

University of St. Thomas Law Journal

Volume 16
Issue 1 *Labor Law and Antitrust Law in the Age
of Trump*

Article 7

October 2019

Relief for Preachers: The History of Parsonages and Taxation

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Theodore F. DiSalvo, *Relief for Preachers: The History of Parsonages and Taxation*, 16 U. ST. THOMAS L.J. 89 (2019).

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ARTICLE

**RELIEF FOR PREACHERS: THE HISTORY OF
PARSONAGES AND TAXATION**

THEODORE F. DISALVO*

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The Internal Revenue Code contains a short, peculiar provision allowing ministers of the gospel to exclude the value of their home from their gross income if their congregation provides them with a home or housing allowance to rent or buy a home.¹ This provision, 26 U.S.C. § 107, is known as the parsonage allowance or parsonage exclusion.² On October

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1. 26 U.S.C. § 107 (2018). In full, the text is rather short: in the case of a minister of the gospel, gross income does not include—

(1) the rental value of a home furnished to him as part of his compensation; or
(2) the rental allowance paid to him as part of his compensation, to the extent used by him to rent or provide a home and to the extent such allowance does not exceed the fair rental value of the home, including furnishings and appurtenances such as a garage, plus the cost of utilities.

2. For convenience, I will refer to the broad doctrine of having favorable tax treatment for a parsonage as the “parsonage exclusion.” The following briefly provides a basic primer on some of the relevant terms in § 107. The definition of a minister of the gospel can be found in Treasury Regulation § 1.1402(c)-5(b) (as amended in 1968), stating a minister of the gospel must be a “duly ordained, commissioned, or licensed minister of a church.” Treasury Regulation § 1.1402(c)-5(b)(2) (as amended in 1968) then provides the services performed by a minister in exercise of the “minister” to include ministrations of sacerdotal functions; conduct of religious worship; and control, conduct, and maintenance of religious organizations (including the religious boards, societies, and other integral agencies of such organizations), all under the authority of a religious body constituting a church or denomination. Broadly, to qualify for § 107, an individual must be a minister and must perform services in the exercise of a church. Originally, the phrase “minister of the gospel” was not read as broadly as it is currently, but the broad reading would be

6, 2017, United States District Court Judge Barbara Crabb held that half of the parsonage exemption violates the Establishment Clause of the First Amendment.³ This was the second time Judge Crabb invalidated half of the parsonage exclusion for violating the Constitution.⁴ The next day, *Christianity Today* denounced her decision: “Atheists Again Get Pastors’ Best Benefit Ruled Unconstitutional.”⁵

In *Gaylor*, Judge Crabb spends significant portions of her opinion reviewing the legislative history and development of the parsonage exemption in the Internal Revenue Code so that she can evaluate the parties’ constitutional claims.⁶ Yet, throughout the opinion in *Gaylor*, the history of § 107, relied on in part to reach the holding, is incomplete. The incompleteness of § 107’s history is not unique, as there is an ongoing debate concerning the origin of the parsonage exclusion within the federal tax code. In fact, no author has yet given a full account of where it came from, outside of one common assumption.

The common assumption among authors has been that the parsonage exemption’s creation was spurred by the development of the convenience of the employer doctrine, a separate doctrine similar to parsonage exclusion. This assumption has been described in various academic works on the constitutionality of the parsonage exemption and has been litigated in the judicial system.⁷ In *Gaylor*, both the plaintiff and the government sparred extensively in their summary judgment motions on whether the parsonage exclusion’s origin in the federal tax code was a direct product of the

confirmed in Revenue Ruling 78-301, where the IRS adopted a broad reading of minister of the gospel to essentially drop the “of the gospel” (*see* Rev. Rul. 78-301, 1978-1 C.B. 103; *see also* *Salkov v. Comm’r*, 46 T.C. 190 (1966) (holding a Jewish Cantor that was a duly ordained, commissioned, or licensed minister qualified as a minister of gospel for purpose of the various tax provisions, including § 107 that included the phrase ministers of the gospel); *see also* *Silverman v. Comm’r*, 57 T.C. 727 (1972) (confirming the broad reading of ministers of the gospel in *Salkov*). *But see* *Lawrence v. Comm’r*, 50 T.C. 494, 500 (1968) (contending that this definition is not unlimitedly broad and does not cover someone calling themselves a minister without performing the duties of the specific faith in question).

3. *Gaylor v. Mnuchin*, 278 F. Supp. 3d 1081, 1106 (W.D. Wis. 2017).

4. *Id.* at 1090. *Freedom from Religion Found., Inc. v. Lew*, 983 F. Supp. 2d 1051, 1073 (W.D. Wis. 2013) (holding that § 107(2) violates the establishment clause because it provides a benefit to religious persons and no one else).

5. Jeremy Weber, *Atheists Again Get Pastors’ Best Benefit Ruled Unconstitutional*, CHRISTIANITY TODAY (Oct. 7, 2017), <http://www.christianitytoday.com/news/2017/october/atheists-get-clergy-housing-allowance-unconstitutional-ffrf.html>.

6. *See Gaylor*, *supra* note 3, at 1090–94 (examining the legislative history of § 107(2) from 1954).

7. *See* Adam Chodorow, *The Parsonage Exemption*, 51 U.C. DAVIS L. REV. 849 (2018) (detailing the historical arrival of the convenience of the employer doctrine along with the parsonage exclusion); Matthew W. Foster, *The Parsonage Allowance Exclusion: Past, Present, and Future*, 44 VAND. L. REV. 149 (1991); Bryce Langford, Note, *The Minister’s Housing Allowance: Should It Stand, and If Not, Can Its Challengers Show Standing?*, 63 KANSAS L. REV. 1129 (2015).

convenience of the employer doctrine.⁸ The government's motion stated, "The available historical evidence further confirms that the parsonage allowance is in fact a legislative application of the convenience of the employer doctrine."⁹ Unfortunately for the defendants, Judge Crabb disagreed with this statement (with respect only to § 107(2)), holding the government's attempt to justify § 107(2) as part of the convenience of the employer doctrine was not a successful argument. Because that doctrine "bears no relationship to church property tax exemptions, [the] historical treatment of [the convenience of the employer] exemptions is not instructive."¹⁰ However, Judge Crabb did not provide an account of where exactly the parsonage exclusion was developed. The academic literature also failed to provide an answer—until now.

The origins and doctrinal development of the parsonage exemption have not been satisfactorily explored before this article. At most, a link to the convenience of the employer doctrine is often made before moving onto questions of the parsonage exclusion's constitutionality. This article details, in four sections, where the parsonage exclusion came from and how it has changed over time. Section I examines the history of parsonages and taxation within the United States before the Revenue Act of 1921, focusing closely on the two positions states took in their respective property tax treatments of parsonages. Section II explores the previously untold story of the codification of the parsonage exclusion into the Revenue Act of 1921 by one-term Senator Nathaniel Barksdale Dial. Newly uncovered historical evidence sheds light on the particular circumstances of this codification. Section III discusses the most significant change to the parsonage exclusion since its addition to the federal income tax code. Section IV takes up a legal battle between Pastor Rick Warren and the Internal Revenue Service (IRS) that caused Congress to act with incredible speed to head off a pending constitutional challenge.

I. TAXATION OF PARSONAGES BEFORE 1921

The taxing of parsonages is older than American history, going back at least a few hundred years prior to the founding of the United States. Until the turn of the sixteenth century, taxation of Catholic Church property was dealt with in the framework of canon law, not the laws of the various countries.¹¹ If a government intended to tax Catholic Church property, such as a

8. See Intervenor-Defendants' Reply Brief in Support of Their Motion for Summary Judgment § II, *Gaylor*, 278 F. Supp. 3d, Section II of the brief for a historical account of the parsonage exclusion. See also Plaintiffs' Combined Brief Opposing Summary Judgment in Favor of the Government and Intervenor-Defendants, *id.*

9. Intervenor-Defendants' Reply Brief in Support of Their Motion for Summary Judgment, *supra* note 8, at 7.

10. *Gaylor*, *supra* note 3, at 1103.

11. W. Stanford Reid, *Clerical Taxation: The Scottish Alternative to Dissolution of the Monasteries, 1530–1560*, 34 CATH. HIST. REV. 2, 137 (1948).

parsonage, that government could only do so in one of two ways: either the clergy could offer voluntary gifts to the crown, such as in cases of national emergency, or papal consent could be requested.¹² By the turn of the sixteenth century, taxing parsonages started to become a more significant issue. As religious organizations other than the Catholic Church began to gain power and influence in Europe, new methods were needed to pay for parsonages. New religious sects, such as Lutheranism and Anglicanism, quickly needed to find a way to pay for or provide parsonages for their clergy. For example, in 1527 Saxony, when the early Lutheran congregations were struggling to pay for their clergy's parsonages, Elector Johann instructed his constituents that the burden of maintaining parsonages should fall onto the peasantry for the first time.¹³ Further changes in the financial treatment of parsonages began when King Henry VIII started giving preferential treatment to the Anglican Church's parsonages while penalizing the Catholic Church's parsonages in Chapter 13 of the 1529 Act of Parliament.¹⁴ The issue of how to pay for a church's parsonage in Europe would follow onto the shores of the American Colonies.

One early example on the question of whether to tax citizens to pay for a clergy's parsonage in the American Colonies is found in reference to the Massachusetts Bay Colony. In 1836, Chief Justice Parsons of Massachusetts discussed the topic of parsonages in colonial Massachusetts in the *American Jurist and Law Magazine*. Chief Justice Parsons states, "In 1654 a law was made enjoining the inhabitants of towns to provide convenient habitations for their ministers, by hiring a suitable house, or by allowing the minister a reasonable sum to provide for himself . . . [a]nd the salary of the minister was raised by assessments made on the inhabitants by the selectmen."¹⁵ This account of the Massachusetts Bay Colony's law on supporting parsonages for their ministers is an early colonial example of taxing the population to provide a minister with a house or a housing allowance. Surprisingly, this colonial law neatly parallels the current language of § 107, which provides an exclusion for either congregation-provided housing or a cash allowance.

While the Massachusetts Bay Colony levied a tax to provide parsonages, this approach would not be the only view taken by most states years later.¹⁶ After the Civil War, two opposite positions appeared in the common law: either to provide or not provide a property tax exemption for a parsonage. Of the seven states successfully surveyed, five states held that they

12. *Id.*

13. Susan C. Karant-Nunn, *Luther's Pastors: The Reformation in the Ernestine Countryside*, 69 *TRANSACTIONS AM. PHILO. SOC'Y* 8, 33 (1979).

14. 21 Hen. 8 c. 13.

15. Theophilus Parsons, *Parsonage Lands in Massachusetts*, 15 *AM. JURIST & L. MAG.* 268, 269 (1836).

16. *See Parker v. Redfield*, 10 Conn. 490 (1835) (discussing pre-Civil War taxation and parsonages).

would not provide a property tax exemption for parsonages, while a minority of two states would.

The minority position to provide a property tax exclusion to parsonages appeared in Virginia and South Carolina after the Civil War. In his review of the *Law of Tax Titles in Virginia*, Raleigh Minor, a University of Virginia law professor, states that “a church parsonage[] is exempt from taxation.”¹⁷ Professor Minor cites Virginia Code § 457 to support this statement. Unfortunately, the exact language of that section has proved inaccessible. However, Virginia’s current state code still contains a property tax exclusion for parsonages. Virginia Code § 58.1-811 provides a property tax exemption for “the residence of the minister of any such church or religious body.”¹⁸ Further, nineteenth century case law in Virginia recognized a property tax exemption for parsonages. In *Andrews v. Auditor*, the Supreme Court of Appeals of Virginia posed the following illuminating hypothetical: “Suppose a church or parsonage, is erected on land with the permission of the owner . . . can the owner of the land be taxed for the value of such buildings? *Certainly not.*”¹⁹ More support of a Virginia statute operating in the 1870s is evident when the court stated, “But it is said that churches and like buildings are exempt from taxation by *express statute*. So they are.”²⁰ Therefore, Virginia had common law and, very likely, statutory law prohibiting the taxation of parsonages that has survived up to today. Yet one state would go even further in its support of this idea.

South Carolina took the idea of a property tax exemption for parsonages one step further by writing it directly into its state constitution. The South Carolina Constitution of 1895, Article 10, Section 4, states, “[t]here shall be exempted from taxation . . . all public libraries, churches, parsonages, and burying grounds.”²¹ The clarity of South Carolina’s position as expressed in their state constitution is remarkable. South Carolina case law responded to the codification of this exemption by wholeheartedly supporting it. In *Protestant Episcopal Church of Parish of St. Phillips v. Prioleau*, the Supreme Court of South Carolina held that a parsonage that was not being used in favor of another parsonage and yet producing rent was still subject to the exemption in Article 10, Section 4, of the South Carolina Constitution because it was still a parsonage.²² This holding is extraordinary for two reasons. First, it is clear the Supreme Court of South Carolina

17. RALEIGH C. MINOR, *LAW OF TAX TITLES IN VIRGINIA* 13 (1898).

18. VA. CODE § 58.1-811 (2017).

19. *Andrews v. Auditor*, 28 Gratt. 115, 128 (Va. 1877) (emphasis added).

20. *Id.* (emphasis added). However, the Supreme Court of Appeals of Virginia does not cite a specific statute for this point but is conceivably pointing to Virginia Code § 457.

21. S.C. CONST. of 1895, art. X, § 4 (1895), http://www.carolana.com/SC/Documents/South_Carolina_Constitution_1895.pdf (last visited May 1, 2017). This language has not changed as it is still in the current version of the South Carolina Constitution, but it is now located at art. X, § 3(d).

22. 63 S.C. 70 (1902).

followed the law presented in the state constitution. More importantly, the Supreme Court of South Carolina endorsed the position that a minister could have multiple parsonages and possibly receive an exemption for all of the properties. No other state property tax, nor the federal income tax, would go that far in granting multiple properties a parsonage property tax exemption.

With the majority position, five states decided not to give a property tax exemption for parsonages in their case law. In Robert Desty's treatise *The American Law of Taxation as in the Courts of Last Resort in the United States*, he unequivocally states, "A parsonage and the land belonging to it are not exempt from taxation as church property. The realty of religious corporations is exempt, but not the residence of a priest."²³ Further, "[a] parsonage is liable to taxation as real estate."²⁴ Desty cited Minnesota, Ohio, Rhode Island, and New Jersey as states that do not provide for a tax exemption.²⁵ However, Desty is incorrect in implying that all states did not provide a property tax exemption for parsonages, as South Carolina and Virginia were providing such an exemption.

In Pennsylvania, there is a long line of case law supporting the majority position that parsonages are not subject to a property tax exemption. In *City of Philadelphia v. St. Elizabeth's Church*, the Superior Court of Pennsylvania lists a comprehensive line of cases to cite the proposition that a parsonage or house for a pastor of a church is not exempt from taxation.²⁶ The court in *City of Philadelphia* cites at least nine different cases supporting this holding, with cases dating back as early as 1858.²⁷ Further, the court develops a doctrine in *City of Philadelphia* that, when the parsonage is an annex of the actual church building, the part that is exempt from taxation (the church itself) is split from the nonexempt part (the parsonage) and taxed accordingly.²⁸ It is important to note that Pennsylvania exempted church property from taxation by statute, but made the policy decision to not include parsonages. For example, Section 1 of Pennsylvania Law 158 explicitly exempted "all churches, meeting-houses, or other regular places of stated worship, with the grounds thereto annexed."²⁹ The case law would continue to hold that parsonages were not included within the meaning of this statute.³⁰

23. ROBERT DESTY, *AMERICAN LAW OF TAXATION: AS DETERMINED IN THE COURTS OF LAST RESORT IN THE UNITED STATES* 112 (1884).

24. *Id.*

25. *Id.*

26. 45 Pa. Super. 363, 364 (1911).

27. *See, e.g.,* Dauphin Cnty. v. St. Stephen's Church, 3 Phila. 189 (1858).

28. 45 Pa. Super. at 369.

29. *See, e.g., id.* at 368.

30. *See, e.g.,* Reform Congregation Oheb Sholom v. Berks Cty. Bd. of Assessment Appeals, 839 A.2d 1217, 1220 (Pa. 2004) (listing cases).

Minnesota is another state that did not allow for a parsonage property tax exemption. In *St. Peter's Church of Shakopee v. Board of County Commissioners for the County of Scott*, the Supreme Court of Minnesota held a parsonage owned by a church is not exempt from taxation.³¹ Specifically, the court cited Subdivision 1, Section 3, Chapter 1, of the Laws of Minnesota 1860 (as amended in 1861).³² This holding was confirmed again in *In Re Grace*.³³ Further examples of states developing the same majority doctrine include Ohio,³⁴ Rhode Island,³⁵ and New Jersey.³⁶

II. THE REVENUE ACT OF 1921 AND SENATOR DIAL

As noted above, some have argued that the parsonage exclusion has its historical roots alongside another doctrine: the convenience of the employer doctrine.³⁷ However, the parsonage exclusion does not grow out of the convenience of the employer doctrine. While the parsonage exclusion may take some cues from this companion doctrine, the parsonage exclusion's existence is thanks to Senator Nathaniel Barksdale Dial of South Carolina. Briefly, this section will develop the history of the convenience of the employer doctrine that is mistakenly assumed as the direct source of the parsonage exclusion before moving onto the parsonage exclusion's own unique birth into the federal tax code.

The convenience of the employer doctrine is currently codified in the federal tax code as 26 U.S.C. § 119. Broadly speaking, the value of meals or lodging furnished for the convenience of the employer are excluded from gross income of an employee.³⁸ A classic example of this doctrine would be a fisherman working on a fishing vessel for weeks or months at a time. The employee has no other option than to live on the boat and eat the food provided. In fact, the development of this doctrine originally developed because of seamen fishing away from home. In 1919, the Bureau of Internal Revenue published a decision, stating, "Board and lodging furnished [to] seamen in addition to their cash compensation is held to be supplied for the convenience of the employer and the value thereof is not required to be reported in such employees' income tax returns."³⁹

In 1920, the Treasury Department amended its regulations to fully adopt the doctrine developed in the 1919 decision.⁴⁰ The amended regula-

31. 12 Minn. 395, 398 (1867).

32. *Id.*

33. 27 Minn. 503, 505 (1881).

34. *See Gerke v. Purcell*, 25 Ohio St. 229 (1874).

35. *See St. Joseph's Church v. Assessors of Taxes*, 12 R.I. 19 (1878).

36. *See Church of the Redeemer v. Axtell*, 41 N.J.L. 117 (1879).

37. Intervenor-Defendants' Reply Brief in Support of Their Motion for Summary Judgment, *supra* note 8.

38. 26 U.S.C. § 119 (2018).

39. O.D. 265, 1 C.B. 71 (1919).

40. T.D. 2992, 2 C.B. 76 (1920).

tion called for compensation paid other than in cash, such as living quarters in a camp furnished to “employees for the convenience of the employer, the ratable value need not be added to the cash compensation of the employee. . . .”⁴¹ Here, the Treasury Department fully adopted a broad principle with respect to the convenience of the employer doctrine by allowing housing to be excluded as long as the compensation is not in cash. The Treasury Department expanded meal exceptions in 1920, stating that “[s]upper money” paid by an employer to an employee, who voluntarily performs extra labor for his employer . . . is considered as being paid for the convenience of the employer and for that reason does not represent taxable income to the employee.⁴² However, this developing doctrine did have limits initially. The Treasury Department limited the doctrine by stating, “[W]here a person receives as compensation for services rendered a salary and in addition thereto living quarters, the value to such person of the quarters furnished constitutes income subject to tax.”⁴³ This decision marked the limitation of the convenience of the employer doctrine in contrast to the expansive position the parsonage exclusion would receive.

With the creation of this distinction, the Treasury Department drew a distinction between necessary and unnecessary housing. For example, necessary housing might consist of living on a boat while fishing or in a camp while logging a forest. But if the employer-provided housing was not a necessity, the salaried person could not exclude the value of the living quarters from his gross income. For example, one group that could conceivably be subject to this distinction is religious ministers. Some ministers might be provided living quarters as a necessary condition of working in that congregation, while others might not. As with the defendants in *Gaylor*, at least one author believes the creation of the convenience of the employer doctrine had a direct effect in creating the parsonage exclusion.⁴⁴ In fact, the author has suggested that the 1920 regulation required the Bureau of Internal Revenue to “delve deeply into a minister’s duties and responsibilities, entangling the Bureau with the inner workings of religion.”⁴⁵ This potential entanglement would require the Bureau to judge how churches conducted their religion, creating First Amendment issues, and was tactfully avoided a year later with the addition of the parsonage allowance.⁴⁶ Yet there has not been any conclusive evidence provided that states that the Bureau was worried about potential constitutional issues. Because

41. *Id.*

42. O.D. 51, 2 C.B. 90 (1920).

43. T.D. 2992, 2 C.B. 76 (1920).

44. Intervenor-Defendants’ Reply Brief in Support of Their Motion for Summary Judgment § II, *Gaylor v. Mnuchin*, 278 F. Supp. 3d 1081 (W.D. Wis. 2017) (No. 16-CV-215); *see also* Peter J. Reilly, *In Defense of Special Tax Treatment for Clergy*, FORBES (Sept. 6, 2012, 6:44 AM), <http://www.forbes.com/sites/peterjreilly/2012/09/06/in-defense-of-special-tax-treatment-for-clergy>.

45. Reilly, *supra* note 44.

46. *Id.*

of the lack of evidence from the Bureau, it appears the connection between the parsonage exclusion's development and the convenience of the employer doctrine lies more in coincidence than causation.

The first mention of the tax treatment of parsonages in the federal tax code is found in the Treasury Cumulative Bulletin No. 4 of January–June 1921. In the Bulletin, the Treasury Department states: “Where in addition to the salary paid a clergyman he is permitted to use the parsonage for living quarters free of charge the fair rental value of the parsonage is considered a part of his compensation for services rendered and as such *should be reported as income*.”⁴⁷

This specific ruling attempted to clarify Section 213(a) of Article 33: compensation paid other than in cash.⁴⁸ This ruling is consistent with an exception within the existing convenience of the employer doctrine. In the 1920 IRS regulation, salaried employees could not exclude the value of the living quarters provided if it did not fall within the convenience of the employer doctrine. Then in 1921, the Treasury Department followed the preceding regulation and applied its general principle to clergymen. This consistency, however, would be short-lived. In the Revenue Act of 1921, the Treasury Department reversed its position that it had held only months prior. The Revenue Act of 1921, § 213(b)(11), states, “The rental value of a dwelling house and appurtenances thereof furnished to a minister of the gospel as part of his compensation is exempt from tax,” thus officially codifying the parsonage exclusion into the federal income tax.⁴⁹

The person responsible for this addition was Senator Nathaniel Barksdale Dial, a freshman Democratic senator from South Carolina. Senator Dial was originally from Laurens, South Carolina, and was a lawyer and mill owner before his single term as a senator.⁵⁰ On October 20 (calendar day, October 27), 1921, Senator Dial submitted a proposal of an amendment to H.R. 8245 (the Revenue Act of 1921) with the stated intent “to reduce and equalize taxation, to amend and simplify the Revenue Act of 1918, and for other purposes.”⁵¹ The amendment proposed adding to H.R. 8245 “the rental value of a dwelling house and appurtenances thereof furnished to a minister of the gospel as part of his compensation.”⁵² Senator Dial's proposal is the first recorded attempt to provide preferential tax treatment for parsonages in the federal tax code.

The parsonage amendment next appeared in the Congressional Record of the Senate on November 2, 1921. The conversation in the record was so

47. O.D. 862, 4 C.B. 85 (1921) (emphasis added).

48. *Id.*

49. Revenue Act of 1921 § 213(b)(11) (1921).

50. *See generally* REBECCA DIAL, TRUE TO HIS COLORS: A STORY OF SOUTH CAROLINA'S SENATOR NATHANIEL BARKSDALE DIAL (1974).

51. *Id.*

52. *Id.*

brief that it only consisted of eleven lines of text.⁵³ Senator Dial first offered the same amendment that he had already sent to the desk on October 20.⁵⁴ Senator Penrose, the president pro tempore of the Senate,⁵⁵ then proceeded to read the amendment⁵⁶ and accept the amendment.⁵⁷ There was no further floor discussion.

The next morning on November 3, *The Washington Post*, in a section titled “Proceedings of Congress and Committees in Brief,” noted that a proposal by Senator Dial of South Carolina was agreed to with no further elaboration.⁵⁸ *The New York Times* followed suit that same morning, briefly acknowledging “another amendment adopted was that by Senator Dial.”⁵⁹

While the Congressional Record and major newspapers lack any detailed discussion on Senator Dial’s amendment, *The Watchman and Southron*, a newspaper from Sumter, South Carolina, wrote a much more substantive discussion. On November 2, the day when Senator Dial offered his amendment to the Senate, *The Watchman and Southron* ran a story titled “Relief for Preachers” on the front page:

Senator Dial has proposed an amendment to the tax bill which, if adopted, will relieve ministers of the Gsopel [sic] hereafter from having to pay an income tax on the parsonages which they now occupy.

At the present time the rental value of a parsonage is counted as a part of the minister’s salary and he must return this rental value when he makes his income tax returns. For instance, if a parsonage is worth \$40 or \$50 a month, he must pay on this rental value.

This matter was presented to Senator Dial recently and he at once saw the injustice of the present law. He took it up with Commissioner Blair, who informed him that nothing could be done, inasmuch as the law now requires that the rental value of the parsonage be counted in.

Senator Dial then conferred with Senator Penrose of Pennsylvania, chairman of the Finance Committee of the Senate, but decided to offer the amendment himself. He said he considered the law unjust and unfair and that in many cases the ministers’ salaries were so small that this extra burden should not be placed

53. 61 CONG. REC. 7162 (Nov. 11, 1921).

54. *Id.*

55. *President Pro Tempore*, United States Senate, https://www.senate.gov/artandhistory/history/common/briefing/President_Pro_Tempore.htm (last visited May 1, 2017) (showing that the Senate Pro Tempore of the 67th Congress was Republican Albert Cummings of Iowa).

56. 61 CONG. REC. 7162 (Nov. 11, 1921).

57. *Biographical Directory Of The United States Congress*, United States Senate, <http://bio.guide.congress.gov/scripts/biodisplay.pl?index=P000217> (last visited May 1, 2017) (showing Senator Boies Penrose was a Republican Senator from Pennsylvania and was the Chairman of the Senate Finance Committee for the 67th Congress).

58. *Proceedings Of Congress And Committees In Brief*, WASH. POST, Nov. 3, 1921, at 6.

59. *Bar Sales Tax Now, Want It For Bonus*, N.Y. TIMES, Nov. 3, 1921, at 8.

on them. He said that he would do all he could to secure the passage of this amendment.⁶⁰

This short newspaper account is the best direct historical evidence of the process used by Senator Dial. *The Watchman and Southron* article also provides the only known evidence of Senator Dial's motivation for writing and presenting this amendment to the Senate. While mainly focusing on the process of this amendment's proposal, the story presents two facts (which are assumed valid) not gleaned from the congressional record.⁶¹ First, Senator Dial approached Commissioner Blair and "took it up" with him.⁶² This account is striking for a few reasons. Senator Dial apparently went directly to the newly appointed commissioner of Internal Revenue to discuss the "injustice" posed by not having tax preferential treatment for parsonages codified already in the federal income tax. Also, Commissioner Blair struck down this request by pointing out that the law now required the addition of the rental value of parsonages into gross income, exactly in line with the Treasury Department's 1921 decision published months earlier.

A second striking circumstance gleaned from this article is how Senator Dial, having failed to persuade Commissioner Blair to take some action, then approached Senator Penrose to discuss available options. Given that Senator Dial proposed this amendment on the floor of the Senate, but with approval of Senator Penrose, one can infer there was some sort of agreement that was reached between Senator Dial and Senator Penrose. Peculiarly, the article says Senator Dial decided to propose the amendment himself. Did Senator Penrose approve of the idea, but did not want to propose it himself in the Senate Finance Committee? This might seem slightly out of the ordinary as Senator Dial had no experience in taxation while Senator Penrose was the powerful chairman of Senate Finance. This pairing was odd and while no direct evidence exists of whether a deal was struck between the two senators, Senator Dial would proceed to offer his amendment.

60. *Relief for Preachers*, THE WATCHMAN AND SOUTHRON (Sumter, S.C.), Nov. 2, 1921, at 1.

61. While this newspaper story has not been independently confirmed with other evidence, such as meeting notes, there is no reason to believe the article is being untruthful on the facts. In Senator Dial's collected papers, he and his staff were in constant written communication with various newspapers. Some of the papers include drafts of newspaper articles, which someone has marked up with changes. Included with those markups are copies of the actual published version, which often has the changes suggested by either Senator Dial himself, or someone on his Senate staff. This all lends support to the notion that Senator Dial and/or his staff had relationships with various news outlets. Further, there is only one surviving document in his collected papers dated from 1921 and that document is not relevant here. His papers provide no direct evidence of a meeting with either Senator Penrose or Commissioner Blair, or with anything to do with his parsonage amendment.

62. Commissioner David H. Blair was Commissioner of Internal Revenue from 1921 to 1929 and was newly installed when Senator Dial apparently met with him sometime in the summer or early fall of 1921. See *Previous IRS Commissioners* (1862–1955), IRS, <https://www.irs.gov/newsroom/previous-irs-commissioners-1862-1955> (last visited Sept. 3, 2019).

Further, it is interesting to note that Senator Penrose represented Pennsylvania, one of the states that had not allowed for a parsonage property tax exemption. Senator Penrose may have been aware of his state's position against a parsonage property tax exemption, but still allowed Senator Dial to proceed to propose his amendment. After meeting with Senator Penrose and having his amendment accepted on the Senate floor, Senator Dial's amendment moved to the House. On November 19, the House took up his amendment. The whole House record consists of a statement of the amendment with the addition of "and the House recedes with an amendment making a clerical change."⁶³ This clerical change appears to be something minor, such as a typesetting issue. After this brief statement in the House record, there is no further discussion in either the House of Representatives or Senate until Senator Dial's amendment was codified as § 213(b)(11) of the Revenue Act of 1921.

While there is not much evidence of the process for Senator Dial's amendment or his motivation, some inferences can be drawn from the context and circumstances of Senator Dial's life in concert with the *Southron* article.⁶⁴ First, Senator Dial apparently was not aware of the Treasury Department's decision not to grant parsonages a tax exclusion earlier in 1921. He was made aware of it only after it was in effect. One can safely assume this happened between the publishing of the Treasury Cumulative Bulletin No. 4 of January–June 1921 and the end of October 1921. At best, this ten-month window is a rather short period of time for a senator in 1921 to be made aware of a problem, come up with a legislative solution, set up meetings with Commissioner Blair and the leader of Senate Finance, and then create an arrangement to have this amendment proposed. Second, it may be inferred that Senator Dial was unhappy with the Treasury Department's decision in early 1921, given that the *Southron* article twice states that Senator Dial considered this law "unjust." In fact, this "unjust" feeling must have motivated Senator Dial to respond with rapid action in a field in which he had no previous experience.⁶⁵

One question raised from this set of inferences is who made Senator Dial aware of the parsonage tax situation? One possible answer is a constit-

63. 61 CONG. REC. 8020 (Nov. 11, 1921).

64. There are two biographies of Senator Dial, including one published by Senator Dial's daughter. See DIAL, *supra* note 50; see also Jerry Slaunwhite, *The Public Career of Nathaniel Barksdale Dial* (1978) (unpublished Ph.D. thesis, University of South Carolina). However, neither of these biographies has any reference to his amendment, parsonages, or even working on taxation issues in the Senate. It is also not clear from his papers or these two biographies that Senator Dial was particularly religious for his day. He did attend Chestnut Ridge Baptist Church in Laurens, South Carolina, growing up, and his descendants are still a part of the congregation today. Chestnut Ridge Baptist Church does not have any surviving correspondence between Senator Dial and the congregation.

65. Senator Dial was not a member of the Senate Finance Committee. See MEMBERSHIP OF THE COMMITTEE, <https://www.finance.senate.gov/imo/media/doc/MembershipbyCongress.pdf> (last visited Sept. 3, 2019).

uent. This is plausible given that South Carolina had such strong property tax treatments for parsonages. Not only was South Carolina's property tax exclusion within case law; it was directly in the state constitution. This fact provides ample opportunity for a constituent to either (i) notice that no parsonage exclusion was provided in the eight years of having a federal income tax; or (ii) recognize what the Treasury Department had decided in early 1921 with its decision to not give preferential treatment to parsonages. One set of constituents that might have played a role is his church congregation at the Chestnut Ridge Baptist Church in Laurens. It is not unreasonable to imagine Senator Dial or a member of his family communicating with this congregation during trips back to South Carolina or through written communication while in Washington, D.C. The population of people that would have been affected by any federal involvement with parsonages is rather small, including ministers and their family members. Perhaps a minister reached out to Senator Dial directly or to a lawyer who knew that the state constitution and case law on South Carolina's tax treatment of parsonages contradicted the federal government's law.

While it is not clear who contacted Senator Dial to apprise him of the now complicated tax situation, Senator Dial was a lawyer. He must have recognized the contradictions that were now at least plausibly going to arise between South Carolina's treatment of parsonages and the federal government's treatment of the same. Property taxes and income taxes target different things; yet the early days of 1921 further complicated the situation for South Carolina citizens and their parsonages. Regardless of rationale, Senator Dial was clearly motivated to change the federal tax code, to which he was successful in a remarkably short period of time. Thus, the full story of how the parsonage exclusion arose in the federal tax code is not through the direct outgrowth of the convenience of the employer doctrine. Senator Dial was made aware of a situation and took it upon himself to change the law. The story of the parsonage exclusion must include Senator Dial's participation.

III. THE PROBLEM OF CASH ALLOWANCES

Since the parsonage amendment's codification as section 213(b)(11) in the Revenue Act of 1921, much of the language has not changed. However, there has been an ongoing evolution concerning the coverage of the parsonage exclusion. This evolution took place while the convenience of the employer doctrine also developed doctrinally, culminating in the Internal Revenue Act of 1954.⁶⁶ This section will briefly develop the changes in the

66. Between the Revenue Act of 1921 and the Revenue Code of 1954, there were only minor changes to the location of the statute. The first change to § 213(b)(11) took place when it became § 22(b)(6) in the Revenue Act of 1928. This location change of the parsonage exclusion was purely clerical. *Compare* Revenue Act of 1921, ch. 136, § 213(b)(11), 42 Stat. 227, 239 (codified at 26 U.S.C. § 954(b)(11) (1925)), *and* Revenue Act of 1928, ch. 852, § 22(b)(8), 45 Stat. 791,

parsonage exclusion from the Revenue Act of 1921 until 1950, and then analyze the parallel expansion of the convenience of the employer doctrine alongside the parsonage exclusion. Although the parsonage exclusion was not born directly out of the convenience of the employer doctrine, the two provisions tracked a similar issue.

Between 1921 and 1950, the parsonage exclusion and the broader convenience of the employer doctrine started to expand in scope. One problem would affect both of them: how to deal with cash allowances for housing rather than on-site provided housing. In 1923, the Treasury Department stated that § 213(b)(11) of the Revenue Act of 1921 “applies only to cases where a parsonage is furnished to a minister and not to cases where an allowance is made to cover the cost of a parsonage.”⁶⁷ Both doctrines were challenged in dealing with cash payments, with the convenience of the employer doctrine taking up the question first. In *Jones v. United States*, the United States Court of Claims expanded the convenience of the employer doctrine to include a cash housing allowance paid to a military officer.⁶⁸ In this case, the military officer received cash for housing because there was no housing available from the army.⁶⁹ The court drew a parallel between a ship captain whose living quarters are provided as a necessary part of the job and a military officer who is told where to live.⁷⁰ The officer has no choice in the matter.⁷¹ However, this decision did not expand the convenience of the employer doctrine to include cash housing allowances in every situation. Here, the court limited its decision to military officers when the military-provided housing ran out of occupancy space, thus forcing the military to provide a housing allowance.

In contrast to the limiting expansion of the convenience of the employer doctrine, courts were more supportive of cash payments for parsonages. In *MacColl v. United States*, the District Court for the Northern District of Illinois held that a minister of the Protestant Episcopal Church could receive a monthly housing allowance and exclude that from his gross income under § 22(b)(6) of the Revenue Act of 1928.⁷² The minister received a \$100 housing allowance from his congregation that he used to purchase a dwelling house.⁷³ Here, the minister did not rent a dwelling house, but instead purchased one himself.⁷⁴ The court held that the money

798 (codified at 26 U.S.C. § 22(b)(6) (1934)), with Revenue Act of 1954, P.L. 83-591 § 107, 68A Stat. 1, 32 (codified at 26 U.S.C. § 107 (1958)).

67. I.T. 1694, 11-1 C.B. 79 (1923).

68. 69 Ct. Cl. 552, 575 (1925).

69. *Id.* at 554.

70. *Id.* at 576.

71. *Id.*

72. 91 F. Supp. 721, 722 (N.D. Ill. 1950).

73. *Id.*

74. *Id.*

being provided to him was excludable from gross income.⁷⁵ Unfortunately, the court did not provide any analysis of the decision other than listing its findings of fact and conclusions of law.⁷⁶ What is striking in this decision is that the holding directly contradicts the Treasury Department's decision from 1923, where the Treasury Department explicitly said that an allowance provided to a minister does not fall within the scope of § 213(b)(11), which is now codified as § 22(b)(6). Four years later, a mere two months before the Revenue Act of 1954, the District Court for the Southern District of Ohio, in *Conning v. Busey*, held a cash allowance provided to a minister was excludable under § 22(b)(6).⁷⁷ In reaching this holding, the court relied on *MacColl v. United States*, although it was not binding authority.⁷⁸ The court recognized how the federal government did not appeal *MacColl* and, following the sound logic of that decision, accepted the position that an allowance for a minister can be excluded.⁷⁹ Despite the fact that the holding was contrary to the Treasury Department's opinion from 1923, the federal government noticed the changing winds and did not appeal *MacColl*.

In the Revenue Code of 1954, the parsonage exclusion takes its two-part form by adding the cash allowance doctrine to the language of the statute. The parsonage exclusion was relocated to § 107, where it still resides today.⁸⁰ The newly divided statute keeps the first section consistent with the form of the previous version of the parsonage exclusion since 1921. The significant addition takes shape in the second section, which allows a rental allowance to be excluded whether a home is rented or purchased. This addition is consistent with the expanding doctrine to allow cash allowances found both in *MacColl* and *Conning*.

With the addition of cash allowances in 1954, Congress matched pre-existing case law and aimed to eliminate the perceived discrimination that some ministers faced when they were provided a larger salary but not a housing allowance. The House Ways and Means Committee report states, “[section 107] is unfair to those ministers who are not furnished a parsonage, but who receive larger salaries (which are taxable) to compensate them for expenses they incur in supplying their own home.”⁸¹ Continuing, “[y]our committee has removed the discrimination in existing law providing that the present exclusion is to apply to rental allowances paid to ministers

75. *Id.*

76. *Id.*

77. 127 F. Supp. 958 (S.D. Ohio 1954).

78. *Id.*

79. *Id.*

80. 26 U.S.C. § 107 (2017):

In the case of a minister of the gospel, gross income does not include—(1) the rental value of a home furnished to him as part of his compensation; or (2) the rental allowance paid to him as part of his compensation, to the extent used by him to rent or provide a home.

81. REPORT OF H. COMM. ON WAYS AND MEANS TO ACCOMPANY H.R. 8300, 83D CONG., INTERNAL REVENUE CODE OF 1954 15 (Comm. Print 1954).

to the extent used by them to rent or provide a home.”⁸² Months later, the Senate Finance Committee report echoed the House statement and accepted the House changes as they were submitted.⁸³

In comparison, the convenience of the employer doctrine also appeared in the Revenue Code of 1954 in its mostly modern form as § 119. Unlike the new § 107, where cash allowances were added as allowable, § 119 did not include the same addition. There is no mention of any sort of allowance for housing in § 119. Instead, subsection 2 clearly states that, “in the case of lodging, the employee is required to accept such lodging on the business premises of his employer as a condition of his employment.”⁸⁴

This split between the parsonage exclusion and the convenience of the employer doctrine with respect to cash allowances was further stated in Revenue Ruling 56-58,⁸⁵ two years after the Revenue Code of 1954, where the IRS accepted the case law developed in *MacColl*, *Conning*, and a post-Revenue Act of 1954 case in *Williamson v. Commissioner*.⁸⁶ Not only does the IRS accept the case law’s position in permitting a housing allowance to be exempt under § 107, but it also notes how the Revenue Code of 1954 does away with the problem of allowances with respect to parsonages.⁸⁷ Ultimately, the IRS acknowledged this position conflicts with the 1923 Treasury decision and thereby revoked the 1923 position of not allowing for a housing allowance to be provided for a minister of the gospel.⁸⁸

IV. PASTOR RICK WARREN VERSUS THE INTERNAL REVENUE SERVICE

After the revision to the parsonage exclusion in the Revenue Code of 1954 to allow cash allowances, the only further change to § 107 would take place in the Clergy Housing Allowance Clarification Act of 2002. The change inserted “and to the extent such allowance does not exceed the fair rental value of the home, including furnishings and appurtenances such as a garage, plus the cost of utilities” before the period at the end of § 107(2).⁸⁹ This change is the direct result of a high profile legal challenge between Pastor Rick Warren and the IRS. This section will explore that legal battle, which culminated in the passing of the Clergy Housing Allowance Clarification Act of 2002 by Congress, and will also explore the importance of the added language to § 107.

82. *Id.*

83. REPORT OF S. COMM. ON FINANCE TO ACCOMPANY H.R. 8300, 83D CONG., INTERNAL REVENUE CODE OF 1954 16 (Comm. Print 1954).

84. 26 U.S.C. § 119 (2017).

85. Rev. Rul. 56-58, 1956-1 C.B. 604.

86. 224 F.2d 377 (8th Cir. 1955).

87. Rev. Rul. 56-58, 1956-1 C.B. 604.

88. *Id.*

89. Clergy Housing Allowance Clarification Act of 2002, Pub. L. No. 107-181, 116 Stat. 583.

Pastor Rick Warren is the founder and minister of the Baptist Saddleback Valley Community Church, which he founded in his home in 1980.⁹⁰ In December 1992, Rick Warren purchased a home for \$360,000.⁹¹ However, the annual fair market rental value of the home was \$58,061 in 1993, \$58,004 in 1994, and \$59,479 in 1995.⁹² This discrepancy between the purchase price in 1992 and the fair market rental value of the house became the central issue in a decade-long dispute that started between Rick Warren and the IRS, and ended with Congress stepping in to deal with the completely separate issue of the constitutionality of § 107.

Each year, before the fiscal year, the trustees of the Saddleback Valley Community Church met to designate the compensation paid to each minister.⁹³ These amounts were allocated between a salary for the minister and a housing allowance.⁹⁴ Between the fiscal years 1993 and 1995, Rick Warren was not assigned a salary but rather received all his compensation in the form of a housing allowance.⁹⁵ The compensation for these three years was \$77,663 for 1993, \$86,175 for 1994, and \$99,653 for 1995.⁹⁶ The vast majority of each year's sum was used by Rick Warren to provide a house for his family and pay his mortgage, utilities, furnishings, landscaping, maintenance, real property taxes, and homeowners insurance.⁹⁷ In 1993, 1994, and 1995, Rick Warren spent more of his housing allowance provided by his church on this home than its fair market rental value. The question of law for the courts became whether Rick Warren's housing allowance compensation, excludable from gross income under § 107(2), was limited to the amount used to provide a home, the lesser of that amount, or the fair market rental value of the home.⁹⁸

The issue of how to treat the difference between the fair market rental value of a house and the housing allowance provided a minister of the gospel was first heard by the United States Tax Court in 2000 in *Warren v. Commissioner*. First, the court held that Pastor Warren was a minister of the gospel within the meaning of § 107, thus leaving the issue of how to treat the difference of the housing allowance and the fair market rental value.⁹⁹ The IRS contended that the exclusion under § 107(2) may not exceed the lesser of the amount used to provide a home or the fair market value of the home, where allowing a greater exclusion would be contrary to the lan-

90. *Warren v. Comm'r*, 114 T.C. 343, 344 (2000).

91. *Id.*

92. *Id.*

93. *Id.* at 345.

94. *Id.*

95. *Id.*

96. *Warren*, 114 T.C. at 345.

97. *Id.*

98. *Id.* at 344.

99. *Id.* at 343.

guage of the statute and the concern for equality in the legislative history in 1954.¹⁰⁰

In 1971, the Treasury Department published a revenue ruling stating that “an ordained minister who purchased his own home and has his church designate his entire compensation as a rental allowance may exclude from gross income only an amount *equal to the fair rental value* of the acquired home plus the cost of utilities.”¹⁰¹ The Treasury Department supported the revenue ruling position by looking at the House and Senate committee reports from 1954. From these reports, the Treasury Department concluded that Congress enacted § 107(2) to eliminate discrimination for certain ministers who received a housing allowance.¹⁰² In short, allowing a minister to exclude from gross income more than the fair rental value would run contrary to the antidiscrimination intent of Congress in creating § 107(2).¹⁰³ In contrast to this, the Tax Court held that the exclusion for a housing allowance for a minister of the gospel was limited to the amount used to provide a home, not the fair market rental value.¹⁰⁴

The Tax Court’s decision was bifurcated. First, the court evaluated the statutory text argument advanced by the IRS, and second, it evaluated the unequal treatment theory. For the statutory text argument, the court stated that neither § 107(2), the regulations thereunder, nor the related legislative history pointed to a limit of the amount of income that may be excluded to the fair market rental value of the residence occupied by the minister.¹⁰⁵ One argument made by the IRS to advance the statutory language argument was the title of § 107, “RENTAL VALUE OF PARSONAGES,” showing that Congress intended to impose a rental value under § 107(2).¹⁰⁶ The court disagreed, pointing out that the heading of a section does not limit the plain meaning of the text.¹⁰⁷ Further, the court believed that by constricting § 107(2) to fair market rental value, it would be disregarding the word “rental.”¹⁰⁸ The IRS argued that Pastor Warren’s position, if adopted by the court, would allow for unequal treatment of ministers who are provided housing and excluded under § 107(1) versus ministers who receive a rental allowance that is excluded under § 107(2).¹⁰⁹ The IRS also argued that the legislative history from both the Senate Finance Committee and House Ways and Means Committee in 1954 pointed to the discrimination of the ministers who were provided housing allowances but were not allowed to

100. *Id.* at 346; *see supra* Part III.

101. Rev. Rul. 71-280, 1971-2 C.B. 92 (emphasis added).

102. *Id.*

103. *Id.*

104. *Warren*, 114 T.C. at 343.

105. *Id.* at 346.

106. *Id.* at 347.

107. *Id.*

108. *Id.*

109. *Id.* at 349.

exclude that sum before the addition of § 107(2).¹¹⁰ The court disagreed, contending that, if the court adopted the IRS position, it would lead to discrimination in the form of added compliance burdens on some ministers.¹¹¹ With this decision not to limit a minister's housing allowance to the fair rental value, the IRS appealed to the Ninth Circuit Court of Appeals.

The Ninth Circuit first heard oral arguments on the appeal in December of 2001.¹¹² Shortly after oral argument, the court contacted constitutional law scholar and then University of Southern California Law School Professor Erwin Chemerinsky to brief the court on the constitutionality of § 107.¹¹³ In a published opinion by a two-to-one vote, the Ninth Circuit panel agreed to appoint Professor Chemerinsky to serve as *amicus curiae* and also have the parties submit supplemental briefs on the following issues: first, does the court have the authority to consider the constitutionality of § 107(2); second, if yes, should the court exercise that authority; and third, is § 107(2) constitutional under the Establishment Clause?¹¹⁴ This was an extraordinary step with the court acting *sua sponte* on the question of the constitutionality of § 107(2). In his dissent, Judge Richard C. Tallman attacks the court's action, stating, "I believe it is injudicious to appoint an *amicus curiae* to attack the constitutionality of the parsonage income tax exclusion when no one but the other panel judges improvidently wish to reach that issue."¹¹⁵ Further, "[a]t oral argument the parties clearly stated that they did not raise this issue in the Tax Court; they are not challenging the constitutionality of the statute in this Court."¹¹⁶ However, Judge Stephen Reinhardt, in a concurrence, disputes Judge Tallman's position and argues that the purpose for the appointment of Professor Chemerinsky is merely to obtain more information "in order to make a more informed and reasoned decision about *whether* to address an issue and, if so, *how*, the issue should be resolved."¹¹⁷ Ultimately, however, Professor Chemerinsky was not provided the opportunity to present his brief to the court, as Congress stepped in to head off any constitutional challenge to § 107.

On April 10, 2002, Representative Ramstad of Minnesota introduced H.R. 4156, the Clergy Housing Allowance Clarification Act of 2002.¹¹⁸ On April 16, Representative Ramstad, Representative Pomeroy of North Dakota, and Representative Sam Johnson of Texas addressed the House floor

110. *Warren*, 114 T.C. at 349.

111. *Id.* at 350.

112. Erwin Chemerinsky, *The Parsonage Exemption Violates the Establishment Clause and Should Be Declared Unconstitutional*, 24 WHITTIER L. REV. 707, 707 (2003).

113. *Id.*

114. *Warren v. Comm'r*, 282 F.3d 1119, 1120 (9th Cir. 2002).

115. *Id.* at 1123.

116. *Id.*

117. *Id.* at 1120.

118. Clergy Housing Allowance Clarification Act of 2002, H.R. 4156, 107th Cong. (2002).

about this Act.¹¹⁹ Representative Ramstad opened his remarks with a scathing attack on the Ninth Circuit, saying, “Mr. Speaker, in one of the most obvious cases of judicial overreach in recent memory, the Ninth Circuit Court of Appeals in San Francisco is posed to inflict a *devastating tax increase on America’s clergy*.”¹²⁰ Continuing, Representative Ramstad argued, “America’s clergy face a devastating tax increase of \$2.3 billion over the next 5 years.”¹²¹ Representative Ramstad followed with an attack on the Ninth Circuit’s decision to appoint Professor Chemerinsky *sua sponte*, as he had already concluded § 107 was unconstitutional.¹²² In order to rectify this “judicial overreach,” Representative Ramstad stated that

[t]he legislation on the floor today will stop the attack on the housing allowance by resolving the underlying issue in the tax court case. H.R. 4156, the bill before us today, clarifies that the housing allowance is limited to the fair rental value of the home, which has been common practice for decades, for 81 years.¹²³

Representative Ramstad clearly recognized there was a threat to § 107 through a constitutional challenge, so he offered legislation to head off the source of the appeal to the Ninth Circuit incorporating the decision of the tax court to not follow the IRS’s previous position of limiting a housing allowance to the fair market rental value. The House then passed this bill by two-thirds vote on April 16, 2002, referring the bill to the Senate Committee on Finance.¹²⁴ With unanimous consent, the committee discharged the bill to the full Senate.¹²⁵ On May 2, the Senate passed the bill with unanimous consent, and the bill was finally signed by President George W. Bush on May 20.¹²⁶

The Clergy Housing Allowance Clarification Act of 2002 codified the 1972 IRS position that rental allowance exclusions may not exceed the fair rental value of the home (including furnishing and appurtenances) plus the cost of utilities.¹²⁷ While Pastor Warren’s position was closed off via the legislation, he was granted a victory through the effective date chosen for the legislation. The bill provided that for all years prior to 2002 clergy could receive a full exclusion for all their housing costs.¹²⁸ However, starting in 2002, the parsonage exclusion would be limited to the fair rental

119. 148 Cong. Rec. 1299–1301 (2002).

120. *Id.* (emphasis added).

121. *Id.*

122. *Id.*

123. *Id.* at 1300.

124. STAFF OF JOINT COMM. ON TAXATION, 107TH CONG., GENERAL EXPLANATION OF TAX LEGISLATION ENACTED IN THE 107TH CONGRESS 285 n.294 (Comm. Print 2003).

125. *Id.*

126. *Id.*

127. *Id.*

128. Chemerinsky, *supra* note 112, at 708.

value of the home.¹²⁹ Therefore, Pastor Warren technically survived the challenge to his previous actions with his housing allowance, but the IRS's position would be the one adopted moving forward.¹³⁰ Also intriguing is the projected revenue effect of the bill. For fiscal years 2002 and 2003, this provision was estimated to increase the federal fiscal year budget by less than \$500,000 annually, only increasing to \$6 million annually by 2011 and 2012.¹³¹ This minuscule amount of comparative revenue would not usually warrant such rapid response by the House and Senate, yet it did here.

Having raced to prevent a constitutional challenge, Congress was successful in avoiding review of the constitutional challenge being presented to the Ninth Circuit for review. Two days after being signed by President Bush, the attorneys for the federal government and Pastor Warren filed a stipulated dismissal in the Ninth Circuit.¹³² Though *Warren* was moot by Congressional action, Professor Chemerinsky would continue to pursue a challenge to the constitutionality of § 107 himself, filing a motion to intervene on the day of the stipulated dismissal.¹³³ Professor Chemerinsky would never get a chance to fully address the constitutional question in court, so he wrote a law review article on the unconstitutionality of § 107 in his paper, *The Parsonage Exemption Violates the Establishment Clause and Should Be Declared Unconstitutional*.¹³⁴ Unfortunately for some, the constitutional challenges remain. As seen by both *Lew* and *Gaylor*, there is a continued effort to attack the constitutionality of § 107 in court. How or when Congress might act again is unknown, as § 107 survived the recent congressional tax overhaul of 2017 without a word raised in its direction.

V. CONCLUSION

This article traced the history of the § 107 parsonage exclusion from its earliest historical roots. Starting with early U.S. state property tax rules present in the common law, one can see the bends and curves of the historical basis for the current parsonage exclusion found in the federal income tax. This article showed the addition of the parsonage exclusion into the federal tax was not developed directly through the commonly assumed convenience of the employer doctrine. Rather, the parsonage exclusion would be codified due to a unique set of circumstances and the will of one man: Senator Dial. While his motivations can only be explored under some assumptions, the historical evidence of *The Watchman and Southron* newspaper story provides some basis to believe Senator Dial acted swiftly to right a

129. STAFF OF JOINT COMM. ON TAXATION, GENERAL EXPLANATION OF TAX LEGISLATION ENACTED IN THE 107TH CONGRESS 285.

130. Chemerinsky, *supra* note 112, at 708.

131. *Id.*

132. *Id.* at 709–10.

133. *Id.* at 710.

134. *Id.* at 707.

perceived wrong. However, the convenience of the employer doctrine and the parsonage exclusion would each track the issue of cash allowances and prove that, while they are two separate doctrines, they are close companions. Overall, this article hopes to have provided a fuller, richer history of parsonages and taxation than has previously been explored.