Secondary Education Act, had breached a specific limitation on its Article I, Section 8 taxing and spending power under the Constitution.

The majority distinguished Frothingham, noting that the taxpayer in Frothingham alleged “generalized grievances” rather than breaches of specific limitations upon Congress’s taxing and spending power. The Flast plaintiff alleged a violation of the First Amendment’s Establishment Clause, which according to the Court, is a “specific bulwark against . . . potential abuses of governmental power” and functions as a specific constitutional limitation on Congress’s taxing and spending powers under Article I, Section 8 of the Constitution. The Frothingham plaintiff, however, alleged that her expected additional tax burden was a due process violation, and the Court stated that the Due Process Clause of the Fifth Amendment contains no provision shielding taxpayers from additional tax liability. Thus, according to the Court, the Frothingham plaintiff was airing a “generalized grievance[]” about government conduct rather than alleging a breach of a specific limitation upon Congress’s taxing and spending power.

Later cases took the bite out of Flast’s apparent expansion of taxpayer standing. In Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., the Court strictly applied the Flast “logical nexus” test and denied standing to the taxpayer plaintiffs. In this case, an organization and several of its employees brought a First Amendment challenge to the conveyance of surplus federal government property to a church-related college. The Court

---

57. Id. at 103.
58. See id. at 103-04.
59. Id. at 104-06.
60. Id. at 86.
61. Id. at 104.
62. Id. at 105.
63. Id. at 105-06.
65. Id. at 468-69. Under the Federal Property and Administrative Services Act of 1949, the Secretary of Health, Education, and Welfare (now the
found no taxpayer standing, distinguishing the case from *Flast*. Unlike the taxpayers in *Flast*, the *Valley Forge* taxpayers were challenging actions of the executive branch, as opposed to exercises of congressional power. Furthermore, the Court found that the property transfer in *Valley Forge* did not directly relate to Congress's taxing and spending powers under Article I, Section 8. Rather, it pertained to Congress's power under the Property Clause at Article IV, Section 3, Clause 2. Thus, based on the factual distinction between the two cases, the *Valley Forge* Court found that the plaintiffs in that case could not establish the first prong of the *Flast* "logical nexus" test and thus lacked standing under that approach. The *Valley Forge* Court found no other basis for standing to bring suit because the respondents did not identify an injury sufficient to establish standing under Article III. In the years following *Valley Forge*, the Court reaffirmed that although *Flast* is still good law and carves out an exception to *Frothingham*, the latter case's blanket ruling against taxpayer standing remains intact as well.

Secretary of Education) is authorized to dispose of surplus property. *Id.* at 466-67.

66. *See id.* at 478-82.

67. *Id.* at 479. Specifically, the *Valley Forge* taxpayers were concerned about the Department of Health, Education, and Welfare's decision to transfer property. *Id.* But see Erwin Chemerinsky, *A Unified Approach to Justiciability*, 22 CONN. L. REV. 677, 691 (1990) (arguing that this distinction may not be important because both Congress and the executive branch are bound by the First Amendment).

68. *Valley Forge*, 454 U.S. at 480; *see also* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 228 (1974) (holding there was no standing because the challenged enactment did not pertain to Congress's taxing and spending powers, but to executive branch action in allowing certain members of Congress to hold commissions in the Armed Forces Reserve); *United States v. Richardson*, 418 U.S. 166, 175 (1974) (finding there was no standing because the taxpayer's challenge did not relate to Congress's taxing and spending power, but to statutes regulating the CIA).

69. *Valley Forge*, 454 U.S. at 480. Specifically, the property transfer related to authorizing legislation under the Federal Property and Administrative Services Act of 1949. *Id.* But see Chemerinsky, *supra* note 67, at 691 (arguing that this distinction is irrelevant because the Establishment Clause under the First Amendment applies to congressional action under both Article I and Article IV).

70. *Valley Forge*, 454 U.S. at 479.

71. *Id.* at 485-86.

The First Amendment states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” The presence of the Establishment and Free Exercise Clauses of this Amendment, taken together, causes interpretation problems because if taken to their extremes, they seemingly conflict with each other. The Supreme Court has historically taken a neutral position between these two clauses, thus walking a “tight rope” between religious autonomy and established religion. Besides the interpretation problems surrounding these two clauses, First Amendment Establishment Clause jurisprudence as a whole is a tangled web of seemingly unsettled doctrines and conflicting results. The Supreme Court has applied a variety of Establishment Clause tests over the years, and it is unclear which test is currently controlling, thus adding to the confusion.

1. Establishment Clause Tests

In Lemon v. Kurtzman, decided in 1971, the Supreme Court developed a three-part test for Establishment Clause violations. The case dealt with Rhode Island’s Salary Supplement Act, which permitted nonpublic school teachers to receive an additional fifteen percent in salary. The Act

---

73. U.S. CONST. amend. I.
76. See Walz, 397 U.S. at 668-69, 672.
77. FARBER, supra note 33, at 275.
78. See id. at 280-83.
80. Id. at 607.
prohibited eligible instructors from teaching religious-related classes and permitted only courses offered in public schools.\textsuperscript{81} The case also dealt with Pennsylvania’s Nonpublic Elementary and Secondary Education Act, which allowed the State Superintendent of Public Instruction to “purchase” certain “secular educational services” from nonpublic schools.\textsuperscript{82} The State would reimburse nonpublic schools for money spent on “teachers’ salaries, textbooks, and instructional materials.”\textsuperscript{83} Under this Act, nonpublic schools would be reimbursed only for materials related to “secular” courses such as mathematics and physical education.\textsuperscript{84}

The Supreme Court, using a three-part test, held that both state statutes were unconstitutional.\textsuperscript{85} The Lemon Court held that, in order to pass Establishment Clause muster, a statute must have a secular legislative purpose,\textsuperscript{86} its principal or primary effect must neither advance nor inhibit religion,\textsuperscript{87} and it cannot “foster ‘an excessive governmental entanglement with religion.’”\textsuperscript{88} The Court did not consider whether the statutes met the first two requirements because they both failed the “excessive governmental entanglement” requirement.\textsuperscript{89} The Court believed that even the most well-meaning instructor would have difficulty remaining neutral under the Rhode Island Act’s provisions.\textsuperscript{90} Furthermore, the Court stated that under both states’ statutes, the inspection and evaluation of the religious content of an organization creates an entanglement because it may lead to “excessive government direction of church schools and hence of churches.”\textsuperscript{91}

The 1980s witnessed a change in the Supreme Court’s Establishment Clause analysis, as the Court began showing disapproval of the Lemon test.\textsuperscript{92} In Lynch v. Donnelly, Justice

\textsuperscript{81} Id. at 608.
\textsuperscript{82} Id. at 609.
\textsuperscript{83} Id.
\textsuperscript{84} Id. at 610.
\textsuperscript{85} See id. at 609, 611.
\textsuperscript{86} Id. at 612.
\textsuperscript{87} Id.
\textsuperscript{88} Id. at 613 (quoting Walz v. Tax Comm’n, 397 U.S. 664, 674 (1970)).
\textsuperscript{89} Id. at 613-14.
\textsuperscript{90} Id. at 618.
\textsuperscript{91} See id. at 620-21.
O'Connor, in a concurring opinion, suggested a clarification of the Lemon test by applying an “endorsement test.” Under the endorsement test, the court must first determine whether the government “intends to convey a message of endorsement or disapproval of religion.” The court then must determine whether the government actually conveyed this message. The endorsement test has been arguably viewed as a less restrictive test for scrutinizing possible Establishment Clause violations. In Agostini v. Felton, the Court addressed the Lemon “excessive entanglement” requirement, stating that administrative concerns and political divisiveness, by themselves, are insufficient to create an “excessive” entanglement. Thus, the post-Agostini Court appears to be less concerned about problems associated with governmental monitoring.

As a result, the Court appears to be moving away from the “excessive entanglement” prong of the Lemon test and instead focusing on the first two prongs of the Lemon test. This approach bears a resemblance to the “endorsement test” described above. Even though Lemon governed the Court’s Establishment Clause analysis for decades and has never been overruled, its current status is unclear and its importance, therefore, has diminished over time. There is, however, no clearly governing Establishment Clause test, and different Supreme Court justices have articulated different tests over the years.

2. Constitutionality of Tax Exemptions for Religious Organizations

In the early 1970s, the Supreme Court began developing its position on the constitutionality of tax statutes pertaining to religious organizations. One of the leading early cases was

---

94. Id. at 691.
95. Id. at 690-91.
96. See Foster, supra note 23, at 175.
98. See FARBER, supra note 33, at 283.
99. See id.
100. See supra text accompanying notes 86-88, 94-95.
101. See FARBER, supra note 33, at 280-83.
102. See id. at 282-83.
103. Foster, supra note 23, at 166.
Walz v. Tax Commission, in which a state statute granted a tax exemption to religious organizations using property exclusively for religious worship. The Court upheld the exemption, stating that the legislative purpose of the tax exemption was "not aimed at establishing, sponsoring, or supporting religion." Furthermore, the Court held that the tax exemption did not excessively entangle government and religion. According to the Court in Walz, a tax exemption is not governmental sponsorship, and there is no link between tax exemption and religious establishment.

In the late 1980s, the Court arrived at a different conclusion when it analyzed a Texas sales tax exemption statute. In Texas Monthly, Inc. v. Bullock, the Court, in a plurality opinion, held that a Texas sales tax exemption for religious periodicals violated the First Amendment. The state statute at issue provided exemptions for "religious faith" periodicals that promote "teaching[s] of the faith" and are "sacred to a religious faith."

The Court, in its analysis, applied an "endorsement test" to determine whether the Texas statute violated the Establishment Clause. The Court found the exemption "narrow" and a form of "state sponsorship of religious belief." The exemption, the Court observed, did not pass the endorsement test because the government is directly subsidizing an exclusively religious organization. The Court distinguished Walz, noting that the latter case involved a state statute broader in scope, covering more than simply religious organizations. In Texas Monthly, however, the statute at

---

105. Id. at 674.
106. Id. at 674-76.
107. Id. at 675-76.
108. Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 25 (1989). The appellant in this case was a general interest magazine publisher that did not qualify for the exemption and paid related sales taxes under protest. Id. at 6.
109. Id. at 5-6.
110. See id. at 8-9.
111. The Court deemed the Texas statute "narrow" because it extended to only religious organizations. Id. at 15.
112. Id.
113. Id.
114. See id. at 15 n.5, 15-16.
issue referred only to religious faith periodicals. The Texas Monthly Court found that the Texas statute lacked a secular objective, thus resulting in governmental endorsement of religious belief. Therefore, the Court held that the Texas statute was unconstitutional.

III. A TAXPAYER’S SUIT—LIKELIHOOD OF SUCCESS

Although a taxpayer plaintiff challenging the parsonage allowance will encounter some difficulties with the Frothingham default position against taxpayer standing, he or she should be able to establish standing based on the Flast exception carved out from Frothingham.

Once standing is established, a court will likely analyze the parsonage allowance using Supreme Court precedent regarding tax exemptions for religious organizations, and it will likely apply some type of Establishment Clause test. The parsonage allowance bears a greater resemblance to the statute at issue in Texas Monthly than the statute in Walz. This cuts in the taxpayer plaintiff’s favor. A court applying either the Lemon test or the endorsement test should find the parsonage allowance unconstitutional.

A. ABILITY TO ESTABLISH TAXPAYER STANDING

1. Standing Under Frothingham

A federal taxpayer, solely because of that status, would not have standing under Frothingham v. Mellon to challenge the parsonage allowance, although factual distinctions exist between Frothingham and the current case that would increase the taxpayer’s likelihood of establishing standing. Frothingham generally disallows taxpayer standing to bring suit challenging the constitutionality of a federal statute, and its holding remains the default position for taxpayer standing despite the exceptions created in Flast. Like the plaintiff in Frothingham, a taxpayer questioning § 107(2) would be challenging a federal statute, which the Frothingham Court

---

115. Id. at 5.
116. Id. at 17.
117. Id. at 25.
118. 262 U.S. 447 (1923).
disfavored because of the uncertain interest federal taxpayers have in the treasury as a whole.\textsuperscript{120} Furthermore, a taxpayer questioning the constitutionality of § 107(2) would arguably be airing a “generalized grievance” much like the plaintiff in \textit{Frothingham} because both plaintiffs are individuals challenging the constitutionality of a federal statute.\textsuperscript{121}

A § 107 plaintiff, however, is distinguishable from the \textit{Frothingham} plaintiff in the nature of the allegations made. In \textit{Frothingham}, the plaintiff charged Congress with enacting a statute that would increase her future income tax burden, resulting in a due process violation.\textsuperscript{122} A § 107 plaintiff would instead be asserting his or her interest in being free of taxing and spending beyond the scope of Congress’s taxing and spending power under Article I, Section 8 of the Constitution.\textsuperscript{123} As the \textit{Flast} Court noted, unlike the Fifth Amendment Due Process Clause, the First Amendment functions as a specific limitation on Congress’s taxing and spending powers under Article I, Section 8 of the Constitution.\textsuperscript{124} Despite this distinction, a § 107 plaintiff still may not have standing under a strict interpretation of \textit{Frothingham} because a federal statute is involved.

2. Standing Under \textit{Flast}

A federal taxpayer questioning the constitutionality of § 107(2) would have standing to sue under \textit{Flast}. The plaintiffs in both cases have some similarities: Like the \textit{Flast} plaintiff, a § 107 plaintiff is questioning the constitutionality of a federal statute, and in both cases the plaintiffs are alleging an Establishment Clause violation with respect to Congress’s taxing and spending power under Article I, Section 8 of the Constitution.\textsuperscript{125}

An important difference does exist, however: In \textit{Flast}, the statute at issue was a federal grant program, but § 107 is a tax

\textsuperscript{120} See \textit{Frothingham}, 262 U.S. at 487.
\textsuperscript{121} See id.; see also \textit{Flast} v. Cohen, 392 U.S. 83, 106 (1968) (noting that the taxpayer in \textit{Frothingham} aired generalized grievances in federal court).
\textsuperscript{122} \textit{Frothingham}, 262 U.S. at 486.
\textsuperscript{123} Such a claim resembles the plaintiff’s claim in \textit{Flast}. See \textit{Flast}, 392 U.S. at 105. Article I, Section 8 of the Constitution states that “Congress shall have Power To lay and collect Taxes.” U.S. CONST. art. I, § 8.
\textsuperscript{124} \textit{Flast}, 392 U.S. at 104-05.
\textsuperscript{125} See \textit{id.} at 105.
It may not necessarily follow that tax exclusions are constitutionally equivalent to federal cash grants. The Court may choose to distinguish between the ability to spend taxpayer money and the ability to tax a particular group of persons less heavily. This argument carries weight upon considering the trend in cases after *Flast*, in which the Court appeared to rein in the ability of a taxpayer to assert a constitutional violation in federal court. This distinction is not entirely convincing, however, because § 107 falls squarely within the boundaries of Article I, Section 8. The text of this Constitutional provision states that Congress has the power to “lay and collect Taxes,” and the parsonage allowance, like any tax exemption, reflects Congress’s ability to “not tax.” The ability to “not tax” is arguably a subset of Congress’s broad power to “lay and collect Taxes.” Therefore, because the factual distinction between *Flast* and the current case is not material, the next step is to apply *Flast*’s “logical nexus” test for taxpayer standing.

A § 107 plaintiff should satisfy the *Flast* “logical nexus” test for taxpayer standing. First, the plaintiff would likely meet the first requirement of the test, establishing a link between taxpayer status and the challenged statute. Like the plaintiff in *Flast*, a § 107 plaintiff is challenging the constitutionality of a federal statute enacted pursuant to the taxing and spending clause of Article I, Section 8 of the Constitution. The necessary link exists because the plaintiff would be a taxpayer and the statute involved pertains to Congress’s power to “lay and collect Taxes” under Article I, Section 8. Therefore, a § 107 plaintiff should be able to satisfy the first prong in the two-part *Flast* test for standing.

A § 107 plaintiff should also meet the second prong of the test, establishing a link between taxpayer status and the alleged constitutional violation. Like the plaintiff in *Flast*, a

---

126. See 26 U.S.C.S. § 107 (LexisNexis 2002) (noting the statute excludes from income rental allowances provided to a “minister of the gospel”); *Flast*, 392 U.S. at 86 (noting the statute at issue was a federal grant program).
127. See supra text accompanying notes 64-72.
129. See id.
130. *Flast*, 392 U.S. at 102.
131. See id. at 105.
133. *Flast*, 392 U.S. at 102.
taxpayer challenging the constitutionality of § 107 is alleging that his or her tax money is being used "in violation of specific constitutional protections against such abuses of legislative power." As the Court noted, the First Amendment's Establishment Clause specifically limits the taxing and spending power provided by Article I, Section 8. Therefore, a § 107 plaintiff would likely satisfy the second part of the Flast test and thus establish proper standing.

The Court's decisions in later cases such as Valley Forge, Schlesinger, and Richardson should have little impact, if any, on a § 107 plaintiff's ability to show standing. First, the plaintiff's cause of action in the Warren scenario is distinguishable from those of the plaintiffs in Schlesinger and Richardson because the latter plaintiffs were challenging executive actions that did not directly relate to Congress's taxing and spending powers. Second, a § 107 plaintiff's cause of action is distinct from the plaintiff's claim in Valley Forge. There, the taxpayer questioned the constitutionality of conveying surplus government property to a tax-exempt religious organization. In the present case, Congress's taxing power would be at the forefront of the plaintiff's complaint. A plaintiff questioning the constitutionality of a tax provision is directly questioning an act under Congress's constitutional tax powers. The problem with the Valley Forge plaintiff's cause of action was its more direct link to Congress's property-related powers, rather than taxing powers, under the Constitution. Despite the Court's attempt in Valley Forge to limit the reach of Flast, a § 107 plaintiff should be unaffected by Valley Forge because his or her claim would be directly tied to Congress's taxing and spending powers under the Constitution. Thus, despite the Court's rulings since Flast, a § 107 plaintiff should

134. Id. at 106.
135. Id. at 105.
136. See Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 228 (1974) (holding there was no standing because the challenged enactment did not pertain to Congress's taxing and spending powers, but to executive branch action in allowing certain members of Congress to hold commissions in the Armed Forces Reserve); United States v. Richardson, 418 U.S. 166, 175 (1974) (finding there was no standing because the taxpayer's challenge does not relate to Congress's taxing and spending power, but to statutes regulating the CIA).
138. See id. at 480.
be able to establish proper standing in federal court on Flast taxpayer standing theory.

3. Standing Under Traditional Standing Principles

A federal taxpayer questioning the constitutionality of the parsonage allowance would probably not have any basis for standing outside of the taxpayer standing context to sue in federal court. The § 107 plaintiff would have to show an "injury in fact" that is concrete and personal to the plaintiff. The average taxpayer who does not receive any housing allowance would have a difficult time arguing that an injury occurred merely because he or she knew of a minister that was able to exclude housing allowance funds from gross income. Such a claim falls under the "generalized grievance" category that the Frothingham Court disfavored and rejected when determining standing. A taxpayer who receives a housing allowance from a non-church organization (and is thus taxable) would have a better chance of establishing standing outside of the Flast context because he or she could point to a specific injury—being taxed on a housing allowance that ministers can exclude from their income. This taxpayer would still need to satisfy other constitutionally required and prudential requirements for standing, so it is unclear whether the taxpayer would be likely to establish standing under the traditional approach. In general, the average taxpayer (including Professor Chemerinsky, should he decide to sue in federal district court) not receiving a housing allowance would have a significantly

140. See Frothingham v. Mellon, 262 U.S. 447, 487 (1923); see also Flast, 392 U.S. at 106 (noting that the taxpayer in Frothingham aired generalized grievances in federal court).
141. See Rakowski, supra note 11, at 781; cf. Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 6 (1989) (noting that appellant, a general interest magazine publisher, filed suit after paying sales taxes that religious faith-based publishers did not have to pay under Texas law).
142. Constitutional requirements for standing in federal court include a cognizable injury that is actual and imminent, causation, and redressibility through judicial action. See Fed. Election Comm'n v. Akins, 524 U.S. 11, 19 (1998). Prudential requirements for standing include no generalized grievances, no third party rights, and the plaintiff's injury must be within in the "zone of interests" to be protected by the statute in question. See id. at 20, 23; Warth v. Seldin, 422 U.S. 490, 501 (1975). A taxpayer seeking to challenge the constitutionality of the § 107 parsonage allowance may file a federal claim in state court as well, and would be subject to the corresponding state law standing requirement.
better chance of establishing standing under the Flast doctrine of taxpayer standing.

B. THE PARSONAGE ALLOWANCE UNDER ESTABLISHMENT
CLAUSE TESTS AND TAX EXEMPTION-RELATED CASE PRECEDENT

First Amendment Establishment Clause jurisprudence is confusing and contains seemingly unsettled doctrines. Furthermore, there is no telling which Establishment Clause test a federal court would use if a taxpayer brought suit challenging the parsonage allowance. Therefore, a proper analysis of the constitutionality of the parsonage allowance should cover two primary areas: the major Supreme Court tests used to uncover Establishment Clause violations and case precedent pertaining to tax exemptions for religious organizations.

1. Constitutionality Under the Establishment Clause Tests

A court should find § 107 unconstitutional when applying the Lemon test. First, the parsonage allowance does not have a secular legislative purpose. The text of the statute describes tax exclusions for "minister[s] of the gospel" only. Legislative history from Congress's statutory revisions in 1954 shows that the purpose of the parsonage allowance was to assist ministers and only ministers. Regardless of any intent to treat housing allowances and directly-provided church housing equally, non-religious individuals and organizations were not contemplated by Congress as the beneficiaries of § 107. Furthermore, recent legislative history surrounding the 2002 parsonage allowance revisions demonstrates Congress's concern about the well-being of ministers. Again,

---

143. See supra notes 77-78 and accompanying text.
144. It is unclear whether a court dealing with § 107 would apply the Lemon test. See FARBER, supra note 33, at 280-81. However, because of Lemon's historical importance and its status as good law, this Comment includes a Lemon analysis of § 107.
147. See Foster, supra note 23, at 152.
148. Id.
149. See 148 CONG. REC. H1299 (daily ed. Apr. 16, 2002) (statement of Rep. Ramstad) ("Clergy members of every faith and denomination rely on the housing allowance. Without it, America's clergy face a devastating tax increase of $2.3 billion over the next 5 years.").
the legislative history points to a non-secular purpose for the parsonage allowance.\footnote{150}

Second, § 107 primarily advances religion.\footnote{151} The parsonage allowance benefits ministers by excluding rental allowances from gross income, and churches benefit by presumably being able to pay their clergy lower salaries because of the non-taxable allowance.\footnote{152} Thus, by paying out less money in salaries, churches have additional funds available for other purposes, such as advertising, facility upgrades, and religious education. All of these activities arguably “advance religion.” Therefore, § 107 advances religion because ministers and churches benefit from the parsonage allowance by having more monetary resources available.

Third, § 107 creates an excessive entanglement with religion.\footnote{153} By permitting the tax exemption for “ministers of the gospel,” the government has to determine on a case-by-case basis who “ministers of the gospel” are.\footnote{154} For example, the government must determine whether nonordained ministers and ministers who are employed by their respective churches for educational purposes are within the scope of the parsonage allowance. These are borderline cases that the IRS must inevitably analyze because corresponding Treasury regulations provide only a limited number of examples of “ministers of the gospel” as a guide.\footnote{155} Advocates of § 107 could argue that taxing ministers on their rental allowances would actually create a greater entanglement because the government would have to monitor whether this income was properly reported. The problem with this argument is that it assumes greater IRS scrutiny is necessary when additions to income, rather than exclusions, are reported. This, however, may not be the case. Arguably, the IRS is more suspicious of taxpayers attempting to reduce their income through exclusions. Therefore, greater

\footnote{150. See id.}
\footnote{151. See Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (noting that the second requirement for constitutionality is that the statute’s principal effect neither advances nor inhibits religion).}
\footnote{152. See 26 U.S.C.S. § 107 (LexisNexis 2002).}
\footnote{153. Lemon, 403 U.S. at 612-13 (noting that the third requirement for constitutionality is that the statute may not create an excessive government entanglement with religion).}
\footnote{154. See 26 U.S.C.S. § 107.}
\footnote{155. Arguably, because the phrase “ministers of the gospel” encompasses a wide range of unspecified duties, the statute could be struck down for vagueness, thus allowing a court to avoid any constitutional issues.}
entanglement likely exists now because the government must determine the propriety of each tax exemption taken by ministers.\textsuperscript{156}

The Court's more recent Establishment Clause jurisprudence also favors the view that the parsonage allowance violates the Clause. Although Agostini resulted in less emphasis on the "excessive entanglement" prong of the Lemon test because the Court was less concerned with administrative issues, this may work to the taxpayer plaintiff's advantage. On the one hand, if a court were to apply a strict Lemon test, the taxpayer plaintiff may have a problem because his or her primary "excessive entanglement" argument is that a tax exemption for ministers creates additional governmental monitoring, an administrative concern that the Agostini Court seems less worried about. On the other hand, if a court were to not apply a complete Lemon test and instead applied an "endorsement test" or focused mainly on the first two prongs of the Lemon test, the taxpayer plaintiff may succeed. The parsonage allowance resembles the Texas statute at issue under Texas Monthly, where the Court applied an endorsement test. Furthermore, as previously stated above, a taxpayer should be able to meet the first two prongs of the Lemon test. Therefore, under the more recent approaches used by the Court for Establishment Clause analysis, a taxpayer challenging the parsonage allowance should succeed.

Recent amendments to § 107 should have no impact on a court's determination of the statute's constitutionality. The Clergy Housing Allowance Clarification Act of 2002 limited the rental allowance exclusion to the fair rental value of the minister's home.\textsuperscript{157} Although Congress was confident that the rental exclusion cap would end any constitutional controversies surrounding the parsonage allowance, it is unclear how this would be possible.\textsuperscript{158} The constitutional issue is not the size of the parsonage allowance, but that § 107 creates tax benefits for ministers only.

\textsuperscript{156} But cf. Agostini v. Felton, 521 U.S. 203, 233-34 (1997) (noting that it is less likely that administrative concerns alone will trigger an Establishment Clause violation).


\textsuperscript{158} Rakowski, supra note 11, at 779-80 (noting that § 107's constitutionality remains at issue).
2. Constitutionality Under the Tax Exemption-Related Case Precedent

The § 107 parsonage allowance is unconstitutional on First Amendment grounds under Texas Monthly. In that case, the Court held that a Texas state statute granting sales tax exemptions to publishers of religious periodicals was unconstitutional.\(^{159}\) A similar result would likely occur in the present case because § 107 and the Texas statute in Texas Monthly both restrict their respective tax exemptions to religious purposes only.\(^{160}\) Nowhere does § 107 mention that anyone other than "ministers of the gospel" would receive a tax exclusion.\(^{161}\) Likewise, the language in the Texas statute at issue in Texas Monthly confined its sales tax exemption to publishers and distributors of "religious faith" periodicals.\(^{162}\) The Texas statute did not provide a sales tax exclusion for non-religious faith periodicals.\(^{163}\) Therefore, based on the initial similarities of the two statutes, a court should find § 107 unconstitutional.

One could argue that differences exist between the Texas Monthly statute and the parsonage allowance, and these differences justify the constitutional validity of § 107. The crux of this argument is that § 107, when read in pari materia with other tax exclusions in the Internal Revenue Code, is merely part of a larger system of tax exclusions created by the Federal Government for the benefit of several types of individuals.\(^{164}\) Section 119 of the Code, for example, excludes the value of housing furnished by an employer for the benefit of the employer from gross income, provided the housing is on the corresponding business premises.\(^{165}\) The Code also provides

\(^{160}\) 26 U.S.C.S § 107 (LexisNexis 2002) (noting that tax exemptions are provided only to "minister[s] of the gospel"); see also Tex. Monthly, 489 U.S. at 5 (noting that under the Texas statute at issue, only "religious faith" periodicals received sales tax exemptions).
\(^{162}\) Tex. Monthly, 489 U.S. at 5.
\(^{163}\) Id.
\(^{165}\) 26 U.S.C.S. § 119 (LexisNexis 2002). Advocates of § 107 could argue that § 107(1) (pertaining to homes furnished to ministers of the gospel) is covered by the lodging exclusion of the benefit-to-the-employer doctrine under § 119. The problem with this argument, however, is that the two statutes are not entirely the same: Section 119 is more restrictive because it requires the housing to be on the business premises and in pursuant to employment, but
exclusions for military personnel and U.S. citizens living abroad. Advocates of § 107 could argue that because the U.S. Supreme Court upheld on First Amendment grounds individual statutes providing benefits to both religious and non-religious organizations, the Court should uphold the parsonage allowance because it provides benefits to religious organizations within a larger network of benefits to non-religious organizations.

The Texas Monthly Court, however, still found the tax exemption statute unconstitutional despite other Texas statutes that provided tax exemptions for other activities. The Court noted that even though Texas grants other sales tax exemptions for different purposes (for example, food sales and sales of agricultural items), the exemption for religious periodicals was still invalid because it lacked an overall secular purpose that encouraged similar benefits for nonreligious activities. The parsonage allowance, as well, lacks such an overall secular purpose because its benefits are conferred only to religious organizations and activities. Thus, because the in pari materia approach did not persuade the Court in Texas Monthly, parsonage allowance advocates should not expect the same argument to work if the Court hears a § 107 case.

A case involving the constitutionality of § 107 is distinct from Walz because of the scope of each statute. The Court upheld the tax provision in Walz because it benefited several organizations besides religious groups and therefore had a secular purpose under the Lemon test. Section 107, however, read by itself is limited to only religious organizations. The narrowness of § 107's tax exemption makes it a likely candidate for unconstitutionality in a future court ruling. Advocates of

---

§ 107(1) does not contain these requirements. See id. §§ 107, 119. Therefore, it is possible that a minister of the gospel could receive § 107 benefits (but not § 119 benefits) for a house located miles away from the church building and used primarily for non-church-related activities.

166. Id. § 134 (providing an income exclusion for “qualified military benefits,” which includes a wide range of allowances and in-kind benefits); id. § 911 (providing an income exclusion for housing costs for qualified U.S. citizens or residents living abroad).

167. See Walz, 397 U.S. at 673.


169. Id.

170. See supra text accompanying notes 144-50 (discussing the parsonage allowance's non-secular purpose under the Lemon test).

171. See Walz, 397 U.S. at 672-73.

§ 107 may argue that the parsonage allowance resembles the statute in Walz when analyzed in terms of a larger network of tax exemptions in the Code. As discussed above, however, the Court in Texas Monthly, a more recent case than Walz, did not adhere to this *in pari materia* argument. Therefore, the parsonage allowance is distinguishable from the statute in Walz.

**CONCLUSION**

The parsonage allowance provides a tax exclusion for ministers. Because this exclusion applies only to ministers, its constitutionality is in question. Although the Ninth Circuit in Warren did not address the issue of whether the parsonage allowance violates the First Amendment’s Establishment Clause, it left open the possibility of a taxpayer suit.

The average taxpayer questioning the constitutionality of the § 107 parsonage allowance in court should be successful. The taxpayer should have standing under the *Flast* approach to taxpayer standing, although he or she would have a more difficult time under the traditional standard. The statutory language and legislative history of the parsonage allowance suggest a nonsecular, religious purpose. Perhaps the most telling sign of trouble for the parsonage allowance is Texas Monthly and the resemblance of § 107 to the statute in that case. Surprisingly, the parsonage allowance survived serious constitutional challenge for years after Texas Monthly. Time may have run out on § 107, given the publicity created by the Ninth Circuit and the Chemerinsky intervention.
