

# THE PARSONAGE EXEMPTION DESERVES BROAD PROTECTION

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## I. INTRODUCTION

Every spring, millions of Americans pore over arcane forms, double-checking to determine whether there is but one more tax exemption to invoke in order to keep more of what they earned. It is important to think of tax exemptions in this way: a legal means to keep more of what one earned. Among the millions of taxpayers engaging in this tedious task wrought with incomprehensible consequences are a statistically insignificant yet important group of citizens who serve the public good: pastors, rabbis, priests, imams, and other religious “ministers.”<sup>1</sup> These ministers may deduct a portion of the pay they receive from their respective religious ministries as a parsonage exemption to cover expenses related to the maintenance of a home.<sup>2</sup>

Exempting the property of ministers from government taxation is neither new nor novel. As recorded in the first book of the Bible, “Joseph made it a law over the land of Egypt to this day, that Pharaoh should have one-fifth, except for the land of the priests only, which did not become Pharaoh’s.”<sup>3</sup> In an unbroken tradition since its inception, the United States has exempted all church property from taxation, including parsonages.<sup>4</sup> Such exemptions from taxation, along with the wider exemptions from governmental regulation afforded religious institutions, such as the constitutionally necessary “ministerial exception” that courts apply to the Americans with Disabilities Act and Title VII of the Civil Rights Act of 1964,<sup>5</sup> ecclesiastical exceptions,<sup>6</sup> and statutorily-created exemptions,

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1. Grouping such diverse religious teachers under the term “ministers” may seem somewhat presumptuous, but it is the term of art for their calling under the law addressed in this Article and, for the sake of brevity, will be used throughout this Article as an all-inclusive term for priests, pastors, rabbis, imams, and other religious leaders. *See, e.g.*, I.R.C. § 107 (2006) (using the term “minister” broadly to incorporate religious leaders of varying beliefs); *see also* Treas. Reg. §§ 1.107-1 (as amended in 1963) (same), 1.1402(c)-5 (as amended in 1968) (same); *Salkov v. Comm’r*, 46 T.C. 190 (1966) (holding that a cantor of the Jewish faith is considered a “minister of the gospel” for the purposes of I.R.C. § 107).

2. I.R.C. § 107.

3. *Genesis* 47:26.

4. *See, e.g.*, *Walz v. Tax Comm’n*, 397 U.S. 664, 677–78 (1970) (stating that the Religion Clauses of the Constitution have historically been viewed as allowing tax exemption for church property).

5. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012) (“We agree that there is such a ministerial exception” that applies to antidiscrimination employment laws such as the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2006), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (2006)).

6. The Supreme Court described what is known as the church autonomy doctrine,

such as those in the Religious Freedom Restoration Act of 1993,<sup>7</sup> guard against government absolutism and preserve the independence of religious institutions, shielding them from government intrusion. Exemptions provide not merely protection against government influence in churches caused by looming sanctions, but also against a more subtle intrusion in the form of an investigation or the adjudication of ecclesiastical matters.

There are those who believe exemptions that exclusively benefit religious organizations are either problematic or unconstitutional.<sup>8</sup> This movement includes several groups hostile to religion in the public square that expansively fight against legal exceptions for religious entities wherever they may find them.<sup>9</sup> Central to these attacks is the notion that religious institutions should be treated the same as secular institutions. But with the ever-increasing reach of governmental regulation of our businesses, our institutions, and our very lives, the damage wrought by government reach into church affairs or coffers and the attendant regulations and investigations is anything but obscure.

This Article considers the history and the legal context—focusing on an analysis of the constitutionality—of the parsonage exemption. This Article also considers the consequences and reasons for the Eleventh Circuit’s *Commissioner v. Driscoll* decision, in which the court held that § 107 of the Internal Revenue Code allows a minister to invoke the parsonage exemption to claim a deduction for only one home.<sup>10</sup> While the issue in *Driscoll* has been treated by the courts primarily as a

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sometimes called the ecclesiastical abstention doctrine, as “a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.” *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952) (citing *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871)). The church autonomy doctrine protects churches against otherwise actionable tort suits because imposing tort liability in some ecclesiastical circumstances “would in the long run have the same effect as prohibiting the practice and would compel the Church to abandon part of its religious teachings.” *Paul v. Watchtower Bible & Tract Soc’y of N.Y., Inc.*, 819 F.2d 875, 881 (9th Cir. 1987).

7. 42 U.S.C. §§ 2000bb–2000bb-4 (2006).

8. See, e.g., Erwin Chemerinsky, *The Parsonage Exemption Violates the Establishment Clause and Should be Declared Unconstitutional*, 24 WHITTIER L. REV. 707 (2003) (arguing for the unconstitutionality of the parsonage exemption).

9. See, e.g., Brief Amici Curiae of the Am. Humanist Ass’n & Am. Atheists et al., in Support of Respondents, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012) (No. 10-553) (contending that the ministerial exception to the ADA is in violation of the First and Fourteenth Amendments).

10. 669 F.3d 1309 (11th Cir. 2012).

statutory interpretation question concerning the meaning of § 107's reference to "a home,"<sup>11</sup> it raises larger questions regarding religious exemptions that are sometimes perceived to unfairly favor religious institutions over secular ones. This Article will explore those broader issues through the lens of the parsonage exemption in § 107.

## II. THE HISTORY OF THE PARSONAGE EXEMPTION

When interpreting a statute, a court should follow the canon of constitutional avoidance and avoid any interpretation that raises doubts about the statute's constitutionality. One of the most important and persuasive considerations used in determining whether a challenged practice is constitutional under the Establishment Clause is the history of that practice.<sup>12</sup> As Justice Brennan wrote in his concurrence in *Walz v. Tax Commission*, "the history, purpose, and operation of real property tax exemptions for religious organizations must be examined to determine whether the Establishment Clause is breached by such exemptions."<sup>13</sup> It is worth noting that for nearly as long as governments have demanded tribute in the form of taxes from their subjects, those governments have chosen not to levy taxes on churches and other religious properties. As one scholar has noted, "a perusal of the history of tax exemption indicates that the granting of tax immunity to ecclesiastical . . . property is probably as old as the institution of taxation."<sup>14</sup>

The practice of exempting religious property from taxation has roots as deep as ancient Egypt.<sup>15</sup> Egypt was not aberrational; the practice of exempting religious property from taxation can be found in the histories of the Roman Empire, Persia, India, and medieval Europe.<sup>16</sup> Given the exemption's deep roots in the Western world and beyond, it is unsurprising that the practice was adopted without controversy by the American colonies.<sup>17</sup>

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11. I.R.C. § 107(2006).

12. See, e.g., *Walz v. Tax Comm'n*, 397 U.S. 664, 677–79 (1970) (recounting the historical congressional approval of tax exemption for churches); see also *Salazar v. Buono*, 130 S. Ct. 1803, 1817 (2010) (noting the Court's consideration of history in determining the constitutionality of religious displays); *McCreary County v. ACLU*, 545 U.S. 844, 866 (2005) (same).

13. *Walz*, 397 U.S. at 681 (Brennan, J., concurring).

14. Claude W. Stimson, *The Exemption of Property from Taxation in the United States*, 18 MINN. L. REV. 411, 418 (1934).

15. *Genesis* 47:26.

16. CHESTER JAMES ANTIEAU ET AL., *RELIGION UNDER THE STATE CONSTITUTIONS* 121–22 (1965).

17. *Id.* at 122.

Each of the original colonies recognized a tax exemption for religious property either by law or by practice.<sup>18</sup> When the First Amendment was ratified in 1791, four of the states recognized such an exemption in their state constitutions as either permissive or mandatory.<sup>19</sup> Those states without a codified exemption almost certainly did not believe codification to be necessary.<sup>20</sup> As a Connecticut court noted, the exemption of religious properties from taxation “has been . . . accepted as axiomatic. It has been incorporated into the constitution of several States. It has been inseparably interwoven with the structure of our government and the habits and convictions of our people since 1638.”<sup>21</sup> Justice Brennan similarly noted, “History is particularly compelling . . . because of the undeviating acceptance given religious tax exemptions from our earliest days as a Nation. Rarely if ever has this Court considered the constitutionality of a practice for which the historical support is so overwhelming.”<sup>22</sup>

The Founders did not regard a tax exemption for religious property as conflicting with the Constitution or the Establishment Clause. Rather, “tax exemption for religious institutions has been the American practice since the disestablishment of churches.”<sup>23</sup> Both South Carolina and Pennsylvania reformed their constitutions in 1790 in recognition of the new federal Constitution, but the practice of exempting religious property from taxation remained unchanged in those states.<sup>24</sup> In Virginia, which, as Justice Brennan noted, “provided the direct antecedents of the First Amendment”<sup>25</sup> and “remained unusually sensitive to the proper relation between church and state during the years immediately following ratification of the Establishment Clause,”<sup>26</sup> the state supreme court reviewed Virginia’s history of exempting religious property from taxation. The court concluded that “the policy of the state has always been to exempt property of the character mentioned and described in

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18. *Id.*

19. *Id.* at 124–31.

20. *See, e.g.*, *State v. Platt*, 24 N.J.L. 108, 120 (1853) (noting that the tax exemption for religious property was “so entirely in accordance with the public sentiment, that it universally prevailed”).

21. *Yale Univ. v. Town of New Haven*, 42 A. 87, 92 (Conn. 1899).

22. *Walz v. Tax Comm’n*, 397 U.S. 664, 681 (1970) (Brennan, J., concurring).

23. Monrad G. Paulsen, *Preferment of Religious Institutions in Tax and Labor Legislation*, 14 LAW & CONTEMP. PROBS. 144, 147 (1949).

24. ANTIEAU, *supra* note 16, at 129.

25. *Walz*, 397 U.S. at 682 (Brennan, J., concurring).

26. *Id.* at 683.

§ 183 of the Constitution . . . . [A]s to such property[,] exemption is the rule and taxation the exception.”<sup>27</sup> Even Washington, D.C., which throughout its history has been bound by the Establishment Clause, has always recognized a tax exemption for religious property.<sup>28</sup>

Against this backdrop of religious tax exemptions, it should be no surprise that in the Revenue Act of 1921, Congress, with little discussion and no controversy,<sup>29</sup> exempted from the gross income of ministers the rental value of any “dwelling house and appurtenances thereof” provided by a church as a part of compensation.<sup>30</sup> Even critics of the parsonage exemption often concede the constitutionality of exempting the value of property owned by the church, given the historical precedent for property tax exemptions and the Supreme Court’s decision in *Walz*.<sup>31</sup>

The parsonage exemption, as codified in 1921, allowed an exemption only for those ministers who lived on property owned by their church, disadvantaging ministers whose churches provided a housing allowance rather than a church-owned parsonage.<sup>32</sup> In 1954, Congress amended the tax code to allow ministers to exempt a portion of their income to the extent used by the minister for housing.<sup>33</sup> According to the Senate Report, the purpose of this addition was to eliminate the disparity in the tax code between ministers who lived in a church-owned parsonage and those who were given a stipend with which to secure housing.<sup>34</sup>

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27. *Commonwealth v. Lynchburg YMCA*, 80 S.E. 589, 590 (Va. 1913). In *Lynchburg YMCA*, the court specifically addressed a provision that allowed an exemption for “[r]eal estate belonging to . . . Young Men’s Christian Associations, and other similar religious associations.” VA. CONST. of 1902, art. XIII, § 183(e). Section 183 also contained an exemption for “[b]uildings with land they actually occupy, and the furniture and furnishings therein lawfully owned and held by churches or religious bodies, . . . [including] the residence of their minister of any such church or religious body.” *Id.* § 183(b).

28. ANTIEAU, *supra* note 16, at 122.

29. See Matthew W. Foster, Note, *The Parsonage Allowance Exclusion: Past, Present & Future*, 44 VAND. L. REV. 149, 151 n.10 (1991) (noting the absence of contemporary debate or discussion in Congress and absence of contemporary court challenges to this statute at the time of its passage).

30. United States Revenue Act of 1921, ch. 136, § 213(b)(11), 42 Stat. 226, 239 (current version at I.R.C. § 107 (2006)).

31. See, e.g., Chemerinsky, *supra* note 8 (arguing only that I.R.C. § 107(2) is unconstitutional even while discussing all provisions of § 107).

32. § 213(b)(11), 42 Stat. at 239.

33. See RICHARD R. HAMMAR, PASTOR, CHURCH AND LAW 100 (1983) (discussing the 1954 revision, which expanded the applicability of the parsonage exemption).

34. S. REP. NO. 83-1622, at 15 (1954).

## III. THE CONSTITUTIONALITY OF THE PARSONAGE EXEMPTION

The parsonage exemption has its constitutional critics.<sup>35</sup> This section argues that the parsonage exemption as codified in § 107 of the Internal Revenue Code is constitutional, but the Treasury regulations<sup>36</sup> interpreting the parsonage exemption are constitutionally problematic.<sup>37</sup>

The Internal Revenue Code directly or indirectly grants many housing tax breaks, including to members of the military,<sup>38</sup> members of the Foreign Service or the intelligence community,<sup>39</sup> persons living in low-income housing,<sup>40</sup> first-time home buyers,<sup>41</sup> some employees who are required to live at their place of work,<sup>42</sup> some members of the Peace Corps,<sup>43</sup> and religious leaders. Each of these tax breaks or credits is structured slightly differently. The parsonage exemption's exclusion of the fair-market rental value of a home is similar to the exclusion of the military's Basic Allowance for Housing in that both allow for the exclusion of a reasonable amount<sup>44</sup> from the taxpayer's gross income.

The first argument against the constitutionality of the parsonage exemption is that it was passed for an unconstitutional purpose. Despite the official reasons for the revision to the tax code given in the Senate Report, those who claim that § 107(2) is unconstitutional argue that the statements of its author, Representative Peter Mack, reveal the exemption's real and unconstitutional purpose.<sup>45</sup> During the committee hearings for the exemption, Mack stated:

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35. *See, e.g.*, Chemerinsky, *supra* note 8 (arguing that § 107(2) is unconstitutional).

36. Treas. Reg. §§ 1.107-1 (as amended in 1963), 1.1402(c)-5 (as amended in 1968).

37. The conclusion that some of the Treasury regulations interpreting the parsonage exemption are unconstitutional in no way affects the constitutionality of the exemption itself—quite the opposite. The reasons supporting the constitutionality of the exemption call for its broader application, rather than the narrower approach taken by the IRS in its regulations.

38. I.R.C. § 134 (2006).

39. I.R.C. § 912 (2006).

40. I.R.C. § 42 (2006).

41. I.R.C. § 36 (2006).

42. I.R.C. § 119 (2006).

43. I.R.C. § 912 (2006).

44. The military's Basic Allowance for Housing (BAH) is calculated to be a reasonable amount according to the cost-of-living in the location where the taxpayer is stationed and is provided directly to the taxpayer as tax-exempt funds. Basic Allowance for Housing (BAH), DEF. TRAVEL MGMT. OFF., [www.defensetravel.dod.mil/site/bah.cfm](http://www.defensetravel.dod.mil/site/bah.cfm) (last visited April 8, 2012). What constitutes a reasonable amount under the parsonage exemption is more ambiguous, but I.R.C. §§ 503 and 4958 provide that unreasonable compensation is either subject to a tax or a revocation of the church's nonprofit status. I.R.C. §§ 503, 4958 (West 2010).

45. *See, e.g.*, Chemerinsky, *supra* note 8, at 711.

Certainly, in these times when we are being threatened by a godless and antireligious world movement we should correct this discrimination against certain ministers of the gospel who are carrying on such a courageous fight against this foe. Certainly this is not too much to do for these people who are caring for our spiritual welfare.<sup>46</sup>

There are multiple difficulties with using this single passage to claim that § 107(2) has an unconstitutional purpose. First, while Representative Mack's language is sweeping, the general thrust of his statement is consistent with the purpose given in the Senate Report: to eliminate a disparity in the tax treatment of ministers.<sup>47</sup> A second difficulty with the critics' interpretation of Representative Mack's comments is that this interpretation ignores that a significant (and constitutional) tax exemption was already allowed to ministers under the previous version of the tax code.<sup>48</sup> Thus, the revisions in the tax code under the Revenue Act of 1954<sup>49</sup> should not be read as creating a new benefit to ministers, but as making a benefit that was already available to some ministers (an income exemption for church-provided housing) available to all ministers who received some form of housing accommodation from their church as a part of their compensation.

Finally, those arguing that the parsonage exemption is unconstitutional have failed to address the point that the difference between providing a housing allowance and providing a church-owned parsonage is one with important theological implications for most churches because it goes directly to the issue of church polity.<sup>50</sup> Church polity is “[t]he internal organizational framework of the churches, their patterns of association, cooperation, and governance, the structures by which the churches implement their doctrine and live their religious commitment.”<sup>51</sup> The organizational structure of churches “is a manifestation of religious faith” and is often a

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46. *Hearings on General Revenue Revisions Before the House Comm. on Ways and Means*, 83d Cong., 1st Sess., pt. 3, at 1576 (1953) (statement of Rep. Peter Mack).

47. *See supra* text accompanying note 34.

48. *See supra* text accompanying notes 29–33.

49. Internal Revenue Code of 1954, ch. 736, 68A Stat. 32 (codified as amended at I.R.C. § 107 (2006)).

50. WILLIAM W. BASSETT ET AL., RELIGIOUS ORGANIZATIONS AND THE LAW § 3:6, at 3-22 (2011) (“Attorneys, on either side of litigation, should understand the churches as they see themselves. Primarily, organizational self-image is a manifestation of religious faith.”).

51. *Id.* at 3-21.

matter of canon law.<sup>52</sup> The Supreme Court itself has recognized that such disputes are often theological in nature. In *Watson v. Jones*, the Court noted that “matter[s] which concern[] theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them” are “purely ecclesiastical.”<sup>53</sup> Indeed, the ultimate issue in that case was ownership of a church’s property when the congregation divided.<sup>54</sup>

The issue of whether a parsonage exemption is available to only those ministers who live in a church-owned home or also to those who receive a housing allowance goes to one of the deepest divides in the modern church: the authority of the institutional church. The Catholic Church places a strong emphasis on the central authority of the institutional church.<sup>55</sup> Therefore, Catholic congregations generally offer church-owned housing.<sup>56</sup> Indeed, as a matter of canon law, “[t]he Roman Pontiff is the supreme dispenser and administrator of all ecclesiastical properties in virtue of his office.”<sup>57</sup> The Methodist Episcopal Church similarly requires that congregations involved in the purchase of property insert certain clauses protecting the rights of the institutional church as superior to those of the congregation.<sup>58</sup> This practice’s historical roots can be traced back to John Wesley.<sup>59</sup>

Many Protestant denominations, on the other hand, tend to be distrustful of a centralized church authority. The Protestant Reformation was intended to eliminate “the system of hierarchical gradation and the identification of the Church with the priestly-sacramental clergy.”<sup>60</sup> The Anabaptists and Quakers,

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52. *Id.* at 3-22.

53. 80 U.S. (13 Wall.) 679, 733 (1871).

54. *Id.* at 681 (“This was a litigation which grew out of certain disturbances in [a local church] which resulted in a division of its members into two distinct bodies, each claiming the exclusive use of the property held and owned by that local church.”).

55. See BASSETT, *supra* note 50, § 3.7, at 3-28 (noting that the Roman Catholic Church is an example of a hierarchical church and, as such, “places ultimate power and authority in ecclesiastical superiors above the local congregation.”).

56. See CARL ZOLLMANN, AMERICAN CIVIL CHURCH LAW 444-45 (Faculty of Political Sci. of Columbia Univ. ed., 2008) (noting that property used by Catholic congregations is usually held by bishops either as corporations sole or individuals in trust for those congregations).

57. THOMAS F. DONOVAN, THE STATUS OF THE CHURCH IN AMERICAN CIVIL LAW AND CANON LAW STUDIES 75 (1966).

58. ZOLLMANN, *supra* note 56, at 445-46.

59. *Id.*

60. PROTESTANTISM 242 (J. Leslie Dunstan ed., 1961).

for example, rejected “the visible church as a kind of ‘trust foundation for supernatural ends.’”<sup>61</sup> Similarly, Walter Rauschenbusch, a key figure in the Social Gospel movement, noted that he and his followers “were against clericalism and against all hierarchies.”<sup>62</sup> Other Protestant churches, such as the Presbyterian Church, have somewhat republican hierarchical structures in which local congregations elect representatives to governing bodies.<sup>63</sup> Because of the decentralized nature of these churches, congregations typically prefer to offer a housing allowance. Numerous factors go into this preference. For example, because church property tends to be owned at the local level,<sup>64</sup> there is often less money with which to provide a parsonage. Another consideration is the issue of ministers’ families. Catholic priests, who remain chaste, do not have families, whereas many Protestant ministers, who usually are allowed to marry, will. This creates a dilemma for Protestant churches that offer parsonages rather than housing allowances: What should the congregation do with the minister’s family once the minister dies? By offering a housing allowance instead of providing a church-owned property, the congregation does not have to deal with the uncomfortable prospect of evicting a minister’s widow and children to make room for the new minister.

Though much more could be said on the theological implications of church-owned property, it is enough for present purposes to recognize that a congregation’s choice to offer a housing allowance rather than allow the minister to live in a church-owned dwelling is not one of mere accounting or convenience, but rather one rich with theological and ecclesiastical underpinnings. This is significant because under the Free Exercise Clause, the government may not “impose special disabilities on the basis of religious views or religious status, or lend its power to one or the other side in controversies over religious authority or dogma.”<sup>65</sup> Moreover, as discussed further below, to the extent that § 107(2) does benefit religion,

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61. DONALD F. DURNBAUGH, *THE BELIEVERS’ CHURCH: THE HISTORY AND CHARACTER OF RADICAL PROTESTANTISM*, at ix (MacMillan 1968) (quoting MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* 144 (Talcott Parsons trans., Charles Scribner’s Sons 1958) (1905)).

62. *Id.* at 285 (quoting WALTER RAUSCHENBUSCH, *THE FREEDOM OF SPIRITUAL RELIGION* 13 (1910)).

63. BASSETT, *supra* note 50, § 3:7.

64. ZOLLMANN, *supra* note 56 at 444.

65. *Emp’t Div. v. Smith*, 494 U.S. 872, 877 (1990).

government can take actions for the purposes of equality that it may not take for other purposes. For these reasons, the constitutionality of § 107(2) cannot be considered apart from the preexisting (and constitutional) parsonage tax income exemption found in § 107(1).

Chemerinsky argues that the parsonage exemption is unconstitutional because § 107(2) benefits only ministers.<sup>66</sup> In noting that other Code provisions provide similar exemptions to members of the military, the Peace Corps, the Foreign Service, employees who live at their place of employment, etc., Chemerinsky dismisses these exemptions as being irrelevant to the constitutionality of the parsonage exemption because they are not located in I.R.C. § 107(2).<sup>67</sup> This dismissal is unreasonable, however, as it would lead to the absurd conclusion that the parsonage exemption is unconstitutional merely because of its location within the Internal Revenue Code, and it would become a valid provision just like the provision of nonprofit status for churches in I.R.C. § 501(c)(3)<sup>68</sup> if only some of the other housing tax exemption provisions had been moved to I.R.C. § 107(2) as well.

Chemerinsky also notes that the government pays members of the military and the Foreign Service, so a tax benefit to those groups is simply compensation for their employment in another form and thus has no bearing on ministers.<sup>69</sup> This cannot be the end of the analysis, though, because first-time home buyers and employees who live at their place of employment for the benefit of their employer are not all federal employees. Ultimately, the parsonage exemption is merely one of several housing tax exemptions that provide reprieve to those who work for the public good.

The parsonage exemption does provide a benefit to religion, but providing a benefit to religion does not render the exemption unconstitutional. As is most directly seen in I.R.C. § 501(c)(3), which grants tax-exempt status to educational, scientific, and religious entities, the government is permitted to provide tax exemptions to groups of entities that benefit the public, including religious entities.<sup>70</sup> As Justice Scalia noted

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66. Chemerinsky, *supra* note 8, at 717–18.

67. *Id.* at 728.

68. I.R.C. § 501(c)(3) (2006) (“[c]orporations, and any community chest, fund, or foundation, organized and operated exclusively for religious . . . purposes”).

69. Chemerinsky, *supra* note 8, at 728.

70. *See* *Walz v. Tax Comm’n*, 397 U.S. 664 (1970) (allowing a tax benefit that goes to

during oral arguments in *Lamb's Chapel v. Center Moriches Union Free School District*, churches in New York are granted exemptions from property tax because “God-fearing” people are “less likely to mug me and rape my sister.”<sup>71</sup> Justice Scalia also noted in his concurrence in *Lamb's Chapel* that “indifference to ‘religion in general’ is *not* what our cases, both old and recent, demand.”<sup>72</sup>

Indeed, the Supreme Court has stated that the Establishment Clause prohibits hostility against religion as much as it prohibits the establishment of a state religion.<sup>73</sup> Declaring a tax provision unconstitutional merely because members of the clergy derive benefit from it would exemplify such hostility to religion. The Supreme Court has also stated that its “precedents plainly contemplate that on occasion some advancement of religion will result from governmental action.”<sup>74</sup> The mere fact that the Internal Revenue Code provides some assistance to religion by reducing the tax burden on ministers (and soldiers, spies, and Peace Corps volunteers) is not a constitutional infirmity.

Chemerinsky analogizes the parsonage exemption to the absolute ban on requiring a person to work on his or her Sabbath that was struck down in *Estate of Thornton v. Caldor, Inc.*<sup>75</sup> As Justice O’Connor’s concurrence explains, however, the statute in *Estate of Thornton* was not struck down because it accommodated religion but because it singled out Sabbath observers for special, absolute protection without any regard for the ethical and religious beliefs of others.<sup>76</sup> Because of the absolute nature of the Sabbath-forcing statute, the government was endorsing “a particular religious belief, to the detriment of those who do not share it.”<sup>77</sup> In fact, Justice O’Connor contrasted the Sabbath-forcing statute with the religious accommodation provisions of Title VII of the Civil Rights Act of 1964, noting that Title VII is acceptable because it “calls for reasonable rather than absolute accommodation and extends that requirement to all

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secular and religious buildings).

71. Transcript of Oral Argument at 48, *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (No. 91-2204).

72. *Lamb's Chapel*, 508 U.S. at 400 (Scalia, J., concurring) (citing *Zorach v. Clauson*, 343 U.S. 306, 313–14 (1952)).

73. *Epperson v. Arkansas*, 393 U.S. 97, 103–04 (1968). Furthermore, as the Supreme Court stated in *Torcaso v. Watkins*, Secular Humanism is itself a religion that can no more be endorsed than theism. 367 U.S. 488, 495 n.11 (1961).

74. *Lynch v. Donnelly*, 465 U.S. 668, 683 (1984).

75. 472 U.S. 703, 710–11 (1985). See Chemerinsky, *supra* note 8, at 727 (“The Supreme Court’s decision in *Estate of Thornton v. Caldor, Inc.* is exactly on point . . .”).

76. *Estate of Thornton*, 472 U.S. at 711 (O’Connor, J., concurring).

77. *Id.*

religious beliefs and practices rather than protecting only the Sabbath observance.”<sup>78</sup> Completely unlike the Sabbath-forcing statute in *Estate of Thornton*, the parsonage exemption does not enforce one religious belief to the detriment of those who do not hold that belief. It does not favor one religion over all other religions. The parsonage exemption is a reasonable accommodation that cannot be perceived to suffer the fatal flaw of establishing one religious dogma to the detriment of all others.

In fact, as has been discussed previously, the parsonage exemption may even alleviate Establishment Clause concerns.<sup>79</sup> At the very least, the parsonage exemption provides more equal treatment for the clergy of denominations that do not traditionally have on-site housing. Without the parsonage exemption, the provision for a housing tax exemption under § 119 of the Internal Revenue Code—which applies to employees who are required to live at their workplace as a condition of employment<sup>80</sup>—would grant tax exemptions to clergy of denominations that traditionally provide housing at the place of worship while denying such exemptions to the clergy of religions and denominations that do not. For example, the Roman Catholic Church traditionally provides rectories where its clergy live. Other denominations are much less likely to provide for or to require as a condition of employment such on-site housing. By enacting the parsonage exemption, Congress equalized the tax burden for clergy of all religions and denominations instead of limiting the reprieve to only those clergy of denominations that provide rectories. *Driscoll*, then, is out of step with the historical drive of the parsonage exemption because limiting the exemption to only one home increases rather than diminishes the disparity between denominations.<sup>81</sup> This means that, for

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78. *Estate of Thornton*, 472 U.S. at 712 (O'Connor, J., concurring).

79. See *supra* text accompanying notes 32, 65, and 76.

80. I.R.C. § 119(a) (2006).

81. The Eleventh Circuit did not consider this issue in its opinion, but rather treated *Driscoll* purely as an issue of statutory interpretation. *Comm'r v. Driscoll*, 669 F.3d 1309 (11th Cir. 2012). The Eleventh Circuit acknowledged that the language of the parsonage exemption is ambiguous because “a home” could mean “no particular home” or “one home.” *Id.* at 1312. The tax court had resolved this issue by noting that the Internal Revenue Code cross-references the Dictionary Act, which states that “[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise—words importing the singular include and apply to several persons, parties, or things.” *Driscoll v. Comm'r*, 135 T.C. 557, 566 (2010), *rev'd*, 669 F.3d 1309 (11th Cir. 2012) (citing I.R.C. § 7701(p)(1)(1) (2006) and quoting 1 U.S.C. § 1 (2006)). The Eleventh Circuit rejected the tax court’s reasoning because “the Code also states that any cross references ‘are

example, a Baptist pastor who preaches in one town on Sunday mornings and teaches a Bible study in another town on Wednesday nights may not deduct the rental value of two apartments—resulting in a disparity between the Baptist pastor and a Roman Catholic priest who would have access to separate church-owned facilities in each town.

IV. THE ECCLESIASTICAL ABSTENTION DOCTRINE RENDERS THE  
TREASURY REGULATIONS INTERPRETING THE PARSONAGE  
EXEMPTION UNCONSTITUTIONAL

Finally, Chemerinsky correctly argues that because the parsonage exemption requires the government to determine who qualifies as a “minister of the gospel,” there is an entanglement problem.<sup>82</sup> The problem lies not in § 107 itself, however, but in the Treasury regulations that interpret it.

For over one hundred years, civil courts, under what is termed the “ecclesiastical abstention doctrine,” have been forbidden to decide “a matter which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them.”<sup>83</sup> The United States Supreme Court defined the core of this First Amendment restraint on civil authority in *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America*, determining that the First Amendment’s restraint on civil authority acknowledges a “spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.”<sup>84</sup> As Justice Brennan asserted,

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made only for convenience, and shall be given no legal effect.” *Driscoll*, 669 F.3d at 1311 (quoting I.R.C. § 7806(a) (2006)). The full text of I.R.C. § 7806(a), however, states: “The cross references in this title to other portions of the title, or other provisions of law, where the word ‘see’ is used, are made only for convenience, and shall be given no legal effect.” *Id.* It is hard to imagine how this could have been intended to negate the legal effect of the referenced statutes (including other portions of the same title). A more plausible reading is that the references themselves have no legal effect, but that does not affect the applicability of the referenced statutes. The Eleventh Circuit also noted that income exclusions are to be “narrowly construed.” *Driscoll*, 669 F.3d at 1312 (citing *Comm’r v. Schleier*, 515 U.S. 323, 328 (1995)). However, the Eleventh Circuit ignores that this principle does not apply to religious exemptions. *Larson v. Valente*, 456 U.S. 228, 243 (1982) (“Strict or narrow construction of a statutory exemption for religious organizations is not favored.”) (quoting *Valente v. Larson*, 637 F.2d 562, 570 (8th Cir. 1981), *aff’d*, 456 U.S. 228 (1982)).

82. Chemerinsky, *supra* note 8, at 730–31.

83. *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 733 (1871).

84. 344 U.S. 94, 116 (1952); *see also* *Gonzalez v. Roman Catholic Archbishop of*

churches must be free to “select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions. Religion includes important communal elements for most believers. They exercise their religion through religious organizations, and these organizations must be protected . . . .”<sup>85</sup>

The ecclesiastical abstention doctrine, therefore, requires that only religious organizations—not the government—determine who is a minister and what actions are ministerial or worshipful.<sup>86</sup> Any sincerely-held religious belief as to what constitutes an act of worship and who is designated as a minister is legitimate, and the First Amendment prohibits the government from intervening in these determinations.<sup>87</sup> Treasury Regulation § 1.1402(c)-5(b)(2)<sup>88</sup> disregards the ecclesiastical abstention doctrine,

Manila, 280 U.S. 1, 7–8 (1929) (holding that the judiciary cannot resolve disputes as to who should be granted a position in the clergy).

85. Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 341 (1987) (Brennan, J., concurring) (quoting Douglas Laycock, *Towards a General Theory of the Religions Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1389 (1981)).

86. This position has not been ratified by the Supreme Court, but it is consistent with its precedent. For example, in *Amos* the Court noted:

[I]t is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission. Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission.

*Id.* at 336. The Supreme Court recently addressed the issue of courts determining whether a person is a minister of a religious organization in *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012). The Court was “reluctant, however, to adopt a rigid formula for deciding when an employee qualifies as a minister.” *Id.* at 707. In a concurring opinion, Justice Alito, joined by Justice Kagan, took a broad view that relied on the religious organization’s belief

that the religious function that respondent performed made it essential that she abide by the doctrine of internal dispute resolution; and the civil courts are in no position to second-guess that assessment . . . . [She is] the type of employee that a church must be free to appoint or dismiss in order to exercise the religious liberty that the First Amendment guarantees.

*Id.* at 716 (Alito, J., concurring). Finally, Justice Thomas, in his concurring opinion, made a particularly salient point that “[j]udicial attempts to fashion a civil definition of ‘minister’ through a bright-line test or multi-factor analysis risk disadvantaging those religious groups whose beliefs, practices, and membership are outside of the ‘mainstream’ or unpalatable to some.” *Id.* at 711 (Thomas, J., concurring).

87. *Kedroff*, 344 U.S. at 116.

88. Treas. Reg. § 1.1402(c)-5(b)(2) (as amended in 1968). Section 1.1402(c)-5 provides the rules that the IRS applies to determine who qualifies as a “minister of the gospel” and whether particular activities are ministerial or sacerdotal. Treasury Regulation § 1.107-1, which deals with the rental value of parsonages, provides the following abridgement of § 1.1402(c)-5:

Examples of specific services the performance of which will be considered duties of a minister for purposes of section 107 include the performance of sacerdotal functions, the conduct of religious worship, the administration and

requiring the Internal Revenue Service to determine who is a minister and which functions constitute “the conduct of religious worship.”<sup>89</sup>

The flaw in Treasury Regulation § 1.1402(c)-5 is illustrated by *Lawrence v. Commissioner*, in which the IRS refused to grant the parsonage exemption to a Southern Baptist minister of education on the grounds that he never baptized anyone or administered the Lord’s Supper.<sup>90</sup> Lawrence was, however, described in his church minutes as “Commissioned Minister of the Gospel in Religious Education.”<sup>91</sup> Lawrence’s primary duties included the administration of his church’s educational and service organizations, including Sunday school and youth group.<sup>92</sup> Lawrence also provided spiritual counseling, assisted in the regular worship services, and occasionally participated in funeral services.<sup>93</sup> In effect, the IRS determined that a true Southern Baptist minister of the gospel will administer baptism and the Lord’s Supper, and that Lawrence, who was designated by his church as a minister of the gospel, was not actually entitled to that position. The church in *Lawrence v. Commissioner* was not permitted to select its own leader or to determine the importance of its own doctrines—both violations of the First Amendment.<sup>94</sup>

Similarly, in *Colbert v. Commissioner*, the IRS denied the parsonage exemption to Colbert, an ordained Baptist minister who served as director of missions for the Christian Anti-Communism Crusade.<sup>95</sup> Colbert spoke at churches an average of

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maintenance of religious organizations and their integral agencies, and the performance of teaching and administrative duties at theological seminaries. Also, the service performed by a qualified minister as an employee of the United States (other than as a chaplain in the Armed Forces, whose service is considered to be that of a commissioned officer in his capacity as such, and not as a minister in the exercise of his ministry), or a State, Territory, or possession of the United States, or a political subdivision of any of the foregoing, or the District of Columbia, is in the exercise of his ministry provided the service performed includes such services as are ordinarily the duties of a minister.

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

89. § 1.1402(c)-5(b)(2) (as amended in 1963).

90. 50 T.C. 494 (1968).

91. *Id.* at 498.

92. *Id.* at 495.

93. *Id.* at 496.

94. As Justice Roberts noted in the Court’s opinion in *Hosanna-Tabor*: “It was wrong for the Court of Appeals . . . to say that an employee’s title does not matter.” *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 708 (2012). It is all but a given that the *Hosanna-Tabor* Court would have deemed Mr. Lawrence a minister, contrary to the conclusion of the IRS.

95. 61 T.C. 449, 450 (1974).

100 to 150 times per year, speaking about the dangers of communism to the world and to the Christian church.<sup>96</sup> The Tax Court said:

In the instant case, we have no doubt that the petitioner was sincere in his belief that his activities and services performed for the Crusade were those of a minister of the Baptist faith . . . .

.....

. . . [B]ut . . . the preaching of anticommunism does not [come within the concept of the tenets and practices of the Baptist faith]. We fully accept the petitioner's thesis that communism is a godless force and that it is, in its purist form, necessarily incompatible with Christianity. However, this proposition is not the basis upon which to equate the preaching of anticommunism with the conduct of religious worship . . . . In the instant case there was competing testimony as to whether the petitioner's speeches and activities were the conduct of religious worship within the Baptist faith . . . .

After considering the record in the instant case, we conclude that the petitioner's speeches and activities for which he was compensated by the Crusade were not the conduct of religious worship. The petitioner's speeches were not religious instruction in the principles laid down by Christ . . . .<sup>97</sup>

Again, in violation of the First Amendment's ecclesiastical abstention doctrine, the IRS and the tax court—operating under Treasury Regulation § 1.1402(c)-5—in the face of a sincerely-held religious belief and testimony that Colbert's messages were inside the scope of religious worship within the Baptist faith, interposed their own theological understanding of the Baptist faith practiced by Colbert to find that anticommunism is not a “principle[] laid down by Christ.”<sup>98</sup>

Ultimately, if the First Amendment's religious protections mean anything, they mean that a court cannot tell a person what is, for him, true religious worship. Yet that is exactly what the IRS and the tax court have done in analyzing the parsonage exemption under Treasury Regulation § 1.1402(c)-5. If, instead, the IRS looks to whether the person claiming the parsonage exemption maintains a sincerely-held religious belief as to his being a “minister of the gospel,” this First Amendment violation will dissolve, leaving the parsonage exemption intact.

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96. *Id.* at 451.

97. *Id.* at 455–56.

98. *Id.* at 456.

The IRS's concern in enforcing Treasury Regulation § 1.1402(c)-5, of course, is that persons will falsely claim to be ministers of the gospel to receive a housing tax exemption. The remedy for this was set forth by Justice Douglas in 1944 in *United States v. Ballard*, in which persons who had been found to make false statements about their religious beliefs were convicted of mail fraud for advertising their religious movement.<sup>99</sup> The Supreme Court noted, however, that “[h]eresy trials are foreign to our Constitution.”<sup>100</sup> This provides the balance that sincerely-held religious beliefs are to be respected by the government, while persons acting out of insincere beliefs for fraudulent purposes may be prosecuted. The difference between the system set forth in *Ballard* and the system in use by the IRS is that under *Ballard*, the courts look at whether the person claiming to hold a religious view is sincere. Under the IRS's approach, the IRS looks at whether the person holding a religious view theologically *should* hold that view. The first approach requires the courts to merely look at facts and determine truthfulness of conviction. The latter approach requires the judiciary to become the arbiter of orthodoxy, setting forth the standard for what constitutes true worship and what constitutes false worship.

#### V. UNNECESSARY CONSTITUTIONAL COMPLICATIONS ARISE FROM THE IRS'S PROPOSED NARROW CONSTRUCTION OF I.R.C. § 107

The structure of our government “secured religious liberty from the invasion of the civil authority.”<sup>101</sup> To that end, “the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere.”<sup>102</sup> Moreover, “[t]he interaction between the church and its pastor is an integral part of church government.”<sup>103</sup> Indeed, “[t]he relationship between an organized church and its ministers is its lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purpose.”<sup>104</sup> It is this relationship between a minister and a church that is at the heart of the

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99. 322 U.S. 78, 79–83 (1944).

100. *Id.* at 86.

101. *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 730 (1871).

102. *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 212 (1948).

103. *Simpson v. Wells Lamont Corp.*, 494 F.2d 490, 493 (5th Cir. 1974).

104. *McClure v. Salvation Army*, 460 F.2d 553, 558–59 (5th Cir. 1972). *See also Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012) (“members of a religious group put their faith in the hands of their ministers”).

parsonage issue in *Commissioner v. Driscoll*.<sup>105</sup>

In *Driscoll*, the issue of statutory construction took center stage. In that case, a minister owned two homes—a primary residence and an additional residence.<sup>106</sup> The minister’s church paid him part of his salary under the parsonage exemption for both homes.<sup>107</sup> The IRS sought to disallow the parsonage exemption for the second home.<sup>108</sup> The IRS’s position stemmed from its determination that “a home” in § 107 allowed a minister to claim the parsonage exemption for only one home, not two.<sup>109</sup> Both the tax court and the Eleventh Circuit ruled on this case solely using statutory construction, without considering greater potential constitutional issues involved.<sup>110</sup> The denial of the parsonage exemption for the minister’s second home is deeply troubling from a constitutional perspective. The *Driscoll* case did not involve any unreasonable income on the part of the pastor, as the IRS conceded in its reply brief on appeal.<sup>111</sup> The case also involved no allegation of fraud.<sup>112</sup> Absent unreasonable income or fraud, courts and the IRS should not adopt a narrow construction of the parsonage exemption.

While the IRS may purport to advance important governmental interests for adopting a narrow construction of the parsonage exemption,<sup>113</sup> the religion clauses of the First Amendment countenance against such a narrow view.<sup>114</sup> But the

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105. 669 F.3d 1309 (11th Cir. 2012).

106. *Driscoll v. Comm’r*, 135 T.C. 557, 558 (2010), *rev’d*, 669 F.3d 1309 (11th Cir. 2012).

107. *Id.* at 558–59.

108. *Id.* at 561.

109. *Id.* at 563–64.

110. *Driscoll v. Comm’r*, 135 T.C. 557, 566 (2010), *rev’d*, 669 F.3d 1309 (11th Cir. 2012).

111. See Reply Brief for Respondent at 8–9, *Driscoll v. Comm’r*, 135 T.C. 557 (2010), *rev’d*, 669 F.3d 1309 (11th Cir. 2012) (No. 1070-07) (conceding that Mr. Driscoll was still entitled to a parsonage allowance). Unreasonable income would have led to the revocation of the allowance or the tax-exempt status of the church. See I.R.C. §§ 503, 4958 (2006)).

112. For a church to obtain tax-exempt status, the Internal Revenue Code requires that “no part of the net earnings of [the church] inures to the benefit of any private shareholder or individual.” I.R.C. § 501(c)(3) (2006). Whether the IRS should be concerned with the ecclesiastical decisions of religious bodies concerning the remuneration of their spiritual leaders is a question reserved for another day. It is sufficient here to suggest that such intrusive governmental monitoring and enforcement poses interesting constitutional questions that, through inference from the text of this Article, the IRS should find troubling.

113. The IRS took the position in *Driscoll* “that exclusions from income must be narrowly construed.” *Comm’r v. Schleier*, 515 U.S. 323, 328 (1995) (citations omitted). Such a general rule is not automatically an important or compelling governmental interest.

114. The “values underlying these two provisions [of the First Amendment] relating

more troubling aspect of the IRS's position—accepted by the Eleventh Circuit—is its preference for some types of religious organizations over others.

Section 119 of the Internal Revenue Code allows for ministers to live on employer-owned premises without incurring any income tax liability for the provision of the benefit.<sup>115</sup> This is a separate provision from § 107 and indeed may exist simultaneously according to the dissent in *Driscoll*.<sup>116</sup> Thus, it is possible for a minister to have two homes and receive exemptions for both homes, as long as one of the homes is on the premises of the ministry and the other home is the parsonage. A minister may have any number of homes under § 119, a fact the dissent relies upon to overcome the very real possibility that a minister may require a second home for ministry purposes.<sup>117</sup> As explained earlier, there are religious reasons for a minister to maintain multiple homes,<sup>118</sup> some of which may be provided on the premises of ministries. In *Driscoll*, the IRS focused its attention on a minister simply because he sought a parsonage exemption for two homes that were not physically connected to church structures.

This position is dangerously close to an Establishment Clause violation under *Larson v. Valente*.<sup>119</sup> The Court explained in *Larson*, “Madison’s vision—freedom for all religions being guaranteed by free competition between religions—naturally assumed that every denomination would be equally at liberty to exercise and propagate its beliefs. But such equality would be impossible in an atmosphere of official denominational preference.”<sup>120</sup> The Court went on to state that “when we are presented with a . . . law granting a denominational preference,

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to religion have been zealously protected, sometimes even at the expense of other interests of admittedly high social importance.” *Simpson v. Wells Lamont Corp.*, 494 F.2d 490, 494 (5th Cir. 1974) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972)). Moreover, “[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.” *Id.* (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945)).

115. I.R.C. § 119(a) (2006) (“There shall be excluded from gross income of an employee the value of any meals or lodging furnished to him, his spouse, or any of his dependents by or on behalf of his employer for the convenience of the employer . . .”).

116. *Driscoll v. Comm’r*, 135 T.C. 557, 572 n.4 (2010) (Gustafson, J., dissenting) (“If a minister who maintains his section 107 home in one location is required to be away from home, the value of his stay in a rectory or ‘prophet’s chamber’ on church premises may be excludable under section 119.”), *rev’d*, 669 F.3d 1309 (11th Cir. 2012).

117. *Id.*

118. See *supra* text accompanying notes 79–81.

119. 456 U.S. 228 (1982).

120. *Id.* at 245.

our precedents demand that we treat the law as suspect . . . .”<sup>121</sup> Finally, no law can withstand constitutional scrutiny that “prefer[s] one religion over another.”<sup>122</sup> Exempting several homes of a minister that are located on the premises of the ministry itself and then denying the same form of exemption to a minister of a religion that has some theological concern regarding on-site housing runs afoul of this constitutional mandate. The same holds true for the exemption to a minister who lives in both an on-site dwelling and maintains an independent parsonage. The IRS’s artificial argument to disallow one but allow another creates a constitutional difficulty where none would otherwise have existed.

It is unclear why the IRS would choose to take such a narrow view of the exemption. As discussed previously, the recovery of potential revenue from second parsonages hardly seems worth the risk of falling into a constitutional conundrum with such an interpretation,<sup>123</sup> and there are already safeguards in place to protect against fraud and overcompensation. Additionally, there is a “considerable burden . . . on the state, in questioning a claim of a religious nature. Strict or narrow construction of a statutory exemption for religious organizations is not favored.”<sup>124</sup> There are a wide variety of theological determinations that may lead to the conclusion that multiple parsonages are necessary. The IRS is in no position to favor the conclusion of any particular faith even though the IRS would claim to be neutral toward such deliberations. If two faith groups conclude that a second parsonage is warranted, the first group should not be financially punished while the second group successfully avails itself of both §§ 107 and 119.

It is understandable that the government must draw the line somewhere. It has at least drawn a line at the top, disallowing unreasonable income. The threat of a single minister claiming multiple parsonages seems largely illusory in the face of what is essentially a salary cap. But between that salary cap and an absolutist approach that § 107 only supports the claim of one parsonage, there are a countless multitude of theological permutations leading to differing ministry approaches regarding

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121. *Id.* at 246.

122. *Id.* at 245 (quoting *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947)).

123. *See supra* note 112.

124. *Larson*, 456 U.S. at 243 (quoting *Wash. Ethical Soc’y v. District of Columbia*, 249 F.2d 127, 129 (D.C. Cir. 1957)).

parsonages. While determining the precise boundaries appears somewhat tenuous—and indeed it is—prudence suggests leaving ample flexibility to allow the various theological permutations to unfold. Anything short of a hands-off approach is fraught with constitutional danger. For example, it would not be for the government to troll through the religious beliefs of a particular ministry to determine whether a particular parsonage arrangement is within acceptable governmental parameters.<sup>125</sup>

## VI. CONCLUSION

The parsonage exemption is the culmination of a legal tradition beginning thousands of years ago and woven into the fabric of American society from the beginning. It is a recognition that clergy bring some good to the world, and it is a restraint on the government's intrusion into the matters of the church. It is also, in its ideal form, a means of bringing equality between different denominations where before there was—unintentionally—denominational favoritism in the tax code. Unfortunately, the parsonage exemption is tainted by the Treasury regulations that apply it. However, with the Supreme Court's decision in *Hosanna-Tabor*, the aspects of the parsonage exemption that remain problematic should be overturned, leaving an exemption that promotes greater religious equality. While the Eleventh Circuit's decision in *Driscoll* is a setback, the parsonage exemption is an important component in ensuring the fairness of the tax code and in avoiding the sort of Establishment Clause problems that so concern its detractors.

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125. *Widmar v. Vincent*, 454 U.S. 263, 272 n.11 (1981) (describing as “impossible” the task of determining “which words and activities fall within ‘religious worship and religious teaching’”) (citation omitted).