

MINISTERIAL MAGIC: TAX-FREE HOUSING AND RELIGIOUS EMPLOYERS

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ABSTRACT

*Religious organizations enjoy many of the same benefits that other non-profit organizations do. Churches, temples and mosques, for example, generally are exempt from local real estate taxes. Economically speaking, a tax exemption has the same effect as a subsidy; freedom from tax liability means that the organization can devote its financial resources to other activities. But where an exemption afforded to a religious employee is broader than the equivalent exemption available to a secular employee, a significant Establishment Clause concern is raised. The parsonage exemption of Internal Revenue Code Section 107 presents such an issue: ministers are permitted to exclude cash housing allowances from their taxable income as a matter of course, even though the equivalent exemptions for secular employees are far more limited. Recently, however, in *Gaylor v. Mnuchin*, the United States Court of Appeals for the Seventh Circuit rejected the argument that the parsonage exemption violates the Establishment Clause. This Essay evaluates the court's reasoning and suggests that the decision minimized the extent to which the parsonage exemption provides active governmental support for religion. This minimization, we argue, led to a distorted Establishment Clause analysis and the wrong result. We also address an issue lurking in the background: the intersection between the parsonage exemption and sex discrimination, given that some religions do not permit women to serve in religious leadership roles that would qualify them as ministers under Section 107. Although the stronger constitutional argument against the parsonage exemption stems from the Establishment Clause, both issues raise important policy concerns.*

INTRODUCTION

The “parsonage exemption” is a little-known—but substantial—tax benefit for religious entities in the United States. The exemption, contained in Internal Revenue Code Section 107, allows “ministers of the gospel” to exclude the value of their housing benefits from their taxable income, even when those benefits take the form of a housing allowance rather than physical housing.¹ A Treasury Department report estimates that, in the aggregate, the

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¹ 26 U.S.C.A. § 107(2) [hereinafter “I.R.C.”].

benefit is worth more than \$800 million in foregone taxes each year.² The vast majority of that amount is attributable to non-taxable cash allowances for ministers, rabbis, imams, and other religious leaders; one recent analysis indicates that 87% of such leaders receive a housing allowance, while only 11% receive in-kind housing (such as use of a parsonage itself).³

The tax laws are, of course, full of rules, exceptions, and exemptions that bestow tax-advantaged (or tax-disadvantaged) status. Because of the parsonage exemption's explicit and material advantaging of religion, however, it raises significant Establishment Clause questions. In March 2019, the Seventh Circuit ruled—in a case closely watched by religious organizations throughout the country—that the parsonage exemption did not violate the Establishment Clause, reversing the district court's ruling that it did. In this Essay, we explore the troubling implications of the Seventh Circuit's decision *Gaylor v. Mnuchin*.⁴ The decision may well be analyzed further by an *en banc* panel and/or the Supreme Court.

In Part I, we provide an overview of the parsonage exemption and of the test case recently brought by the Freedom From Religion Foundation (“FFRF”) to challenge the law's constitutionality. Part II evaluates the strengths and weaknesses of the Seventh Circuit's Establishment Clause analysis in the case. We argue that the Seventh Circuit understated the extent to which the parsonage exemption provides active governmental support for religion, while overstating the religious entanglement that would result if the exemption were narrowed to cover only in-kind housing (as opposed to cash allowances). We also question the Seventh Circuit's broad conclusion that the parsonage exemption passes the “historical significance” standard laid out by the Supreme Court in *Town of Greece v. Galloway*,⁵ notwithstanding the significant differences between the practice being challenged in *Town of Greece* (legislative prayer at the beginning of town board meetings) and the parsonage exemption, which is a financial benefit of much more recent vintage.

Part III of the Essay turns to a new issue: how the parsonage exemption intersects with sex discrimination concerns, given that some religions do not permit women to serve in religious leadership roles that would qualify them as ministers for purposes of Section 107.⁶ The Supreme Court already has

² See Office of Tax Analysis, U.S. Dep't of the Treasury, Tax Expenditures: Fiscal Year 2020, at 24 (Oct. 19, 2018).

³ See Sarah Eekhoff Zylstra, *Are Pastors' Homes That Different?*, CHRISTIANITY TODAY (June 24, 2014), <https://www.christianitytoday.com/ct/2014/june/are-pastors-homes-that-different.html> (reporting that 87% of pastors receive cash housing allowance and 11% receive in-kind allowances).

⁴ *Gaylor v. Mnuchin*, 919 F.3d 420 (7th Cir. 2019), available at <https://tinyurl.com/y256qfo3>.

⁵ *Town of Greece v. Galloway*, 572 U.S. 565 (2014).

⁶ See, e.g., David Masci, *The Divide Over Ordaining Women*, Pew Res. Ctr. FactTank (Sept 9, 2014) (listing multiple denominations that do not ordain women).

made clear that the “ministerial exception” allows religions to enforce such sex classifications without risking employment discrimination liability.⁷ The parsonage exemption, in turn, can amplify the effect of that sex discrimination by depriving women of the corresponding tax benefits as well. Moreover, the broad definition of who counts as a “minister” for purposes of the ministerial exception in the antidiscrimination context means that a woman working for a religious entity could find herself in the worst of both worlds: enough of a “minister” that the ministerial exception bars her from bringing any employment discrimination claim against her employer, yet not enough of a “minister” to qualify for the parsonage exemption. Even though this sex-based disparate impact likely does not rise to the level of unconstitutionality, it raises further policy questions about the parsonage exemption’s continued existence.

I. OVERVIEW OF THE PARSONAGE EXEMPTION

I.R.C. § 107, which has long been known as the “parsonage exemption,” includes two provisions. It states that the gross income of a “minister of the gospel” does not include (1) the rental value of a home furnished as part of the minister’s compensation, or (2) a rental allowance paid as part of compensation, to the extent used by the minister to rent or provide a home, as long as the allowance does not exceed the fair rental value of the home, including furnishings and utilities.⁸ On its face, the provision seems clear enough: there is a tax-free housing benefit that religious figures can receive, which likely facilitates their employment in some way. However, further consideration of the seemingly simple rule reveals several complex issues, particularly in terms of who qualifies for the exemption and how this exemption’s structure differs from other tax-free housing provisions.

A. Who Is a Minister?

Despite the Christian connotations of the phrase “minister of the gospel” in I.R.C. § 107, courts have interpreted this statute to apply to non-Christian “ministers” as well.⁹ This is not surprising, given the clear Establishment

⁷ See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Commission*, 565 U.S. 171, 190, 195 (2012) (recognizing a “ministerial exception to employment discrimination suits”).

⁸ See I.R.C. § 107 (excluding from gross income the rental value of parsonages).

⁹ See, e.g., Adam Chodorow, *The Parsonage Exemption*, 51 U.C. DAVIS L. REV. 849, 861 (2018) (noting that the United States Tax Court has construed the parsonage exemption to apply to leaders of diverse faiths).

Clause concerns that would result from providing this benefit only to Christian religions. Thus, for instance, the Tax Court has held that a Jewish cantor who has credentials formally recognized by a national association and who regularly conducts a congregation's liturgical services, officiates at weddings and funerals, and provides religious instruction to the congregation's youth qualifies as a "minister of the gospel" for purposes of the parsonage exemption.¹⁰

The interpretation that the exemption is available to "ministers of the gospel" of all faiths does not explain how to determine whether someone counts as a minister in the first place, however. In dicta, the Tax Court has defined a minister as someone "authorized to administer the sacraments, preach and conduct services of worship."¹¹ But because religions vary as to whether such activities can be conducted by lay individuals in addition to ordained people, and further vary as to the process for ordination, there is no bright-line rule for who qualifies as a minister for purposes of I.R.C. § 107. The Internal Revenue Service has stated routinely that it will not provide any advance ruling on whether someone is "minister of the gospel" for purposes of the parsonage exemption.¹² Instead, the Treasury Regulations under I.R.C. § 107 specifically provide that the standards contained in Treas. Reg. § 1.1402(c)-5 will apply in determining whether the housing benefit operates as a form of remuneration for services that are "ordinarily the duties of the minister of the gospel." These include services that constitute "the conduct of religious worship or the ministration of sacerdotal functions" as well as "directing, managing, or promoting the activities of such organization."¹³ Thus, the definition of who can be a "minister" is very broad.

Interestingly, the statutory language of I.R.C. § 107 itself does not even require that the minister actually be engaged in ministerial functions in order to receive tax-free housing. Imagine, for example, that an individual has been ordained as a minister in a particular faith. That person then returns to school and becomes a medical doctor. The religious organization or congregation decides that it would be convenient to have this doctor routinely

¹⁰ See, e.g., *Salkov v. Comm'r*, 46 T.C. 190, 194 (1966) ("Although 'minister of the gospel' is phrased in Christian terms, we are satisfied that Congress did not intend to exclude those persons who are the equivalent of 'ministers' in other religions. Nomenclature alone is not determinative."). Recognizing the Christian bias embedded in the word "minister," we use it reluctantly, and for convenience purposes only. See, e.g., *Minister*, OXFORD ENGLISH DICTIONARY (2019) ("A person appointed to perform a liturgical duty or other service in the Christian church; a deacon, acolyte, etc.").

¹¹ *Salkov*, 46 T.C. at 194.

¹² See, e.g., Rev. Proc. 2019-3; 2019-01 I.R.B. 130, §3.01(19).

¹³ Treas. Reg. § 1.1402-(c)-5 (listing rules applicable to the determination of whether minister is performing services "in exercise of his ministry").

attend congregational services and functions, in the event of any medical emergencies. The religious organization has housing that it is willing to make available to the doctor at no cost, and the doctor moves in. Based on a reading of the statute alone, it is not clear that the doctor would be required to include the value of the housing in gross income. Only by referring to the regulations under I.R.C. § 107 and the incorporation by reference of Treas. Reg. § 1.1402(c)-5 does one read into the statute a requirement that the minister must be “in exercise of his ministry or in the exercise of duties required by such [religious] order” in order to receive the housing benefits tax-free.¹⁴ These regulations are not binding law, however, and are subject to judicial review.¹⁵

B. How the Parsonage Exemption Differs From Other Tax-Free Housing Statutes

The parsonage exemption differs from I.R.C. § 119, the other major tax rule applicable to tax-free housing related to employment. Generally speaking, under I.R.C. § 119 an employee may exclude from gross income the value of any lodging furnished to the employee if the employee is required to accept the lodging on the employer’s business premises as a condition of employment.¹⁶ Salient aspects of I.R.C. § 119 are that the lodging must be on the *business premises* of the employer and that residing in that housing must be *required* in order for the employee to “properly perform the duties of his employment...for example, the lodging is furnished because the employee is required to be available for duty at all times, or because the employee could not perform the services required of him unless he is furnished such lodging.”¹⁷ One example is a funeral director who must reside in the same building as the funeral home, because the business receives phone calls at all hours and the funeral director must have easy access to the materials and equipment necessary to transport bodies to the funeral home.¹⁸ Another example is a cattle ranch manager who must tend to the cattle at irregular hours and

¹⁴ *Id.* See also Treas. Reg. §§ 1.107-1(a) (“In general, the rules provided in § 1.1402(c)5 will be applicable to such determination” of whether the home or rental allowance has been “provided as remuneration for services which are ordinarily the duties of the minister of the gospel”).

¹⁵ See, e.g., *Walton v. Commissioner*, 1115 T.C. 589, 594-602 (2000) (concluding that a regulation promulgated under I.R.C. § 2702 is not a valid interpretation of law, and thus that the estate planning device known as a “zeroed-out GRAT” is permissible).

¹⁶ I.R.C. § 119(a)(2).

¹⁷ Treas. Reg. § 1.119(b)(3) (1985) (elaborating on the necessary showing that the employee is “required to accept such lodging as a condition of his employment”).

¹⁸ See, e.g., *Schwartz v. Commissioner*, 22 T.C.M. (CCH) 835 (1963) (holding that a funeral director’s housing is governed by § 119 because “it was in its best business interests to have petitioners reside in the funeral home and required that they do so as a condition of their employment”).

whose presence is needed to safeguard the cattle from natural and other dangers.¹⁹ Other minor exclusions under I.R.C. § 119 provide for a tax-free housing benefit for employees living in a “camp” in a foreign country because the employee is required to render services in a remote area where no housing is available.²⁰ Exclusions are also available for employees of certain educational institutions or academic health centers who receive housing on or in the proximity of the campus.²¹

The specific requirements of I.R.C. § 119—in particular, that the housing must be on the employer’s business premises and that the employee needs to live there in order to perform his or her duties—go to the policy that the purpose of the housing is to meet the “convenience” (or needs) of the employer, rather than to provide compensation to the employee.²²

In contrast to the tax-free lodging under I.R.C. § 119, the tax-free lodging under I.R.C. § 107 is much more akin to a compensation substitute. The minister need not reside in property owned by the religious congregation, the property need not be on or near the “business premises,” and—perhaps most significantly—the benefit does not have to be furnished in-kind. The minister may receive a cash allowance instead of physical housing. That means a minister who already owns his own home, for example, could use his tax-free housing allowance to pay down his mortgage or pay the rent of the very same apartment—wherever located—that he rented before taking the job as a minister.²³

C. The Purpose of the Parsonage Exemption

The legislative history to I.R.C. § 107 is not especially robust. In 1921, when the Internal Revenue Service first addressed the question of whether housing for ministers gave rise to taxable income, it answered in the affirmative.²⁴ Congress responded almost immediately with the forerunner of I.R.C. § 107, but at that time, the exemption was limited to in-kind housing.²⁵ There is nothing in either the House Report, the Senate Report or the

¹⁹ See, e.g., *Wilhelm v. US*, 257 F. Supp. 16, 21 (D. Wyo. 1966) (holding that a ranch manager was required to accept lodging on ranch premises because of a need to move cattle frequently for feeding and safety, as well as to guard against theft or loss).

²⁰ See I.R.C. § 119(c) (applying to employees living in a foreign country in a common area not available to publish and which accommodates ten or more employees).

²¹ See IRC § 119(d) (applying to lodging furnished by certain educational institutions to employees).

²² See I.R.C. § 119(a) (excluding meals and lodging furnished “for the convenience of the employer” if certain other tests are met).

²³ See, e.g., *Treas. Reg. § 1.107-1(a)* (1963) (gross income does not include a rental allowance “to the extent such allowance is used by [minister] to rent or otherwise provide a home”).

²⁴ O.D. 862-1921-4 C.B. 85.

²⁵ Revenue Act of 1921, Pub. L. No. 67-98, § 213(b)(11), 42 Stat. 227, 239 (1921).

reports of the legislative hearings that explains why Congress enacted the parsonage exemption initially.²⁶ When Congress expanded the provision in 1954 to also make cash allowances tax-exempt,²⁷ Representative Peter Mack of Illinois explained that the change was necessary in order to “correct ... discrimination against certain ministers of the gospel who are carrying on such a courageous fight” against “a godless and antireligious world movement.”²⁸ Mack also believed that clergymen were underpaid, and so cash stipends could serve as a needed compensation boost.²⁹ Other rationales for exempting both in-kind and cash housing benefits were to put on equal footing those denominations that did not traditionally build and offer housing to their ministers with those that did, as well as the need to neutralize economic differences between congregations (presumably on the theory that it would be easier for a less wealthy congregation to raise an annual stipend than to build new housing).³⁰

Over the years, several constitutional and tax law scholars have argued that the parsonage exemption violates the Establishment Clause.³¹ Recently, the FFRF set up a test case to explore this proposition. The FFRF paid three of its officers a cash housing allowance, and those officers then filed tax returns and sought refunds, alleging that their housing allowances should be tax-exempt. When the refunds were not received, the officers brought a suit in the Western District of Wisconsin seeking to have I.R.C. § 107 declared unconstitutional, on the grounds that it violates the Establishment Clause.³² After several procedural twists and turns, the district court ultimately ruled on summary judgment that § 107(2)—the portion of the parsonage exemption that deals with housing allowances as opposed to in-kind housing—is unconstitutional.

²⁶ See generally, *Income Tax: Internal Revenue Hearings on the Proposed Revenue Act of 1921 Before the S. Comm. on Fin.*, 67th Cong. 497-577 (1921); S. REP. NO. 67-257 (1921); H.R. REP. NO. 67-350 (1921).

²⁷ Internal Revenue Code of 1954, Pub. L. No. 591-736, 68A Stat. 32, 32.

²⁸ *General Revenue Revision: Hearings Before the H. Comm. on Ways & Means*, 83d Cong., 1576 (1953) (statement of Rep. Peter Mack, Member, H. Comm. On Ways & Means).

²⁹ H.R. Rep. No. 83-1337, at 15 (1954) as reprinted in 1954 U.S.C.C.A.N. 4035, 4040.

³⁰ *General Revenue Revision: Hearings Before the H. Comm. on Ways & Means*, 83d Cong., *supra* note 28, at 1574.

³¹ See, e.g., Chodorow, *supra* note 9, at 872-894 (analyzing Establishment Clause issues with the parsonage exemption); Erwin Chemerinsky, *The Parsonage Exemption Violates the Establishment Clause and Should be Declared Unconstitutional*, 24 WHITTIER L. REV. 707 (2003) (limiting analysis to constitutionality of cash housing allowance); Richard H. Fallon, *Tiers for the Establishment Clause*, 166 U. PA. L. REV. 57, 99 (2017) (proposing that parsonage exemption be subject to strict scrutiny and stating that it should be declared unconstitutional under such an analysis).

³² See generally, *Complaint, Gaylor v. Lew*, 278 F. Supp. 3d 1081 (W.D. Wis. 2017) (No. 16 Civ. 215), *rev'd sub nom. Gaylor v. Mnuchin*, 2019 WL 1217647 (Mar. 15, 2019). See also U.S. CONST. Amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...”).

In so concluding, the district court held that the statute violates the Establishment Clause because it does not have a secular purpose or effect and because a reasonable observer would view it as an endorsement of religion. In particular, the court emphasized § 107(2)'s special features, such as its extension to housing allowances (as opposed to solely in-kind housing) and the absence of a need to show that the minister is required to accept such housing as a condition of employment and for the convenience of the employer.

II. THE SEVENTH CIRCUIT REJECTS ESTABLISHMENT CLAUSE CHALLENGE TO TAX-FREE CLERGY HOUSING ALLOWANCE

The district court's rejection of the parsonage exemption garnered tremendous attention. Not surprisingly, the I.R.S. filed an appeal quickly; the Service was joined by the other religious organizations and ministers who had been permitted to intervene in the case. Additionally, amicus briefs opposing the district court's decision came from numerous religious organizations,³³ members of Congress³⁴ and the States of Wisconsin, Arizona, Arkansas, Colorado, Georgia, Indiana, Kansas, Louisiana, Missouri, Nebraska, Ohio, Oklahoma, South Carolina, Texas, Utah, and West Virginia, and the Attorney General of Michigan.³⁵ Within legal academia, three tax professors filed an amicus brief against the district court's decision and arguing in favor of the constitutionality of the parsonage exception,³⁶ while twenty-three tax professors filed an amicus brief supporting the appellees-plaintiffs.³⁷

Approximately five months later—on March 15, 2019—a unanimous three-judge panel of the Seventh Circuit reversed the lower court's decision, holding that the parsonage exemption did not violate the Establishment Clause. Noting that the Supreme Court had still not settled on a single Establishment Clause standard, the *Gaylor* court evaluated the constitutionality of the parsonage exemption under two different Establishment Clause tests:

³³ See, e.g., Thomas C. Berg, Brief for Evangelical Council for Financial Accountability, et al. as Amici Curiae in Support of Appellants, *Gaylor v. Mnuchin*, 919 F.3d 420 (7th Cir. 2019) (Nos. 18-1277 & 18-1280), 2018 WL 2017944.

³⁴ See, e.g., Kelly J. Shackelford et al., Brief for Members of Congress as Amicus Curiae in Support of Appellants, *Gaylor v. Mnuchin*, 919 F.3d 420 (Nos. 18-1277 & 18-1280), 2018 WL 2180988.

³⁵ See Brad D. Schimel et al., Brief for the States of Wisconsin, et al., and the Attorney General of Michigan as Amicus Curiae in Support of Appellants, *Gaylor v. Mnuchin*, 919 F.3d 420 (7th Cir. 2019) (Nos. 18-1277 & 18-1280), 2018 WL 2017943.

³⁶ See Alexander James Egbert, Brief for Tax Law Professors as Amicus Curiae in Support of Appellants, *Gaylor v. Mnuchin*, 919 F.3d 420 (7th Cir. 2019) (Nos. 18-1277 & 18-1280).

³⁷ See Adam Chodorow, Brief for Tax Law Professors as Amicus Curiae in Support of Appellants, *Gaylor v. Mnuchin*, 919 F.3d 420 (7th Cir. 2019) (Nos. 18-1277 & 18-1280). The signatories to this amicus brief included one of the authors of this essay.

the longstanding *Lemon* test (itself comprised of three prongs)³⁸ and the much more recent *Town of Greece* historical significance test.³⁹ Under either test, the Seventh Circuit wrote, the parsonage exemption passes constitutional muster.⁴⁰

The *Gaylor* court began its *Lemon* test analysis with a discussion of whether the legislation had a secular purpose, and concluded that it did.⁴¹ The parsonage exemption, the court reasoned, was simply one of many “parallel provisions” in the tax law that exempt employer-provided housing.⁴² None of the other provisions cited, however, permits an employee to exclude an employer-provided *cash allowance*, as I.R.C. § 107 does.⁴³ Nor do any of the other housing provisions accord tax-free status to housing benefits unrelated to the employee’s work duties.⁴⁴ But the *Gaylor* court did not view these differences as dispositive. Instead, the court accepted the government’s argument that the parsonage exemption’s inclusion of both in-kind housing and cash housing allowances helped eliminate “discrimination between ministers,” since smaller or poorer denominations might not be able to afford in-kind housing. The court did not discuss the fact that at this point, any such disparity has shrunk, given that the overwhelming majority of religions only provide cash allowances.⁴⁵ The court further accepted the government’s argument that the parsonage exemption’s approach is the best way to avoid entanglement with religion, insofar as the current approach provides a *per se* exemption rather than requiring religious organizations to defend their approach to their ministers’ housing.

The *Gaylor* court next considered whether I.R.C. § 107 satisfies *Lemon*’s second prong: that the “principal or primary effect [of the law] must be one that neither advances nor inhibits religion.”⁴⁶ Citing the Supreme Court’s decision in *Walz v. Tax Commission of City of New York*, which upheld a municipal tax exemption for church-owned property,⁴⁷ the court reasoned that granting a tax exemption “is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding

38 See *Lemon v. Kurtzman*, 403 U.S. 602, 615 (1971) (articulating a three-part test for evaluating Establishment Clause claims).

39 *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014) (“[T]he Establishment Clause must be interpreted by reference to historical practices and understandings.”) (internal quotations omitted).

40 *Gaylor*, 919 F.3d at 435-436.

41 *Id.* at 435 (citing *Lemon*, 403 U.S. at 612-13).

42 *Id.* at 429.

43 See I.R.C. § 107 (stating no requirement that the tax-free housing be used in conjunction with the taxpayer’s work as a minister).

44 *Id.*

45 See Zylstra, *supra* note 3 and accompanying text.

46 *Lemon*, 403 U.S. at 612-13 (internal citations omitted).

47 397 U.S. 664 (1970).

that the church support the state.”⁴⁸ Even though the Seventh Circuit acknowledged that subsidies and exemptions may have the same economic impact, it stated that the failure to tax by definition represented non-advancement of religion, according to the precedent cited. The court acknowledged the Supreme Court’s subsequent decision in *Texas Monthly v. Bullock*, in which the Court held that a sales tax exemption for religious publications was unconstitutional because it constituted a promotion of religion.⁴⁹ But the Seventh Circuit relied on the fact that *Texas Monthly* was a plurality decision. “When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices,” the opinion stated, “the holding of the Court may be viewed as that position taken by the Members who concurred in the judgments on the narrowest grounds.”⁵⁰ The court concluded that because the parsonage exemption provided an exemption rather than a tax subsidy, its primary effect was “not to advance religion on behalf of the government, but to ‘allow[] churches to advance religion.’”

Finally, on the third prong of the *Lemon* test—that the law may “not foster an excessive entanglement with religion”⁵¹—the court stated that some government entanglement with religion is inevitable, but the broad tax benefit of I.R.C. § 107 avoids “excessive” entanglement by obviating the need to inquire into whether and how the minister uses the home for ministry-related functions.⁵² Indeed, this analysis echoed the court’s earlier analysis under *Lemon*’s first prong, where the court held that one of the secular purposes of the statute was to avoid excessive entanglement.

The Seventh Circuit then turned from *Lemon* to the Supreme Court’s 2014 decision in *Town of Greece*,⁵³ in which the Court stated that the Establishment Clause must be interpreted “by reference to historical practices and understandings.” There, the Supreme Court held that beginning a town board meeting with a prayer did not violate the Establishment Clause in large part because the Framers themselves had considered legislative prayer “benign” and the “First Congress provided for the appointment of chaplains only days after approving language for the First Amendment.” The *Town of Greece* Court thus implied that the practice could not possibly violate the First Amendment when it had been accepted by the very same people who drafted and ratified the First Amendment. The *Gaylor* court extended this reasoning

48 Gaylor, 919 F.3d at 434 (citing *Walz*, 397 U.S. at 675) (internal quotations and citation omitted).

49 489 U.S. 1, 7 (1989).

50 Gaylor, 919 F.3d at 433, (quoting *Marks v. United States*, 430 U.S. 188, 193 (1977)).

51 *Lemon*, 403 U.S. at 612-13 (internal citations omitted).

52 Gaylor, 919 F.3d at 434-435.

53 572 U.S. at 576 (stating that alleged Establishment Clause violations should be evaluated “by reference to historical practices and understandings”) (internal quotations and citation omitted).

to the parsonage exemption, stating that as early as 1802, Congress had permitted the County of Alexandria, Virginia (then under federal control) to exempt church property from taxation, that in 1855 the Supreme Court had accepted religious property tax exemptions, and that today, over 2,600 existing federal laws provide some sort of exemptions related to religion.⁵⁴ For these reasons, the Seventh Circuit concluded that the parsonage exemption passed the “historical significance” test as well as the *Lemon* test, and thus did not violate the Establishment Clause.

In our view, the *Gaylor* court’s reasoning has several key flaws. First, in its application of *Lemon*’s “primary effect” test, the court conclusorily relied on the Supreme Court’s decisions in *Walz* (upholding a property tax exemption for properties used for religious worship) and *Amos* (upholding Title VII’s provision allowing religious entities to discriminate on the basis of religion) for the proposition that exemptions do not amount to government support. The *Gaylor* court failed to grapple with the reality that a tax exemption has the same financial effect as a tax subsidy, as noted by *Texas Monthly*. Indeed, the court declined to engage at all with *Texas Monthly*’s substantive reasoning, instead relying entirely on its status as a plurality opinion. But the very fact that the Treasury Department and religious organizations claimed in their amicus briefs that “the survival of many congregations hangs in the balance” of the validity of the parsonage exemption⁵⁵ is further proof that § 107 functions as an active subsidy of religion. The legislative history of the 1954 expansion of the parsonage exemption, in citing the need to bolster the salaries of ministers, supports this claim.⁵⁶ Similarly, the *Gaylor* court did not consider the factual differences between the narrower exemptions in *Walz* and *Amos* and the broad nature of the parsonage exemption. Indeed, the *Walz* exemption of religious *property* is much more analogous to a parsonage exemption that would only cover in-kind housing, rather than a cash allowance. Likewise, the *Amos* exemption had a Free Exercise Clause-related purpose—“lifting a regulation that burdens the exercise of religion”—that is not present here.

Second, the *Gaylor* court overstated the amount of entanglement that would result between government and religious entities if the parsonage exemption were limited to only covering in-kind housing, i.e., if parsonages were simply covered under I.R.C. § 119. This flaw permeates the opinion, undergirding the court’s analysis under the first and third prongs of *Lemon*, in which the court concluded that the parsonage exemption was less entangling than the other alternatives. As Adam Chodorow has persuasively written,

⁵⁴ *Gaylor*, 919 F.3d at 436.

⁵⁵ *Id.* at 423.

⁵⁶ *See supra* Part I.B.

however, applying I.R.C. § 119 to ministers likely would lead to *less* entanglement.⁵⁷ Such an approach would eliminate from coverage the 87% of ministers who solely receive cash housing allowances, which itself would “significantly reduc[e] church-state interactions.”⁵⁸ As for the small percentage of ministers receiving in-kind housing, the tax authorities would simply have to confirm that the housing was on-site, required as a condition of employment and for the convenience of the employer. These inquiries are not particularly doctrinal or intrusive in nature.

Finally, the *Gaylor* court’s application of the “historical significance” test is particularly questionable. In focusing on the broad history of religion-related tax exemptions, the Seventh Circuit elided the fact that the specific practice facing challenge—the extension of the parsonage exemption to *cash allowances*—occurred only in 1954. This makes it much less analogous to the practice of legislative prayer, which dates back to the nation’s founding. Nor did the *Gaylor* court consider whether the historical significance test should apply differently when the challenged governmental practice involves *financial* rather than *symbolic* support for religion.

III. MINISTERIAL TAX BENEFITS AND SEX DISCRIMINATION

Although the primary focus of most commentary on the parsonage exemption is whether it violates the Establishment Clause, there is another issue lurking in the background: sex discrimination. Numerous religions do not ordain women. Indeed, a recent Pew Research Center report noted that “[m]any of the nation’s largest denominations, including Roman Catholics, Southern Baptists, Mormons (Latter-Day Saints), and the Orthodox Church in America, do not ordain women or allow them to lead congregations.”⁵⁹

Such religions do not risk employment discrimination liability for these sex-based classifications. The Supreme Court has broadly held that the “ministerial exception,” stemming from both the Establishment and Free Exercise Clauses, shields religious organizations from all employment discrimination lawsuits.⁶⁰ “When a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us,” the Supreme Court wrote in *Hosanna-Tabor Evangelical Lutheran Church & School v. Equal Employment Opportunity Commission*.⁶¹

⁵⁷ Chodorow, *supra* note 9, at 855.

⁵⁸ *Id.*

⁵⁹ Masci, *supra* note 6.

⁶⁰ *Hosanna-Tabor*, 565 U.S. at 190.

⁶¹ *Id.*

“The church must be free to choose those who will guide it on its way.”⁶² The parsonage exemption, in turn, can amplify the effect of such sex discrimination. Not only do some women lack the opportunity to serve as ministers in the first place, but they are also deprived of the corresponding tax benefit that such ministers might receive. This tax treatment is not a foregone conclusion; some of the religions that do not ordain women still classify certain female employees as “ministers of the gospel” for purposes of the parsonage exemption. For example, the Lutheran Church Missouri Synod does not ordain women as pastors,⁶³ but still deems some women holding church positions (such as deaconesses) eligible for the parsonage exemption.⁶⁴ However, it is entirely up to each religious organization to make this choice, just as each organization has complete discretion to determine who can serve as a minister at all.

Recently, Amanda Retberg, a former professor at Wisconsin Lutheran College, which follows the rules of the Wisconsin Evangelical Lutheran Synod, discovered that male professors were being classified as “ministers,” and thus were able to exclude housing allowances from their taxable income, while women holding the same professorial positions were not receiving that classification.⁶⁵ Indeed, the Synod’s current tax manual specifically states that “[a]ll called pastors, male staff ministers, male professors and male teachers of the WELS are considered ‘Ministers of the Gospel’ according to a private letter ruling from the IRS dated March 2, 1955.”⁶⁶ Retberg was so disturbed by this disparity that she left her job (as well as the Synod).⁶⁷ In response to a reporter’s inquiry, the Provost of Western Lutheran College acknowledged the inequality and stated that in order to equalize the treatment of male and female employees, “WLC has chosen to provide a stipend to female called workers toward the goal of compensation equity among all WLC called workers.”⁶⁸

⁶² *Id.*

⁶³ See The Lutheran Church Missouri Synod, The Ordination of Women to the Pastoral Office, lcms.org/Document.fdoc?src=lcm&id=1099&dialogFeatures=protocol=http.

⁶⁴ *Id.*

⁶⁵ See Amanda Retberg, *Discrepancy or Discrimination? Doesn't Matter*, YOUR TAX MATTERS PARTNER (Mar. 18, 2019), <https://ytmp.blogspot.com/2019/03/discrepancy-or-discrimination-doesnt.html>.

⁶⁶ Peter J. Reilly, *Parsonage: Religious Liberty Smuggles Sex Discrimination Into Tax Law*, FORBES (Mar. 20, 2019), <https://www.forbes.com/sites/peterjreilly/2019/03/20/parsonage-religious-liberty-smuggles-sex-discrimination-into-tax-law/#7401466566bd>.

⁶⁷ See Retberg, *supra* note 65 (“I found all of this deeply troubling and personally, could no longer support this inequality. Therefore, awhile back I made the decision to leave the college and denomination.”).

⁶⁸ *Id.*

The economic equalization impulse is laudable, but this approach does not fully rectify the disparity. If Western Lutheran College and similarly situated religious employers do provide female employees with a “gross up” on account of their (supposed) ineligibility for the parsonage exemption, then that effectively means that the college will have to pay women more in salary than they pay to men. This may create a perverse incentive not to hire women at all. It is also not clear that the stipend will fully equalize all situations, given potential variations in overall income and tax rates.

Particularly ironic is the potential for a female employee to fall into the worst of both worlds: covered by the ministerial exception (and thus unable to bring any employment discrimination claims against her employer), but not considered a “minister of the gospel” for purposes of the parsonage exemption. Indeed, it is quite possible that Amanda Retberg would have found herself in this situation had she brought a lawsuit to challenge her employer’s practice of providing only male professors with a housing allowance—or, for that matter, if she brought an entirely unrelated employment discrimination lawsuit against her employer, such as a claim under the Americans with Disabilities Act.⁶⁹ Under *Hosanna-Tabor*, there is no “rigid formula for deciding when an employee qualifies as a minister.”⁷⁰ Relevant factors include the employee’s formal title, the substance reflected in that title, the employee’s own use of that title, and the extent to which the employee performs religious functions.⁷¹ Courts have recently held that a “lay principal” at a Catholic elementary school,⁷² a Hebrew language teacher at a Jewish day school,⁷³ and a director of music at a Catholic parish⁷⁴ all fell within the ministerial exception, even though there was no discussion of whether they also were receiving, or would be eligible to receive, tax-free housing under I.R.C. § 107. Additionally, the United States District Court for the District of South Carolina recently held that an English as a Second Language professor at a multi-denominational Christian university was covered by the ministerial exception, and thus could not bring an employment discrimination claim against her employer, even though she had never benefited from the parsonage exemption.⁷⁵ A court might well have reached the same conclusion about

69 See *Hosanna-Tabor*, 565 U.S. at 192 (holding that, because the plaintiff employee (a religious school teacher) was covered by the ministerial exception, her Americans with Disabilities Act claim against her employer could not go forward).

70 *Id.* at 190.

71 *Id.* at 192.

72 *Fratello v. Archdiocese of New York*, 863 F.3d 190, 192 (2d Cir. 2017).

73 *Grusgott v. Milwaukee Jewish Day School, Inc.* 882 F.3d 655, 656 (7th Cir. 2018).

74 *Sterlinski v. Catholic Bishop of Chicago*, 319 F. Supp. 3d 940, 950 (N.D. Ill. 2018).

75 *Lishu Yin v. Columbia International University*, 335 F. Supp. 3d 803, 817 (D.S.C. 2018).

Retberg, who had been required to complete theology classes and requirements in order to obtain her position, and who was working at an explicitly religious university.

To be clear, we are not arguing that the parsonage exemption is itself unconstitutional under an equal protection theory. Although the parsonage exemption does have a disparate impact on women, it is facially neutral. Thus, a court would apply heightened review to the parsonage exemption only upon a showing that it was *intended* to disadvantage women. There is no such showing to be made here. In the case of the original parsonage exemption enacted in 1921, there is little to no legislative history.⁷⁶ When Congress expanded the exemption in 1954 to permit a cash allowance, legislators referred to enhancing ministers' salaries and eliminating distinctions between religious sects and congregations.⁷⁷ If one were able to survey the lawmakers from 1954, it is likely that the "ministers" they had in mind were all men. Even so, that does not rise to the level of discriminatory intent. Awareness that a particular law will benefit men more than women is not enough. As the Supreme Court said in *Personnel Administrator v. Feeney*, a challenger would need to show that Congress "selected or reaffirmed [this] particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon" women.⁷⁸ There is nothing in the record to support such a claim.

For these reasons, it is unlikely that the parsonage exemption could be struck down as a form of sex discrimination. Nevertheless, the exemption's disparate impact as to sex does raise further questions—beyond those already discussed in the Establishment Clause context—about its continued wisdom. At the very least, for as long as the parsonage exemption remains in effect, public pressure might be brought to bear on religious organizations to treat men and women equally for tax purposes, even if they do not accord the title of "minister" to women. After all, the deference afforded to religious institutions to make these sorts of decisions would give them latitude to do so.

CONCLUSION

Because tax laws have measurable financial impacts, they are useful lenses for evaluating the constitutionality of the government's decision to treat certain individuals or activities alike or differently. The parsonage exemption is problematic both because it favors religious employers over secular employers, and because it has a discriminatory impact on women. Although the stronger constitutional argument against the parsonage exemption

⁷⁶ See *supra* Part I.C.

⁷⁷ *Id.*

⁷⁸ 442 U.S. 256, 279 (1979).

stems from the Establishment Clause, the exemption's sex-discriminatory impact is nevertheless an important policy issue that deserves attention.