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## ORTHODOX JEWISH WOMEN AND ELIGIBILITY FOR THE PARSONAGE EXEMPTION

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### INTRODUCTION

A life in the clergy is not only one of piety and righteousness—it is also a good way to save on taxes. In Section 107 of the Internal Revenue Code of 1986, Congress has granted the parsonage tax exemption to any individual who carries the title of “minister of the gospel.”<sup>1</sup> As a result, any individual who serves as a father, rabbi, or imam can be entitled to either an exclusion of a home’s rental value or a housing allowance from gross income.<sup>2</sup> Indeed, parsonage is quite different than the standard religious tax exemption, because it applies to only a *subset* of individuals within particular religious groups. The parsonage exemption has attracted significant controversy and has been repeatedly challenged on constitutional grounds.<sup>3</sup> Besides frequent constitutional challenges, determining which individuals are eligible for parsonage stirs its own flavor of controversy and is an especially contentious issue with regards to Orthodox Jewish women.

By principle, Orthodox Jewish communities do not ordain women; thus women cannot serve in the rabbinate. As a result, Orthodox Jewish women working as teachers lack the required component of ordination<sup>4</sup> and are precluded from the parsonage allowance. The religious controversy as to whether women can serve in the rabbinate is manifest in the parsonage exemption. Should women be ineligible just because they cannot be ordained? What will these women do should they decide they want to take parsonage?

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<sup>1</sup> 26 U.S.C. § 107 (2002) [hereinafter all reference to the IRS Code are to the Internal Revenue Code of 1986, as amended].

<sup>2</sup> *Id.*

<sup>3</sup> See *Warren v. Comm’r*, 302 F.3d 1012, 1013 (9th Cir. 2002); Complaint, *Freedom From Religion Found., Inc. v. Comm’r*, No. 2:09-at-01672 (E.D. Cal. Oct. 16, 2009), available at [http://www.news10.net/news/pdf/ffrf\\_v\\_irs.pdf](http://www.news10.net/news/pdf/ffrf_v_irs.pdf). See also *infra* Part I.B.3.

<sup>4</sup> 26 C.F.R. § 1.1402(c)-5 (2009). The Treasury Department defines a “minister of the gospel” as someone who is a “duly ordained, commissioned, or licensed minister of a church.” *Id.*

These questions have been addressed by Michael Broyde, an esteemed legal and rabbinical scholar, professor at Emory University, and member of the Beth Din of America, a pre-eminent rabbinical court in America. He proposes that female Orthodox teachers, despite lacking ordination and formal certification, can be entitled to parsonage because being hired to perform sacerdotal functions serves as a functional commission allowing for eligibility. Broyde has been outspoken about this issue,<sup>5</sup> and to date no legal articles have been published in response. It is high time to evaluate Broyde's approach and to assess whether there is a way for these women to qualify for the exemption. This particular aspect of the parsonage exemption is a controversial issue in the Orthodox Jewish community, as many educational institutions are looking for ways to provide incentives for teachers to continue their career path while adjusting to the current economic situation.

However, I argue that Broyde's approach is too liberal and its application would constitute an abuse of the parsonage exemption. A careful analysis of the pertinent case law, relevant statutes, regulations, and IRS decisions indicate that entitling women who lack ordination and an official licensing would be an exploitation of the provision. Nevertheless, Orthodox Jewish women can still be entitled to parsonage provided they hold a formal degree, one that is theological in nature. A degree which indicates that a woman is qualified to lead in a religious, spiritual capacity can be a vehicle towards fulfilling the criteria of Section 107.

The result of this proposition sheds light on the nature of parsonage, the character traits of those who are eligible for parsonage, and how Congress views the Section 107 exemption. Through the lens of this small sliver of the American population, the essence of the parsonage exemption is revealed.

This Note posits that unordained Orthodox Jewish women can only take parsonage when they have an official licensing, which can be satisfied with a theological degree. Part I presents a background of the parsonage exemption as well as the historical debate as to its constitutionality. Part II discusses the scope of the parsonage exemption and the case law that determine eligibility. Part III first introduces Broyde's approach to the issue of unordained Orthodox Jewish women's entitlement to parsonage and then presents an evaluation and ultimately a suggestion as to how unordained women can be eligible. This Note ultimately concludes that unordained women can be entitled to the parsonage exemption and that lacking ordination does not bar eligibility when a woman has an official certification to her character as a spiritual leader.

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<sup>5</sup> See Michael J. Broyde, *May an Orthodox Yeshivah Day School or High School Provide Parsonage to Women Teaching Judaic Studies*, 18 TEN DA'AT: J. JEWISH EDUC. 7 (2006) [hereinafter Broyde, *Parsonage to Women*]; Michael J. Broyde, Op-Ed, *Orthodox Women Clergy?*, JEWISH PRESS, July 22, 2009, <http://www.jewishpress.com/pageroute.do/40150/> (last visited Oct. 31, 2010) [hereinafter Broyde, *Orthodox Women Clergy?*].

## I. HISTORICAL BACKGROUND OF THE PARSONAGE EXEMPTION

*A. Section 107: The Road to the Parsonage Exemption*

To fully understand the implications of broadening the scope of the category of a “minister of the gospel,”<sup>6</sup> it is necessary to understand the nature and background of the parsonage exemption.

The Internal Revenue Service (“IRS”) has historically provided ministers with a tax exclusion relating to housing rental allowances—in one form or another—and, although the statutory language has changed over time, this particular tax deduction has always been on the books.<sup>7</sup> The origin of the parsonage allowance is from the Revenue Act of 1921, which allowed for an exclusion of gross income of the “rental value of a dwelling house and appurtenances thereof furnished to a minister of the gospel as part of his compensation.”<sup>8</sup> In 1954, Congress readdressed this statute and Section 107(2) was expanded to include even housing allowances that were paid to a minister renting a home.<sup>9</sup>

In the 1970s and early 1980s, the parsonage allowance exclusion was not highly scrutinized by Congress.<sup>10</sup> After this period, the combination of the scandals of the time, along with U.S. Treasury Department scrutiny and Congress’s rallying for support, put the parsonage allowance on the front lines of analysis.<sup>11</sup>

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<sup>6</sup> 26 U.S.C. § 107.

<sup>7</sup> Phil Bednar, Comment, *After Warren: Revisiting Taxpayer Standing and the Constitutionality of Parsonage Allowances*, 87 MINN. L. REV. 2107, 2110 (2003).

<sup>8</sup> Revenue Act of 1921, Pub. L. No. 67-98, § 213, 42 Stat. 227, 239 (1921) (amended 1954). See Brojde, *Parsonage to Women*, *supra* note 5, at n.4 (explaining that although this Act uses the term “him” in reference to “ministers of the gospel,” this is presumably because only men filled these positions at that time, and it is an inappropriate assumption nowadays).

<sup>9</sup> Bednar, *supra* note 7, at 2110. This provision is found in 26 U.S.C. § 107(2), and its language at the time of Warren stated that the gross income of a “minister of the gospel” did not include either: “(1) the rental value of a home furnished to him as part of his compensation; or (2) the rental allowance paid to him as part of his compensation, to the extent used by him to rent or provide a home.” *Id.*

<sup>10</sup> See Matthew W. Foster, Note, *The Parsonage Allowance Exclusion: Past, Present, and Future*, 44 VAND. L. REV. 149, 159 (1991).

<sup>11</sup> Bednar, *supra* note 7, at 2110. See Foster, *supra* note 10, at 159-63 (explaining the scandals of that time and the U.S. Treasury Department’s scrutiny of the parsonage exemption). In 1978, the IRS starting cracking down on “mail-order ministries” in which a promoter, in the name of a church, would sell certificates of ordination and licensure, through the mail, in exchange for donations. Foster, *supra* note 10, at 160. The purchasers of the certificates could become “ministers” for their own “churches” and operate them as a tax-exempt entity. *Id.* Additionally, these ministers could receive deductions for contributions to their respective churches, and could receive housing allowances excludable under § 107. *Id.* at 161. Eventually, numerous mail-order ministers were convicted for § 107 tax fraud. *Id.* After the scandal heightened scrutiny of § 107, in 1984, the U.S. Treasury Department attempted to eliminate § 107 as a part of President Reagan’s plan to simplify the tax system. *Id.* at 162. But, because of efficient lobbying from constituents of their disfavor with this plan, § 107 remained and the Treasury Department’s plan failed. *Id.* at 162-63.

Despite the controversy, the parsonage provision remained intact and was unchanged until 2002.<sup>12</sup>

Congress's amendment partially codified the IRS's position found in Rev. Rul. 71-280.<sup>13</sup> In Rev. Rul. 71-280, the IRS examined whether an ordained minister who received compensation as a rental allowance could exclude an amount equal to the fair rental value of the acquired home plus the cost of utilities from gross income.<sup>14</sup> In that case, a minister received an annual salary of \$15,000, but the minister purchased a home and the down payment and annual mortgage payments exceeded the total compensation.<sup>15</sup> Additionally, the minister's purchased home would normally be rented for \$250 per month. The IRS decided, based on the understanding of the congressional intent behind Section 107,<sup>16</sup> that there was only an allowance for an exclusion of an amount received in lieu of a home in kind, and that a "rental allowance" is an amount equal to the fair rental value of the home, including furnishings and appurtenances such as a garage, plus the cost of utilities.<sup>17</sup>

Specifically, Congress amended Section 107(2) in response to *Warren v. Commissioner* by passing the Clergy Housing Allowance Clarification Act of 2002.<sup>18</sup> Since 2002, Section 107 provides:

[I]n the case of a minister of the gospel, gross income does not include [either:] the rental value of a home furnished . . . as part of his or her compensation; or the rental allowance paid . . . as part of his [or her] compensation, to the extent used . . . 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.*<sup>19</sup>

In *Warren*, Richard Warren, a well-known Baptist minister, received a housing allowance of approximately \$80,000 per year from his church and

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<sup>12</sup> Foster, *supra* note 10, at 163. Nevertheless, Foster asserts that this change in the government's attitude toward § 107 did "foreshadow other governmental and judicial attempts to restrict Section 107." *Id.*

<sup>13</sup> Ellen Onsi Bonito & James L. Wittenbach, *Who Qualifies, and When, for the Parsonage Allowance for 'Ministers?'*, 14 TXNEXEMPT 227, at 227 (2003).

<sup>14</sup> Rev. Rul. 71-280, 1971-2 C.B. 92. See Bonito & Wittenbach, *supra* note 13, at 227 (describing that the "[l]ong-standing policy on Section 107 is reflected in Rev. Rul. 71-280").

<sup>15</sup> Rev. Rul. 71-280, 1971-2 C.B. 92.

<sup>16</sup> See *infra* Part I.B.3.a, text accompanying notes 223-30 (discussing the nature of the legislative history behind § 107 and potential rationale for § 107).

<sup>17</sup> Rev. Rul. 71-280, 1971-2 C.B. 92. The IRS stated that "although a rental allowance can be used to purchase a home . . . . To the extent that a greater amount is designated as a rental allowance, the designation will be ineffectual." *Id.* See also Bonito & Wittenbach, *supra* note 13, at 227-28 (explaining the background of the ruling).

<sup>18</sup> *Warren v. Comm'r*, 302 F.3d 1012, 1014 (9th Cir. 2002).

<sup>19</sup> 26 U.S.C. § 107 (emphasis added).

excluded the entire amount under Section 107(2).<sup>20</sup> The IRS argued that Richard Warren excluded too much because his allowance was greater than the fair market rental value of his home.<sup>21</sup> The Tax Court ruled in Warren's favor and allowed for the parsonage exclusion to exceed a home's fair market rental value.<sup>22</sup>

*Warren* was eventually brought on appeal, and at this time the Court requested that Professor Erwin Chemerinsky submit an amicus brief as to whether the court should consider the constitutionality of Section 107 and whether Reverend Warren's exclusion had violated the Establishment Clause.<sup>23</sup> But, on May 20, 2002, the President signed the Clergy Housing Allowance Clarification Act of 2002 thereby amending the parsonage allowance to include a cap for the exclusion up to the fair market rental value, and resolving the statutory interpretation at issue.<sup>24</sup> Sponsors of this Act explained that the bill was designed to prevent the Ninth Circuit from ruling on the constitutionality of Section 107.<sup>25</sup> This limitation removed any First Amendment concerns associated with the parsonage exemption because the Act would address the issue involved in *Warren* when it was decided in the Tax Court.<sup>26</sup>

On May 22, 2002, both parties filed a stipulation to dismiss the appeal, but Chemerinsky then filed an opposition to this dismissal and a notice of motion to intervene as a private taxpayer.<sup>27</sup> Chemerinsky argued that despite the unusual nature of his request, it should nevertheless be allowed in order to serve as a "larger facial challenge" to Section 107's constitutionality and "to prevent the government from evading this question."<sup>28</sup> The Ninth Circuit denied Chemerinsky's motion<sup>29</sup>

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<sup>20</sup> *Warren*, 302 F.3d at 1013.

<sup>21</sup> *Id.*

<sup>22</sup> *Warren v. Comm'r*, 114 T.C. 343, 351 (2000).

<sup>23</sup> *Warren*, 302 F.3d at 1014.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* See Bonito & Wittenbauch, *supra* note 13, at 227 (elaborating on the process of the legislation). The legislation of this amendment was "rushed through both houses of Congress with broad bipartisan support," as it was a response to *Warren*, which, at this time, was being decided by the Ninth Circuit. *Id.* The Ninth Circuit considered ruling on the constitutionality of the housing allowance exclusion before ultimately dismissing the case. *Id.* Congress was concerned that the Ninth Circuit would rule the parsonage exclusion to be unconstitutional, so "Congress attempted to short-circuit the court (before the case was dismissed)" and passed the Clergy Housing Allowance Clarification Act of 2002. *Id.* at 228. See also Jon Wiener, *Rick Warren's Clout*, NATION, Jan. 15, 2009, available at <http://www.thenation.com/article/rick-warrens-clout> (last visited Oct. 31, 2010) (quoting the editor of the Church Law & Tax Report newsletter, Richard Hammar, in his explanation to the New York Times, that before the court could rule, "Congress stepped in—and acted with 'almost miraculous' speed" in its enactment of the Clergy Housing Allowance Certification Act of 2002).

<sup>26</sup> Bednar, *supra* note 7, 2112. See 148 CONG. REC. H1300 (daily ed. Apr. 16, 2002) (statement of Rep. Ramstad) ("The legislation on the floor today will stop the attack on the housing allowance by resolving the underlying issue in the tax court case.")

<sup>27</sup> Bednar, *supra* note 7, 2108.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

and added that Chemerinsky's constitutional arguments were better suited in district court.<sup>30</sup>

As a result, the constitutionality of Section 107 has yet to be resolved,<sup>31</sup> and although the Ninth Circuit did consider the issue worthy of supplemental briefs, at the end of the day, the court did not rule on this issue.<sup>32</sup> Congress's amendment of Section 107 clarifies the exclusion for clergy housing allowances by codifying Rev. Rul. 71-280 and limits this exclusion to the fair rental value of the home.<sup>33</sup> To date, the parsonage exemption is fully operational, and although there have been some minor tweaks to its text,<sup>34</sup> there is a tax exemption for anyone within the meaning of a "minister of the gospel" per Section 107.<sup>35</sup>

### *B. Constitutionality of the Parsonage Exemption*

Besides the aforementioned Congressional scrutiny,<sup>36</sup> the judiciary has attempted to assess the constitutionality of the parsonage exemption.<sup>37</sup> In *Warren*, the constitutionality issue of Section 107 was raised, but due to Congress's quick reaction to amend the statute and the Ninth Circuit's decision to deny Chemerinsky's motion, the court did not rule on the issue.<sup>38</sup> Despite the lack of a judicial ruling, there has been a substantial amount of discourse on the subject of whether the parsonage exemption is constitutional, or in conflict with the Establishment Clause.<sup>39</sup>

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<sup>30</sup> *Id.* The Ninth Circuit determined that Chemerinsky failed to demonstrate a right to intervene based on the Federal Rule of Civil Procedure twenty four. *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 2109.

<sup>33</sup> 26 U.S.C. § 107. *See also* Bonito & Wittenbauch, *supra* note 13, at 227.

<sup>34</sup> Bednar, *supra* note 7, at 2110 (stating that the "Internal Revenue Code has historically provided for ministers a tax exclusion pertaining to rental allowances (i.e., parsonage allowances), although the statutory language has changed over time.").

<sup>35</sup> *See* Bonito & Wittenbauch, *supra* note 13, at 228 (discussing other facets of the parsonage allowance). Parsonage is includable in the calculation of earnings from self-employment and is subject to self-employment tax under IRS Code § 1402(a)(8). *Id.* Additionally, when parsonage is given in the form of a housing allowance, Rev. Rul. 87-32 provides that for a minister of the gospel who pays interest on a mortgage or real property taxes on his or her home, the allowable deductions under IRS Code §§ 163 and 164 for those payments are not denied under IRS Code § 265. *Id.* The significance of this ruling is that under 26 U.S.C. § 256(a)(6), a person who is eligible for the parsonage allowance can still take the allowable deductions for interest on a mortgage or real property per 26 U.S.C. §§ 163 and 164. This is true, even though portions of the amounts expended may be allocable to a rental allowance excluded from gross income under § 107. *Id.* Moreover, "in addition to receiving the exclusion from gross income, the minister is also entitled to claim the interest on a mortgage and property taxes on the home as itemized deductions." *Id.* *See* Rev. Rul. 87-32, 1987-1 C.B. 131.

<sup>36</sup> *See supra* text accompanying notes 10-12.

<sup>37</sup> *Warren*, 302 F.3d at 1014 (9th Cir. 2002). *See* Bednar, *supra* note 7, at 2107-08.

<sup>38</sup> *Warren*, 302 F.3d at 1014. *See supra* note 25 and accompanying text.

<sup>39</sup> *See infra* Part I.B-E.

Before addressing the specific issue of the parsonage exemption and its application to the issue of Orthodox Jewish women, this Note will outline the general constitutional issues of tax exemptions for religious institutions.

### 1. The Establishment Clause and its Tests

The First Amendment states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof,” and the combination of these two clauses, namely, the Establishment Clause and the Free Exercise Clause, seem to be in conflict with one another.<sup>40</sup> In general, the Supreme Court has held a neutral position in the analysis of these two clauses and essentially “walk[s] a ‘tight rope’ between religious autonomy and established religion.”<sup>41</sup> In addition to the issue of how to interpret the First Amendment, there is uncertainty and debate as to how the Establishment Clause should be applied, and how to test whether a particular law is constitutional or not.<sup>42</sup> Nevertheless, from its face, the Establishment Clause “forbids any law respecting an establishment of religion,” and not only this, but the language of the Clause “also forbids what the Supreme Court has labeled as ‘three main evils’: sponsorship, financial support, and active involvement of the government in religious activity.”<sup>43</sup> Thus, the analysis, application, and tests concerning a particular law are geared towards determining whether the law respects or promotes an established religion.

In *Lemon v. Kurtzman*, the Supreme Court established a three-part test as a means of determining whether a particular law is in violation of the Establishment Clause.<sup>44</sup> At issue in *Lemon* was the Rhode Island Salary Supplement Act, an act which supplemented an eligible teacher’s salary by fifteen percent for teaching secular subjects in nonpublic elementary schools.<sup>45</sup> The supplement would be given, provided that the recipient teaches in a nonpublic school at which the

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<sup>40</sup> Bednar, *supra* note 7, at 2117 (citing *Walz v. Tax Comm’n of the City of N.Y.*, 397 U.S. 664, 668-69 (1970) to demonstrate the dichotomy of these two clauses and that the clauses would clash one another if “expanded to a logical extreme.”). Moreover, the court states that the “Establishment and Free Exercise Clauses of the First Amendment are not the most precisely drawn portions of the Constitution.” *Id.* at 668.

<sup>41</sup> *Id.* (referencing the language in *Walz*, 397 U.S. at 672). See also Edith Brown Clement, *Public Displays of Affection . . . For God: Religious Monuments After McCreary and Van Orden*, 32 HARV. J.L. & PUB. POL’Y 231, 242 (2009) (discussing Justice Breyer’s opinion in *McCreary*, where he states that the “touchstone for [the] analysis is the principle that the ‘First Amendment mandates governmental neutrality between religion and religion, and between religion and non-religion.’”). However, in *Van Orden*, Breyer “emphasize[s] that the Supreme Court has not consistently embraced the concept of neutrality.” *Id.*

<sup>42</sup> Clement, *supra* note 41, at 242.

<sup>43</sup> Foster, *supra* note 10, at 165-66. See *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (explaining that the authors of the First Amendment “did not simply prohibit the establishment of a state church or a state religion, an area history shows they regarded as very important and fraught with great dangers. Instead they commanded that there should be ‘no law respecting an establishment of religion.’”). See also *Walz*, 397 U.S. at 668.

<sup>44</sup> *Lemon*, 403 U.S. at 612-13.

<sup>45</sup> *Id.* at 607.

average expense on secular education is less than public schools,<sup>46</sup> and provided that the teacher agrees to “teach only those subjects that are offered in the State’s public schools.”<sup>47</sup> Additionally, the *Lemon* court ruled on the Pennsylvania Nonpublic Elementary and Secondary Education Act of 1968, which authorized the state to reimburse nonpublic schools for their “actual expenditures for teachers’ salaries, textbooks, and instructional materials.”<sup>48</sup> Hence, nonpublic schools could only get reimbursed for any materials that would relate to secular courses such as “mathematics, modern foreign languages, physical science, and physical education.”<sup>49</sup>

The Court applied the three-part test to the facts of this case and analyzed the constitutionality of the statutes.<sup>50</sup> The Court held that a statute must first “have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; [and] finally, the statute must not foster ‘an excessive government entanglement with religion.’”<sup>51</sup> The court ruled that in the aforementioned statutes, there was an “excessive entanglement between government and religion,” and that the two statutes were unconstitutional, having violated the Establishment Clause.<sup>52</sup>

Although the *Lemon* test has been the primary test for the Establishment Clause for a substantial period of time<sup>53</sup> and has not been overruled, its status has been questioned in recent times.<sup>54</sup> In *Lynch v. Donnelly*, Justice O’Connor wrote a separate concurrence offering a clarification of the Establishment Clause doctrine.<sup>55</sup> O’Connor suggested an “endorsement test,” such that the court must first determine whether the government had the intention to “convey a message of endorsement or disapproval of religion”<sup>56</sup> and then “determine whether the government actually conveyed this message.”<sup>57</sup>

This “endorsement test,” which is arguably less restrictive than the *Lemon* test, demonstrates that the court is drifting from the “‘excessive entanglement’

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<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 608.

<sup>48</sup> *Id.* at 609.

<sup>49</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 610 (1971).

<sup>50</sup> *Id.* at 612.

<sup>51</sup> *Id.* at 612-13.

<sup>52</sup> *Id.* at 614. The court stated that “the cumulative impact of the entire relationship arising under the statutes in each State involves excessive entanglement between government and religion.” *Id.*

<sup>53</sup> See Foster, *supra* note 10, at 167. See also *Wallace v. Jaffree*, 472 U.S. 38, 63 n.3 (1985). Justice Lewis Powell stated that “the *Lemon* test has been applied consistently in Establishment Clause cases since it was adopted in 1971. In a word, it has been the law. Respect for *stare decisis* should require us to follow *Lemon*.” *Id.*

<sup>54</sup> See *infra* text accompanying notes 69-83.

<sup>55</sup> *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984).

<sup>56</sup> Bednar, *supra* note 7, at 2119 (quoting *Lynch*, 465 U.S. at 691).

<sup>57</sup> *Id.*

prong” and is “instead focusing on the first two prongs of the *Lemon* test.”<sup>58</sup> Even though Justice O’Connor “labeled” the endorsement test a “clarification” of the *Lemon* test, she gave the theory a “stronger independent status” in *Wallace v. Jaffree*.<sup>59</sup> The number of written opinions in *Wallace*<sup>60</sup> indicates the extent of the Court’s disagreement over the correct standard of scrutiny for what should be deemed unconstitutional according to the Establishment Clause.<sup>61</sup> No clear test has been adopted however, and instead over the past years, Supreme Court justices have articulated and adopted their own different tests.<sup>62</sup>

## 2. Constitutionality of Tax Exemptions for Religious Institutions

In 1970, the Supreme Court began developing its approach to the constitutionality of tax statutes that relate to religious organizations, beginning with the landmark case of *Walz v. Tax Commission of the City of New York*.<sup>63</sup> The appellant in *Walz*, a property owner in New York, sought an injunction to prevent the New York City Tax Commission “from granting property tax exemptions to religious organizations for religious properties used solely for religious worship.”<sup>64</sup> The argument was based on the fact that the New York City Tax Commission’s exemption was in violation of the First Amendment.<sup>65</sup> The Supreme Court ruled that the New York statute was not considered to be an attempt at establishing a religion, because it simply was “sparing the exercise of religion from the burden of property taxation levied on private profit institutions.”<sup>66</sup> The court stated that:

The legislative purpose of a property tax exemption is neither the advancement nor the inhibition of religion; it is neither sponsorship nor hostility . . . [i]t has not singled out one particular church or religious group or even churches as such; rather, it has granted exemption to all houses of religious worship within a broad class of property owned by nonprofit,

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<sup>58</sup> *Id.* (discussing *Agostini v. Felton*, 521 U.S. 203, 233-34 (1997), where the Court addressed the “excessive entanglement” requirement found in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and stated that administrative concerns and political divisiveness, were “insufficient by themselves” to be considered “‘excessive’ entanglement”).

<sup>59</sup> Foster, *supra* note 10, at 170. See *Wallace v. Jaffree*, 472 U.S. 38 (1985).

<sup>60</sup> Justice Powell filed a concurring opinion. *Wallace*, 472 U.S. at 62. Additionally, Justice O’Connor filed a concurring opinion. *Id.* at 67. Chief Justice Burger dissented and filed an opinion. *Id.* at 84-90. Justice White both dissented and filed an opinion. *Id.* at 90-91. Justice Rehnquist both dissented and filed an opinion. *Id.* at 91-114.

<sup>61</sup> *Id.*

<sup>62</sup> Bednar, *supra* note 7, at 2117 (citing DANIEL A. FARBER, THE FIRST AMENDMENT 282-83 (2d ed. 2003)).

<sup>63</sup> 397 U.S. 664 (1970).

<sup>64</sup> *Id.* at 666.

<sup>65</sup> *Id.* at 667. The Appellate Division of the New York Supreme Court granted the summary judgment motion of the respondents, and the New York Court of Appeals affirmed. *Id.*

<sup>66</sup> *Id.* at 673.

quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups.<sup>67</sup>

Additionally, the court did not consider a tax exemption a “sponsorship” because the government was not transferring part of its revenue to churches—rather the government was abstaining from demanding the church to pay taxes and thereby supporting the state.<sup>68</sup>

The Supreme Court in *Texas Monthly, Inc. v. Bullock* reached a different conclusion than *Walz*.<sup>69</sup> In *Texas Monthly*, the Supreme Court, in a plurality opinion, invalidated a Texas statute which exempted sales tax for periodicals or books that either promulgated teachings of faith or consisted of writings that were “sacred to a religious faith”<sup>70</sup> for being in violation of the Establishment Clause.<sup>71</sup> The court adopted and applied Justice O’Connor’s “endorsement test” from *Lynch*<sup>72</sup> to determine whether the Texas statute was violating the Establishment Clause.<sup>73</sup> The court ruled that the Texas statute was a narrow exemption that constituted a subsidy, targeted at sponsoring religious beliefs.<sup>74</sup> Additionally, because the government was directing a subsidy exclusively to religious organizations it “provide[d] unjustifiable awards of assistance to religious organizations,”<sup>75</sup> “convey[ed] a message of endorsement’ to slighted members of the community,”<sup>76</sup> and “promulgate[d] the teachings of religious faiths.”<sup>77</sup> Moreover, the court distinguished this case from *Walz*: in *Walz*, the statute was broader in scope and “extended to a large number of nonreligious organizations” that could have been reasonably construed with a “secular objective,”<sup>78</sup> unlike *Texas Monthly*, where the statute only referred to religious periodicals and literature.<sup>79</sup> Thus, the court ruled that the Texas statute endorsed a religious belief and thereby lacked a secular objective.<sup>80</sup>

Although *Texas Monthly* indicates a movement in the Court from *Walz*,<sup>81</sup> because *Texas Monthly* is a plurality decision and because the court carefully

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<sup>67</sup> *Id.* at 672-73.

<sup>68</sup> *Walz v. Tax Comm’n of the City of N.Y.*, 397 U.S. 664, 675 (1970).

<sup>69</sup> *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989).

<sup>70</sup> *Id.* at 5.

<sup>71</sup> *Bednar, supra* note 7, at 2120 (*citing Texas Monthly, Inc.*, 498 U.S. at 25).

<sup>72</sup> *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984).

<sup>73</sup> *Bednar, supra* note 7, at 2120 (*citing Texas Monthly, Inc.*, 498 U.S. at 8-9).

<sup>74</sup> *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 15 (1989).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* (*citing Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 348 (1987) (O’Connor, J., concurring)).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 15 n.5.

<sup>79</sup> *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 5 (1989). *See supra* text accompanying notes 70-71.

<sup>80</sup> *Texas Monthly, Inc.* 489 U.S. at 17.

<sup>81</sup> *See Foster, supra* note 10, at 168 (discussing the Court’s first demonstration of dissatisfaction

distinguished this case from *Walz*, the decision “does not settle the status of . . . [tax] exemptions granted on the basis of religion.”<sup>82</sup> Arguably the most notable indication that the decision in *Texas Monthly* is not binding comes from the parsonage exemption.<sup>83</sup>

### 3. Constitutionality of the Parsonage Exemption

The parsonage exemption has been challenged before, but the judiciary has not ruled it unconstitutional.<sup>84</sup> Despite the fact that the *Warren* case did not reach a decision, many continue to argue that Section 107 should fail under the Establishment Clause. Before addressing its constitutionality in light of unordained Orthodox Jewish women, this Note will briefly outline some arguments<sup>85</sup> that have been made as to why Section 107 is in violation of the First Amendment and, assuming that there is standing for a taxpayer to bring such a lawsuit, the court should invalidate the statute.<sup>86</sup>

#### *a. Section 107 Under the Scrutiny of the First Prong of the Lemon Test*

Section 107 can be shown to fail the first prong of the test, because “[t]he statute does not articulate a secular purpose.”<sup>87</sup> The issue in Section 107 is that “[i]n the case of a minister of the gospel, gross income does not include . . . the rental value of a home furnished to him as part of his compensation; or . . . the rental allowance paid to him as part of his compensation . . . .”<sup>88</sup> The statute only entitles a “minister of the gospel”—a religious figure—to take parsonage, and it

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with the *Lemon* test, as seen in *Larson v. Valente*, 456 U.S. 228 (1982). “In *Larson*, members of the Unification Church challenged a Minnesota statute [requiring] religious organizations to meet certain registration and reporting requirements if they received half or less of their total contributions from members or affiliated organizations.” Foster, *supra* note 10, at 168-69. Justice Brennan opined that the “*Lemon* Test was unnecessary to decide” whether this statute was within the Establishment Clause because, as he explained, the *Lemon* test is “useful only when analyzing laws that confer a benefit to all religions,” and not a statute that discriminates among different religions. *Id.* at 169).

<sup>82</sup> KENT GREENAWALT, RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS 295 (2008), available at [http://books.google.com/books?id=bjdqTenz\\_IMC&printsec=frontcover&dq=GREENAWALT,+RELIGION+AND+THE+CONSTITUTION:+ESTABLISHMENT+AND+FAIRNESS&cd=1#v=onepage&q=&f=false](http://books.google.com/books?id=bjdqTenz_IMC&printsec=frontcover&dq=GREENAWALT,+RELIGION+AND+THE+CONSTITUTION:+ESTABLISHMENT+AND+FAIRNESS&cd=1#v=onepage&q=&f=false).

<sup>83</sup> *Id.*

<sup>84</sup> See *infra* text accompanying notes 23-35.

<sup>85</sup> Foster, *supra* note 10, at 166-68. See Bednar, *supra* note 7, at 2126-31.

<sup>86</sup> See Bednar, *supra* note 7, at 2125-26 (discussing whether there is standing for a taxpayer to bring such a suit. In order to achieve standing according to the Frothingham Court, “[a] taxpayer who receives a housing allowance from a non-church organization” has the best chance of bringing a suit, because there is an injury-in-fact as it would not be considered a generalized grievance. *Id.* at 2125. Nevertheless, under the Flast doctrine, even an average taxpayer who is not receiving a housing allowance could have standing. *Id.* at 2125-26).

<sup>87</sup> Foster, *supra* note 10, at 167.

<sup>88</sup> 26 U.S.C. § 107.

does not articulate any secular purpose.<sup>89</sup> Moreover, the legislative history, which is very “sparse,” neither expresses nor implies a secular purpose.<sup>90</sup>

Even so, since Section 107 “*appears* to confer a benefit on the basis of religion,” courts would try to imply a legitimate purpose in an effort to maintain the statute’s constitutionality.<sup>91</sup> As such, some commentators have offered suggestions to the legitimacy of Section 107’s purpose, which would give credence to the constitutionality of the statute.

Some argue that Congress could have intended to confer a tax benefit “to an economically deprived group.”<sup>92</sup> Because clergy wages in 1954 were approximately nine percent below the national labor force average, Congress felt the need to supplement with this tax exemption.<sup>93</sup> Nevertheless, Matthew W. Foster argues that this is unlikely because other under-compensated groups did not receive this benefit.<sup>94</sup> Additionally, he says that even if Congress would make a conditional receipt of a tax benefit on the recipient’s occupation, because a clergy position has a religious quality, which is necessary for the benefit to be attached, it would hardly be considered “secular.”<sup>95</sup>

Kent Greenawalt offers a different approach. He suggests that the purpose of the parsonage exemption is based on the usage of the clergy’s home for church related activities.<sup>96</sup> “[C]harities do not have the tradition of their leaders living next to the main locus of their activities, and that clerics who reside within the boundaries of their church [mosque or synagogue] properties consistently make their living spaces available for church [mosque or synagogue] activities.”<sup>97</sup> Moreover, because a minister uses his or her house for the purposes of work, it

<sup>89</sup> Foster, *supra* note 10, at 167.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> Roger H. Taft, Comment, *Tax Benefits for the Clergy: The Unconstitutionality of Section 107*, 62 GEO. L.J. 1261, 1268 (1974).

<sup>93</sup> *Id.* See Foster, *supra* note 10, at 167.

<sup>94</sup> Foster, *supra* note 10, at 167. See Taft, *supra* note 92, at 1268 (arguing that Congress intends to support “an economically deprived group” is inefficient as it provides assistance to a group that is not as needy as others, as well as ignoring equally needy people of different occupations).

<sup>95</sup> Foster, *supra* note 10, at 167-68. See Taft, *supra* note 92, at 1268.

<sup>96</sup> GREENAWALT, *supra* note 82, at 296.

<sup>97</sup> *Id.* See Edward A. Zelinsky, Dr. Warren, *The Parsonage Exclusion, and the First Amendment*, 95 TAX NOTES 115, 116 (2002) (arguing that the novelty of § 107 can be understood in its contrast to § 119). § 119 excludes employer-provided housing from an employee’s income if it satisfies the test of being on the employer’s premises, provided for the “employer’s ‘convenience,’ is [a] required . . . condition of employment, and is furnished in-kind [and not in] cash allowance.” *Id.* § 119 applies to any employment, regardless of whether it is religious in nature, and this breadth of application does not raise any constitutional concerns. *Id.* § 107, however, “is limited only to certain employees of religious institutions,” does not contain a “convenience-of-the-employer test, does not require that the excluded housing be located on the employer’s premise” and can apply to cash allowances. *Id.* Because of this distinction, there can be controversial constitutional situations when “religious employers provide housing assistance to clergy[men]” in a way that fails the § 119 test but “satis[ies] the more lenient standard of section 107.” *Id.* at 117.

would be administratively difficult to calculate the exact amount of tax payments.<sup>98</sup> Greenawalt's suggestion, however, would not apply to a particular minister or cleric whose home is away from the church, but one could argue that the extension is justified evenly—to all clerics—to achieve fairness with the tax exemption.<sup>99</sup>

*b. Section 107 Under the Scrutiny of the Second Prong of the Lemon Test*

In addition to failing the first prong of the *Lemon* test, it is arguable that Section 107 fails the second prong as well.<sup>100</sup> If a statute directly confers a benefit onto a religious entity, it may be considered unconstitutional.<sup>101</sup> Section 107 grants a tax exemption to a minister, which, in effect, acts like a government subsidy by enabling the minister to have a higher salary than he or she would after taxes.<sup>102</sup> Thus, an argument can be made that the parsonage exemption is unconstitutional because of the direct benefit which is being conferred on the minister.

Even so, a counterargument can be presented: parsonage is not a direct subsidy, and is rather an indirect benefit to a religious minister.<sup>103</sup> Because it does not actually provide the minister with cash allowance, it can be argued that there is no direct benefit being conferred on a religious institution. This is similar to the rationale in *Walz*: a tax exemption is not considered a “sponsorship” when there is no transfer of revenue to churches and the government abstains from demanding the church to pay taxes.<sup>104</sup> So too, because the government is not directly transferring funds to clergymen, an argument can be made as to why parsonage should not fail the second prong of the *Lemon* test.

*c. Section 107 Under the Scrutiny of the Third Prong of the Lemon Test*

Lastly, one can argue that Section 107 also fails the third prong of the *Lemon* test because there is an excessive entanglement of government and religion.<sup>105</sup> There are treasury regulations which outline the criteria for a minister to receive the parsonage exemption, as well as a large amount of time and litigation expended on determining whether taxpayers have met the proper requirements and if the housing allowance is reasonable.<sup>106</sup> Therefore, one could maintain that these analyses

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<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> Foster, *supra* note 10, at 168.

<sup>101</sup> *Id.* It can be unconstitutional if the statute *directly* confers a benefit but not if the statute only *indirectly* confers a benefit. See *Texas Monthly, Inc., v. Bullock*, 489 U.S. 1 (1989). See also *Walz v. Tax Comm'n of the City of N.Y.*, 397 U.S. 664 (1970).

<sup>102</sup> Foster, *supra* note 10, at 168 (adding that § 107 also “indirectly benefits the . . . church, by enabling it to pay the minister a lower salary”).

<sup>103</sup> See *infra* text accompanying notes 225-31.

<sup>104</sup> *Walz*, 397 U.S. at 675.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

would be considered excessive entanglement—the detailed litigation and Congressional scrutiny is excessive—to the extent that even if the first two prongs would be satisfied, the statute would still be unconstitutional.<sup>107</sup>

*d. Section 107 Under the Scrutiny of the “Endorsement Test”*

Even if the “endorsement test” is followed, it can still be argued that Section 107 is in violation of the Establishment Clause. Because Section 107 “favors taxpayers with a religious vocation,” it can be argued that this “create[s] a strong presumption that its purpose is to endorse” religion.<sup>108</sup> Moreover, because the statute only grants the exemption to a “minister of the gospel,” it conveys the message that people who work in the field of religion are more favored than those whose work is secular.<sup>109</sup>

*e. Evaluating the Strengths of the “Lemon Test” and the “Endorsement Test”*

There are compelling arguments that the parsonage exemption is unconstitutional, and assuming that a taxpayer has standing, a court might rule that this exemption *is* unconstitutional. On the other hand, despite the strength of these arguments, they might not sway a court’s decision because the *Lemon* test and endorsement test may not be the controlling factor of the court.<sup>110</sup>

Some have argued that if the court would adopt the *Walz* approach, Section 107 would be considered constitutional<sup>111</sup> because it is possible to defend that the exclusion is a mere expression of “Free Exercise” concerns.<sup>112</sup> Tax exemptions should not be viewed as a subsidy but rather as a way to “preserve[] the autonomy and freedom of religious bodies while avoiding any semblance of established religion.”<sup>113</sup> By taxing a religious institution, there becomes a conflict between the religious institution and a tax collector who would need to either audit or bring a compliance proceeding.<sup>114</sup> Granting autonomy and allowing for such an exemption is an actual fulfillment of the constitution, being that it “reinforce[s] the desired separation” and “restricts the fiscal relationship between church and state.”<sup>115</sup> Hence, Section 107 can be seen as a manifestation of the Free Exercise clause and should not be considered unconstitutional.

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<sup>107</sup> *Id.*

<sup>108</sup> Foster, *supra* note 10, at 174.

<sup>109</sup> *Id.*

<sup>110</sup> See *supra* text accompanying notes 81-83.

<sup>111</sup> Zelinsky, *supra* note 97, at 120.

<sup>112</sup> *Id.* at 119.

<sup>113</sup> *Walz v. Tax Comm’n of the City of N.Y.*, 397 U.S. 664, 672 (1970). See Zelinsky, *supra* note 97, at 118 (highlighting this distinction).

<sup>114</sup> Zelinsky, *supra* note 97, at 118 (stating that “[o]n a more theoretical level, taxing religious bodies invades their space.”).

<sup>115</sup> *Walz*, 397 U.S. at 676.

In recent years, the judiciary has not ruled on the constitutionality of Section 107, and although the *Warren* court attempted to, it was cut off by Congress' passing of the Clergy Housing Allowance Clarification Act of 2002.<sup>116</sup> Nevertheless, the passing of this Act has not resolved the issue of the constitutionality of the parsonage exemption.<sup>117</sup>

“Although Congress was confident that the rental exclusion cap” of the fair rental market value would end the controversy as to the constitutionality of the statute, it is debatable whether such a result is likely.<sup>118</sup> Because the constitutional arguments are predicated on the tax benefit which has been created and not the *size* of the benefit, the amended Section 107(2) is unable to mitigate the controversy.<sup>119</sup> Moreover, even now cases are being filed questioning the constitutionality of the statute.<sup>120</sup>

Nevertheless, Section 107 is still alive and kicking, and although there are strong arguments to have it removed, eligible ministers are still entitled to the tax exemption. Indeed, the constitutionality of Section 107 is not the only controversial element of the parsonage exemption, for the scope of the exemption, and how broadly it can be extended—particularly in regards to Orthodox Jewish women—has its own flavor of debate, and will be discussed in Part II.

## II. SCOPE OF THE PARSONAGE EXEMPTION

### A. What is a “Minister of the Gospel?”

Determining who is eligible for the parsonage deduction requires careful analysis of the statutory language of Section 107, its corresponding regulations, and the pertinent case law. While Section 107 indicates that the parsonage exemption from gross income is only for a “minister of the gospel,” the statute does not clarify what that means, and what is included within that classification.<sup>121</sup> The Treasury Department addresses this issue in 26 C.F.R. Section 1.107.1(a) and indicates that “[i]n order to qualify for the exclusion, the home or rental allowance must be provided as remuneration for services which are ordinarily the duties of a minister of the gospel.”<sup>122</sup> This, however, is not so helpful, because it does not define *what*

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<sup>116</sup> See *supra* text accompanying notes 24-26.

<sup>117</sup> Bednar, *supra* note 7, at 2128.

<sup>118</sup> *Id.* (citing Eric Rakowski, *Are Federal Income Tax Preferences for Ministers' Housing Constitutional?*, 95 TAX NOTES 775, 779-80 (2002)).

<sup>119</sup> *Id.* See generally Erwin Chemerinsky, *The Parsonage Exemption Violates the Establishment Clause and Should be Declared Unconstitutional*, 24 WHITTIER L. REV. 707 (2003) (arguing that irrespective of the theory behind the Establishment Clause, the parsonage exemption is unconstitutional).

<sup>120</sup> See Complaint, Freedom From Religion Found., Inc. v. Comm'r, No. 2:09-at-01672 (E.D. Cal. Oct. 16, 2009) (copy on file with author).

<sup>121</sup> 26 U.S.C. § 107.

<sup>122</sup> 26 C.F.R. § 1.107-1(a) (2009).

a minister of the gospel is. Fortunately, the regulations in 26 C.F.R. Section 1.107-1(a) reference 26 C.F.R. Section 1.1402(c)-5 as an applicable source to determine who can qualify for the exemption.<sup>123</sup>

In 26 C.F.R. Section 1.1402(c)-5, the Treasury Department refers to a “duly ordained, commissioned, or licensed minister of a church”<sup>124</sup> in regards to self-employment tax purposes.<sup>125</sup> It provides that these services include any of the following: “the ministration of sacerdotal functions and the conduct of religious worship, and the control, conduct, and maintenance of religious organizations,[—]including . . . [its] integral agencies[—], under the authority of a religious body constituting a church or church denomination.”<sup>126</sup> Congress adds that determining whether a minister’s service is considered “ministration of sacerdotal functions” or “conduct of religious worship” will depend on the “tenets and practices of the particular religious body constituting [the minister’s] church or church denomination.”<sup>127</sup>

Although a minister must provide sacerdotal functions, and be commissioned, licensed, and ordained, the IRS in Rev. Rul. 78-301 acknowledges there is no particular standard found in the regulations that the ordination, commissioning, or licensing must come from some “higher ecclesiastical authority.”<sup>128</sup> Additionally, the IRS agrees that the regulations do not require that a higher authority “bestow the power to perform certain religious functions that could not be performed by another member of the congregation.”<sup>129</sup> Thus, in Rev. Rul. 78-301, the IRS decided that an unordained Jewish cantor who was commissioned and employed by a congregation was entitled to parsonage because when the “regular, full-time duties to the congregation are spiritual or religious in nature,” it is considered to be an exercise of ministry duty.<sup>130</sup>

<sup>123</sup> *Id.* The regulations do provide some specific examples of the kinds of services which are considered duties of a minister for the purpose of § 107: “performance of sacerdotal functions, the conduct of religious worship, the administration and maintenance of religious organizations and their integral agencies, and the performance of teaching and administrative duties at theological seminaries” will all be considered the duties which will qualify as being within § 107. *Id.*

<sup>124</sup> 26 C.F.R. § 1.1402(c)-5(a)(1) (2009). See Rev. Rul. 78-301, 1978-2 C.B.103.

<sup>125</sup> Bonito & Wittenbauch, *supra* note 13, at 229.

<sup>126</sup> 26 C.F.R. § 1.1402(c)-5(b)(2). “If a minister . . . meets one of [these] three tests . . . he or she will qualify for” the §107 exemption. Bonito & Wittenbauch, *supra* note 13, at 235. The decision in *Mosley v. Comm’r*, 68 T.C.M. (CCH) 708 (1994), highlights this idea, the court decided whether “ordained Baptist ministers working for a nonprofit organization providing support to Baptist missionaries” were entitled to a § 107 deduction. Bonito & Wittenbauch, *supra* note 13, at 233. The Court ruled that taxpayers met the third test and were allowed to take a deduction. *Id.* at 234.

<sup>127</sup> 26 C.F.R. § 1.1402(c)-5(b)(2)(i).

<sup>128</sup> Rev. Rul. 78-301, 1978-2 C.B. 103.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* The IRS states that an example of this would be “leading the worship service.” *Id.* The IRS also directs this ruling to 26 C.F.R. §§ 1.107-1(a) and 1.1402(c)-5(b)(2). *Id.*

Hence, the IRS has recognized that the standards for ordination found in the regulations “vary from denomination to denomination.”<sup>131</sup> This highlights an essential characteristic of the parsonage allowance: the exemption is not limited to any particular religion, because the IRS rules that Section 107 includes religions of all faiths.<sup>132</sup> Some scholars astutely point out that Section 107 could be interpreted to only allow the parsonage allowance for “clergy of faiths that preach the Christian gospel,” but federal courts have held that “Congress did not intend” that the limitation applies only to the Christian faith, but that all faiths are entitled to take a deduction.<sup>133</sup>

Furthermore, although the regulations have not established a particular standard of ordination, commissioning, or licensing, this deferential approach only relates to the higher ecclesiastical or institution providing the certification. The Treasury Department is deferential concerning the evaluation of an ecclesiastical authority’s validity, but it will require a scrutiny of the type of ordination, license, or commission. In 26 C.F.R. Section 1.1402(c)-5, the Treasury Department, in its discussion of “service performed by a minister in the exercise of his ministry” indicates that this “includes the ministration of sacerdotal functions and the conduct of religious worship . . . under the authority of a religious body constituting a church or church denomination.”<sup>134</sup> Then the Treasury Department discussed the applicable rules “in determining whether services performed by a minister are performed in the exercise of his ministry.”<sup>135</sup> Thus, the regulations indicate that the authority is not subject to evaluation, but the nature of the services which relate to that particular authority can be scrutinized. So too, in regards to the evaluation of whether a person is considered “ordained, commissioned, or licensed”<sup>136</sup> the deferential approach only extends to the reliability of a religious authority but not to the type of ordination, commission, or licensing.<sup>137</sup>

#### *B. Wingo and Expanding Definitions of a “Minister of the Gospel”*

The Tax Court in *Wingo v. Commissioner*<sup>138</sup> expanded the definition of a “minister of the gospel” in ruling whether a person is considered “duly ordained,

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<sup>131</sup> Michael J. Broyde, *Orthodox Yeshivas, Female Instructors, and the Parsonage Allowance*, 18 TXNEXEMPT 44 (2006).

<sup>132</sup> See *Salkov v. Comm’r*, 46 T.C. 190, 194-99 (1966). See also Rev. Rul. 58-221, 1958-1 C.B. 53 (ruling that an ordained person performing ordinary rabbinic duties of religious worship or ministration of sacerdotal functions according to the practices and rules of the *Jewish* faith is considered a “minister of the gospel.” (emphasis added)).

<sup>133</sup> Broyde, *supra* note 131.

<sup>134</sup> 26 C.F.R. § 1.1402(c)-5(b)(2).

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> See *infra* Part III.C-D.

<sup>138</sup> *Wingo v. Comm’r*, 89 T.C. 922 (1987).

commissioned, or licensed” in regards to a self-employment tax exemption.<sup>139</sup> In *Wingo*, James S. Wingo was approved as a probationary member of the North Arkansas Annual Conference of the United Methodist Church,<sup>140</sup> and was additionally “licensed as a local pastor and ordained as a deacon by The United Methodist Church.”<sup>141</sup> Wingo was appointed to serve as the pastor of a local church in Arkansas, and was authorized to conduct rituals such as worship, administration of the Sacraments of Baptism, and perform marriage, burial, and confirmation services.<sup>142</sup> Wingo was also responsible for various community and church needs, such as family counseling, and performing an administrative and organizational role within the church.<sup>143</sup> Wingo served as a pastor and ordained deacon until June of 1984, and was then accepted as a “member in full connection with the Annual Conference and was ordained as an elder.”<sup>144</sup>

Wingo decided not to report “self-employment tax due on either his 1981 or 1982 joint Federal income tax returns,” instead of choosing to file for an exemption.<sup>145</sup> Wingo considered himself to be an employee at the time, and did not file Form 4361—the “Application for Exemption from Self-Employment Tax by Ministers” as required by IRS Code Section 1402(e)—which would have excluded him from paying this tax.<sup>146</sup> The Tax Court ruled that Wingo was considered a pastor for the purposes of IRS Code Section 1402(e), was considered self-employed, and erred in filing his Federal income tax return.<sup>147</sup> The court reasoned that the “triggering event” to apply for the exemption is when the individual assumed the “duties and functions of a minister”<sup>148</sup> and that the test for the occurrence of this event is based on the three prongs of 26 C.F.R Section 1.1402(c)-5, in addition to whether petitioner was licensed, commissioned, or ordained.<sup>149</sup> The court determined that although Wingo was not considered a full leader, and despite the fact that the congregation was not the highest governing body of the church, since he was in charge of organizational and administrative concerns for various aspects of church function, he was considered a minister for the purposes of Section 1402(c).<sup>150</sup>

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<sup>139</sup> Bonito & Wittenbauch, *supra* note 13, at 230.

<sup>140</sup> See *Wingo*, 89 T.C. at 924 (using the full title of the United Methodist Church conference, which is was thereafter referred to as the “Annual Conference”). “The United Methodist Church is governed and maintained” by these conferences which are made up of various different conferences. *Id.* at 923-24.

<sup>141</sup> *Id.* at 926.

<sup>142</sup> *Id.*

<sup>143</sup> *Wingo v. Comm’r*, 89 T.C. 922, 926 (1987).

<sup>144</sup> *Id.* at 927.

<sup>145</sup> *Id.*

<sup>146</sup> Bonito & Wittenbauch, *supra* note 13, at 230. See also *Wingo*, 89 T.C. at 927-28.

<sup>147</sup> *Wingo*, 89 T.C. at 938-39.

<sup>148</sup> *Id.* at 931 (quoting *Ballinger v. Comm’r*, 728 F.2d 1287, 1290 (10th Cir. 1984)).

<sup>149</sup> *Id.* at 934.

<sup>150</sup> *Id.* at 935.

What comes out of *Wingo* is a five-factor balancing test to determine whether someone is considered ordained, commissioned, or licensed under Section 1402:

1. Does the person administer sacerdotal functions customarily administered only by clergy?
2. Does the person conduct worship services?
3. Does the person perform services in the control, conduct, and maintenance of a religious organization?
4. Is the person considered a spiritual leader by his or her religious body?
5. Does the person have a formal license, commission or ordination?<sup>151</sup>

The court in *Wingo* determined that the petitioner had met all five prongs of this test.<sup>152</sup> Another important point from *Wingo* is that the requirement of being “ordained, commissioned, or licensed is a disjunctive phrase,” and someone “who is not ordained can still be a minister” within the meaning of Section 1402, as well as Section 107, by being “duly commissioned or licensed to be a minister.”<sup>153</sup>

### *C. Cantors Provided with Parsonage Allowance*

In Rev. Rul. 78-301, the IRS maintains the position that a Jewish cantor is eligible for the parsonage exemption.<sup>154</sup> The IRS ruled that although a cantor is not ordained, having a bona fide commission, being a full-time employee of a synagogue, and performing substantial “religious worship, sacerdotal, training, and educational functions” of Jewish practices, allows for entitlement to the exemption.<sup>155</sup>

The novelty of this ruling is that merely having a certification of being a trained cantor,<sup>156</sup> which is not required by Jewish law in order to serve as a cantor, allows for entitlement to the parsonage exemption.<sup>157</sup> Interestingly, based on the tenants of Judaism, anyone, even a cantor without training, is able to conduct the same religious rituals and functions of a rabbi, despite lacking the “central qualification for being a rabbi—the ability to answer questions of Jewish Law.”<sup>158</sup>

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<sup>151</sup> Broyde, *supra* note 131 (providing this formulation of the Tax Court in *Knight v. Comm’r*, 92 T.C. 199, 205 (1989)).

<sup>152</sup> *Id.*

<sup>153</sup> *Bonito & Wittenbach, supra* note 13, at 230.

<sup>154</sup> Rev. Rul. 78-301, 1978-2 C.B. 103.

<sup>155</sup> *Id.* The IRS notes that cantor and rabbi each play an integral role in the religious service: the rabbi’s “predominant function . . . is to conduct certain portions of the service and to act as the teacher, while the cantor acts as the representative of the congregation in prayer and recitation of the liturgy.” *Id.*

<sup>156</sup> See Rama, Orah Hayyim 581:1. The role of a cantor is to lead the prayer services, often times with nice sounding melodies. For particular prayer services, the cantor’s leadership is integral, as he or she represents the synagogue.

<sup>157</sup> Broyde, *supra* note 131; see also *Silverman v. Comm’r*, 57 T.C. 727, 732 (1972) (stating that formal ordination is not required by Judaism to commission a cantor, and being “commissioned by the Cantors Assembly” and being “called” to his congregation” to perform ministerial duties, allows for an entitlement to the parsonage exemption).

<sup>158</sup> Broyde, *supra* note 131. See *Silverman*, 57 T.C. at 732 (stating that in Judaism, “certain ecclesiastical duties” can only be done by a rabbi, “[f]or example, the rabbi has the duty of interpreting all questions involving Jewish law . . . [but] because [a] cantor does not perform all of the duties

In fact, Jewish cantors “historically lacked any certification or ordination at all, and many cantors to this day are uncertified.”<sup>159</sup> Even so, the IRS concludes that being involved in the “performance of the sacerdotal rites of Judaism,” is meaningful for Section 107.<sup>160</sup>

Michael Broyde takes this ruling one step further, and argues that the IRS’s ruling can also apply to a religious teacher in an Orthodox Jewish educational institution who has been vested with an ecclesiastical role and authority.<sup>161</sup>

*D. Scope of Orthodox Jewish Rabbis: Application to Women*

Broyde applies the aforementioned rulings to the key issue of whether a woman teaching in an Orthodox Jewish institution is entitled to the parsonage allowance.<sup>162</sup> Before addressing the details of his novel idea, this Note will provide a background of the scope of rabbinic authority within Orthodox Judaism.

Much of the Jewish legal discourse relating to rabbinic authority is focused on who can be eligible for the title of rabbi, while the actual rabbinic ordination is more “a matter of custom or tradition, rather than a formal mandate of Jewish law.”<sup>163</sup> Many rabbis have not been “formally ordained,” and in fact, it is possible for a person who has never received formal ordination to “head a [Jewish] rabbinical seminary.”<sup>164</sup>

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entrusted to the rabbi does not imply that he is not a ‘minister of the gospel.’”). *See also* Rev. Rul 78-301, 1978-2 C.B. 103. (adding that in Judaism, a “congregation is autonomous and the title of cantor is bestowed on an individual when the individual is chosen by the congregation as its religious leader in liturgy and prayer”).

<sup>159</sup> Broyde, *supra* note 131.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* *See* I.R.S. Tech. Adv. Mem 200318002 (Jan. 7, 2003) (ruling that where teachers and administrators were commissioned through a hiring process but were neither ministers of the gospel nor were performing any duties equivalent to those of a Church minister, were not eligible for the parsonage allowance).

<sup>164</sup> Broyde, *supra* note 131. Broyde cites an example of this idea from a responsum of Rabbi Moses Feinstein, a prolific “Jewish Law decisor[] in America of the last century.” *Id.* Broyde understands that in *Iggrot Moshe*, *Yoreh Deah* 3:70, Rabbi Feinstein was discussing whether a rabbi “who was never formally ordained [can] be removed from his . . . pulpit [for] merely lack[ing] ordination,” and that Rabbi Feinstein ruled that he is entitled to the rabbinic position even though he lacks the ordination. *Id.* Rabbi Feinstein’s decision is predicated on the fact that the person provides “ecclesiastical guidance to those who have accepted his authority as one who is wise in matters of Jewish law.” *Id.* *See id.* n.8. Upon careful reading of Rabbi Feinstein’s responsum, however, it does not seem that Rabbi Feinstein is addressing the issue of a rabbi who was not formally ordained. Rather, he is discussing a case of where a community never *appointed* a rabbi, and one particular rabbi assumed the position, and maintained the position for a number of years. The issue is whether this particular rabbi is allowed to continue his duties, and Rabbi Feinstein concludes that he is, even when the community can replace the rabbi with another. The only method of deposing this particular rabbi would be through a legal claim of right. Even though Broyde’s usage of Rabbi Feinstein’s responsum to support the assertion that rabbis do not require a formal ordination is not exact, the proposition is still true: there have been many noted community rabbis who never received any formal ordination, and still performed sacerdotal and rabbinic duties and answered questions pertaining to Jewish Law.

Current practice in most Orthodox institutions disallows the ordination of women to practice in the clergy.<sup>165</sup> One issue is that according to Jewish law, women should not be appointed to positions of authority, known as *serarah*, in the Jewish community and granting a woman the title of “rabbi” would run contrary to this rule.<sup>166</sup> There are aspects of the clergy, however, which women can perform: Jewish law permits women to answer various questions concerning Jewish law.<sup>167</sup> Additionally, there are programs in Israel which have been training women in certain Jewish laws, such as family purity, in an effort to assist women in these matters.<sup>168</sup> Moreover, “rabbinical courts [in] Israel have welcomed women [to serve] as advocates” for divorce law.<sup>169</sup>

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<sup>165</sup> Broyde, *Orthodox Women Clergy?*, *supra* note 5. See Broyde, *supra* note 131.

<sup>166</sup> *Id.* (indicating that for reasons of either *serarah* or tradition, being knowledgeable or even trained does not readily allow a woman to be called a “rabbi”). The source for disallowing women to serve positions of authority (“*serarah*”) is found in Maimonides, *Hilkhot Malakhim* 1:5. The verse in Deuteronomy 17:15 states “You shall surely place a King for you.” Sifrei states that this verse only allows for the appointment of a King in the masculine tense and not in the feminine tense, implying that only a man can be a King of Israel, but not a woman. Sifrei, Deuteronomy Chapter 157. Some authorities maintain that this particular rule of not allowing women to be a King (or queen) is only applicable if a woman is *appointed* to such a position, but should she receive the throne by virtue of inheritance, there has been no violation of *serarah*. *Minkhat Hinukh* 297:1. See also Magein Avot, *Pirkei Avot* 1:10. Maimonides extends the interpretation of Sifrei to include not only kingship, but other types of authoritative positions as well. Maimonides *Hilkhot Malakhim* 1:5. Rabbi Feinstein rules that a woman cannot undertake a position of a Kashrut-inspector, but under dire circumstances, he takes a lenient position, and allows women to perform such services. *Iggrot Moshe*, *Yoreh Deah* 2:44. Rabbi Feinstein believes that even though Maimonides is the most extreme opinion amongst his contemporaries, and very few adopt this position, the generally accepted practice is to defer to Maimonides and follow his opinion. *Id.*

There is a specific debate about whether women can serve as judges for Jewish legal matters, which is related to the issue of *serarah*. Mishnah rules that anyone who is a valid witness can be a valid judge. Mishnah, *Niddah* 6:4. The implication of the Mishnah is that whoever cannot be a valid witness for a Jewish legal matter cannot serve as a judge. A woman is unable to serve as a valid witness. Babylonian Talmud, *Baba Kamma* 88a. Therefore, the rule of the Mishnah should be that a woman is invalid to serve as a judge in a Jewish legal matter. Some disagree with this interpretation, one opinion being Tosafot, stating that a woman can be a valid judge, and that the Mishnah cannot infer any ruling about women, since the Mishnah’s case was only referring to a law affecting men and not women. Tosafot, *Baba Kamma* 15a. Other opinions disagree with Tosafot, and indeed Shulkhan Arukh rules that women are invalid judges. Shulkhan Arukh, *Hoshen Mishpat* 7:4.

Despite the ruling of Shulkhan Arukh, it can be argued that if a Jewish community accepts a woman to a position of authority, even to the position of a judge, there is no violation of *serarah*. This is based on a separate discussion how Deborah the Prophetess was able to serve as a judge, despite contrary ruling that women are invalid judges. Tosafot suggest that Deborah was elected to the position by the Jewish nation, and because she was elected, there is no violation of *serarah*. Tosafot, *Baba Kamma* 15a; See generally Aryeh A. Frimer, *Edited Transcript of “Women in Communal Leadership Positions,” Lecture by Rabbi Aryeh A. Frimer*, available at [http://bermanshul.org/frimer/Women\\_in\\_Leadership.pdf](http://bermanshul.org/frimer/Women_in_Leadership.pdf) (discussing this particular approach of Tosafot as well as the pertinent issues of *serarah*). Sociologist Max Weber describes Deborah’s role as that of “charismatic leadership” and that Jewish people followed her *not* because they were forced to, but because they wanted to. *Id.* at 10.

<sup>167</sup> Piskhei Teshuva, *Hoshen Mishpat* 7:5 (quoting opinions which maintain that a woman is permitted to answer questions relating to Jewish law). See Michael J. Broyde, *Orthodox Women Clergy?*, *supra* note 5 (stating that women who are involved in Jewish outreach regularly answer different questions relating to Jewish law and beliefs).

<sup>168</sup> Broyde, *Orthodox Women Clergy?*, *supra* note 5.

<sup>169</sup> *Id.*

Broyde has suggested that within the Jewish community, institutions should train women for positions of clergy.<sup>170</sup> Women could learn and receive ordination, but of a different genre than ordination for a man—there is no necessity for men and women to have identical forms of ordination.<sup>171</sup> Although Broyde believes that some will protest and argue that his suggestion will “lead down a slippery slope toward egalitarian services,” Broyde maintains that this is unlikely because of a sharp distinction between the way that Orthodox clergy undertake Pastoral and legal matters.<sup>172</sup> Women can be trained to adequately serve in a position of answering a legal question without interfering in other aspects of the clergy. However, a good suggestion to avoid such a slippery slope would be to adopt the practice of England, and start identifying different members of the clergy by distinct titles;<sup>173</sup> proper names will avoid confusing different roles and create boundaries which can avoid a slippery slope.

The more recent advancement of allowing women to learn *Torah* and Jewish law comes as an abrogation to the classical approach, and there is tremendous apprehension to call a woman “rabbi.”<sup>174</sup> Despite the growing role for women in

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<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* Broyde refers to other objections to such training due to a “disagreement with the worldview . . . of [the] specific individuals [who were] involved in organizing the first” female Orthodox clergy program. *Id.* Although Broyde shares many of these objections, he believes that this issue can be circumvented by offering an “alternative program[] with different faculty, staff, . . . and worldviews.” *Id.* See Mayer Fertig, *Agudah Welcomes New Title for Controversial Clergywoman*, JEWISH STAR, Feb. 5, 2010, <http://thejewishstar.wordpress.com/2010/02/03/frum-female-but-a-rabbi/> (discussing the appropriate title for, Sara Hurwitz, whom Rabbi Avi Weiss of Riverdale “considered the first female Orthodox rabbi”). Beyond Hurwitz, there are more women who are studying for the equivalent of Hurwitz’s rabbinic ordination and in four years there will be “four more women . . . acting as rabbis.” *Id.* Hurwitz hopes that the Jewish community will recognize that such women “are talented, sensitive clergy [who] will be a boon to the community.” *Id.* Despite what Hurwitz’s title is, she believes that her “job description is rabbi” and that she “do[es not] care what people call [her, a]lthough a title does help [her] function.” *Id.* Rabbi Shafran added that “it would be good for [Rabbi Weiss and Sara Hurwitz] to come clean, too, about what the entire venture really is: an essential break with the mesorah [“tradition”] of Klal Yisrael [“the Jewish people”].” *Id.* Hurwitz has expressed her sadness with accusations that she has caused a rift within the Jewish people. *Id.* At the time of this article, Hurwitz’s title was not “Mahara’t” but rather was “Rabbah.” *Id.* At first, Agudath Israel of America approved the new title, but it was not for the reasons that Rabbi Weiss was hoping for. *Id.* Rabbi Avi Shafran, spokesman for Agudath Israel stated: “[i]t is laudable that the disingenuous title has been abandoned [and] the new one better reflects the intention of its conferrers.” *Id.* Nevertheless, Hurwitz’s title was eventually repealed as the Rabbinical Council of America, as well as Weiss, agreed that the title would be “Mahara’t.” Noam Amdurski, *Agudah: RCA and Avi Weiss Agreement On “Rabba” is a “Superficial Move,”* MATZAV, Mar. 9, 2010, <http://matzav.com/agudah-rca-and-avi-weiss-agreement-on-rabba-is-a-superficial-move> (last visited Oct. 31, 2010). See also Michael Lynton & Gary Ginsberg, *The 50 Most Influential Rabbis in America*, NEWSWEEK, Jun. 28, 2010, available at <http://www.newsweek.com/2010/06/28/the-50-most-influential-rabbis-in-america.html> (last visited Oct. 31, 2010) (ranking Sara Hurwitz at 36 as “she has had an impact on the roles considered acceptable for modern Orthodox women”).

<sup>173</sup> Broyde, *Orthodox Women Clergy?*, *supra* note 5.

<sup>174</sup> See generally *id.*

the realm of practicing Jewish law, it is unlikely that an Orthodox community will ever give a woman the title of “rabbi.”<sup>175</sup>

In addition to this controversy, an Orthodox Jewish woman might claim that she has been subject to gender discrimination by being unable to serve in the clergy. Nevertheless, there is no cause of action for such a gender discrimination claim. Federal courts have uniformly found that anti-discrimination laws do not extend to relationships between an organized religious group, its clergy, or anyone functioning as a minister.<sup>176</sup> Because of this, a gender discrimination claim will fail.<sup>177</sup>

The rationale for this ministerial exception<sup>178</sup> to the anti-discrimination laws<sup>179</sup> is that government involvement is considered excessive entanglement, and is a violation of the Establishment Clause.<sup>180</sup> The U.S. Court of Appeals stated that the “introduction of government standards to the selection of spiritual leaders would significantly, and perniciously, rearrange the relationship between church and state.”<sup>181</sup> The court indicates that despite the tension between the objectives of gender discrimination suits, a church or synagogue’s “choice may create minimal infidelity to the objectives of Title VII, [but] it provides maximum protection of the

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<sup>175</sup> *Id.*

<sup>176</sup> Martha Minow, *Should Religious Groups Be Exempt from Civil Rights Laws?*, 48 B.C. L. REV. 781, 801 (2007) (citing various cases supporting this assertion).

<sup>177</sup> See *Rockwell v. Roman Catholic Archdiocese of Boston, MA*, No. 02-239-M, 2002 WL 31432673, at \*1 (D. N.H. Oct. 30, 2002). Susan Rockwell, an attorney, proceeded in a pro se case “against various entities in the Roman Catholic Church, as well as the Commissioner of the [IRS],” challenging that the church should not be entitled to a tax exemption on the grounds that the church excludes women from the clergy. *Id.* The U.S. District Court ruled that allowing the plaintiff to succeed in such a gender discrimination claim would “disregard the so-called ‘ministerial exception’ which, generally speaking, provides that state and federal anti-discrimination laws are not applicable to the employment relationship between a church and its ministers or clergy.” *Id.* at \*2.

<sup>178</sup> See Gregory A. Kalscheur, *Civil Procedure and the Establishment Clause: Exploring the Ministerial Exception, Subject-Matter Jurisdiction, and the Freedom of the Church*, 17 WM. & MARY BILL RTS. J. 43, 69 (2008) (discussing that the prevailing understanding of how the ministerial exception operates and how it is characterized as a “subject-matter jurisdiction defense [and] not as a challenge to the legal sufficiency of the plaintiff’s claim.”). Unlike the court in *Petruska v. Gannon University*, 462 F.3d 294 (3d Cir. 2006), most courts understand this exception to be a “constitutionally mandated limitation on a court’s power to hear a particular category of cases brought against religious employers.” *Id.* Although a plaintiff’s claim will be dismissed regardless of how the ministerial exception is understood, the difference is that when a federal or state court “clearly and consistently treat the ministerial exception as a limitation on their subject-matter jurisdiction, they make a powerful statement about the foundations of limited government [and] such statements affirm the penultimate of the state.” *Id.* at 90-91.

<sup>179</sup> See Minow, *supra* note 174, at 801.

<sup>180</sup> *Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985). See also Posting of Paul McGreal, to the Faculty Lounge: Conversations About Law, Culture, and Academia, <http://www.thefacultyounge.org/2010/02/ministerial-exception-shministerial-exception-part-i.html> (Feb. 05, 2010, 11:56 AM) (critiquing the ministerial exception). Even though the Supreme Court has not adopted the ministerial exception, every circuit court which has addressed this issue “has adopted some form of the [ministerial exception] doctrine.” *Id.*

<sup>181</sup> *Rayburn*, 772 F.2d at 1169.

First Amendment right to the free exercise of religious beliefs.”<sup>182</sup> Consequently, a woman cannot bring a gender discrimination suit in this context, as it would constitute excessive government entanglement.<sup>183</sup>

Women’s current status in the role of Jewish clergy has a tremendous affect on Section 107, which will be elaborated upon in Part III. At issue is whether unordained Orthodox Jewish women, who teach in religious schools and are in a similar capacity to ordained teachers, can be entitled to parsonage.

### III. ORTHODOX JEWISH WOMEN’S ENTITLEMENT TO PARSONAGE

Michael Broyde asserts that an Orthodox Jewish woman who teaches in a religious school can be entitled to the parsonage exemption even though she is not ordained. There are a number of steps to Broyde’s reasoning and his argument must be evaluated by carefully analyzing the pertinent case law and IRS rulings.

#### *A. Broyde’s Novel Approach*

Broyde states that an “Orthodox Jewish yeshiva is not [like] a congregation” or a synagogue, rather “[i]t is a parochial school and seminary devoted to the teaching of Judaic studies in conformity with the doctrines of Orthodox Judaism.”<sup>184</sup> Despite this difference, a person who works at a yeshiva and performs the same functions as one of the yeshiva’s ordained rabbis should be entitled to parsonage.<sup>185</sup> Broyde argues that this result should also “apply to women who teach Judaic studies, supervise prayers, and provide religious counseling of the kind provided by rabbis in the school,” because these actions are all sacerdotal in nature.<sup>186</sup>

Broyde clarifies that “[t]his result would not apply to a teacher of the Hebrew language” or the Talmud; if a woman teacher is hired by a yeshiva to conduct religious services, and is required to “adhere to a specific level of religious conduct in her personal life,” inside and outside of school, then the woman is serving as the “functional equivalent of ordination.”<sup>187</sup> Broyde argues that these requirements are a “‘licensing’ in a ministerial function,” and by virtue of this, a woman should be

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<sup>182</sup> *Id.*

<sup>183</sup> I propose that another rationale can be offered to explain the exception to anti-discrimination laws. A woman cannot make a gender discrimination claim when she has actively chosen to join a community which disallows her from becoming ordained. If a Jewish woman has chosen to be Orthodox, and has committed herself to the tenants and practices of that faith, she cannot claim for discrimination since she chose to be a part of that particular system. A woman could just as easily join a different sect of Orthodoxy or even practice Conservative or Reform Judaism should she decide that she wants ordination. Therefore, if a woman agrees to belong to a synagogue where she accepts and follows its guidelines and practices, she cannot claim any gender discrimination.

<sup>184</sup> Broyde, *supra* note 131.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

granted parsonage—being that the yeshiva has employed her and “functionally ‘commissioned’ her as a minister.”<sup>188</sup> Hence, a school provides the requisite commission and religious authorization which is required by Section 1402(c) to grant the parsonage exclusion under Section 107.<sup>189</sup>

Broyde supports his contention from *Knight v. Commissioner*, which involved taxpayer John G. Knight, an unordained Presbyterian pastor who was a licentiate of the Cumberland Presbyterian Church (“CPC”).<sup>190</sup> Among Knight’s duties were to “preach[], conduct[] the worship service, visit[] the sick, perform[] funerals, and minister[] to the needy.”<sup>191</sup> Knight was a “‘licentiate minister of the Gospel,’” and since he was unordained, “he could not moderate or vote,” but he would nevertheless engage in activities that any lay person could do, though a minister would perform them as well.<sup>192</sup> The court applied the *Wingo* balancing test and found that while Knight “did not administer the CPC sacraments” nor “participate in the ‘control, conduct, and maintenance of a religious organization,’” Knight did “conduct[] worship services,” was “‘duly licensed,’ but not ordained” and was “a spiritual leader.”<sup>193</sup> Hence, “[t]hree of the five *Wingo* factors [were] present,” and the court determined that Knight was a licensed minister.<sup>194</sup> Despite Knight’s inability to perform marriages and sacraments, or to participate in church government, the court ruled that it did not diminish the ministry that he performed, and concluded that he was a “minister of the gospel.”<sup>195</sup>

Broyde maintains that facts in *Knight* are analogous “to the role of unordained women employed as Judaic studies instructors and religious role models in Orthodox Jewish yeshivas.”<sup>196</sup> Broyde believes that such women perform sacerdotal roles, and are clearly involved in the “control, conduct, and maintenance of a religious organization” but they lack formal ordination.<sup>197</sup> Consequently, Broyde contends that ordination should not be a determining factor in establishing an ecclesiastical authority of the Jewish faith for purposes of Section 107.<sup>198</sup> For Judaism, “ordination [is] simply less relevant” than for other religions; “there is no analogous ritual to the ‘sacraments’ that, in almost all Christian denominations,” can only be performed by someone who is ordained.<sup>199</sup> Because of the flexible nature of ordination within the practice of Jewish tenants, this

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<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Knight v. Comm’r*, 92 T.C. 199, 200 (1989).

<sup>191</sup> *Id.* at 201.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 205.

<sup>194</sup> *Id.*

<sup>195</sup> Broyde, *supra* note 131. See *Knight v. Comm’r*, 92 T.C. 199, 205 (1989).

<sup>196</sup> Broyde, *supra* note 131.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

particular prong should not be strictly binding when there are additional offsetting factors.

The novelty of Broyde's argument is that women can be entitled to parsonage for mere performance of sacerdotal function even without a formal certification.<sup>200</sup> Broyde maintains that "the functional commission by the yeshiva" along with performing sacerdotal functions, allows someone in the Jewish faith to be eligible for parsonage.<sup>201</sup> He does concede that a formal certification, one that would clearly demonstrate that "women are qualified for such positions . . . would be" beneficial, but nevertheless, is not required should a female Orthodox Jewish teacher decide to take parsonage.<sup>202</sup>

### *B. Evaluating Broyde's Approach*

Broyde's thesis is that Orthodox Jewish women who teach in religious schools are considered "duly commissioned,"<sup>203</sup> and can take parsonage, despite lacking ordination and formal licensing.<sup>204</sup> Broyde's approach, however, is not supported by case law, and relying on his theory would be an abuse of the parsonage exemption. Although the court in *Wingo* states that "duly ordained, commissioned, or licensed" is a disjunctive phrase and that not all elements are necessary,<sup>205</sup> there is no authority that relies on a mere commission, without a formal license or ordination, to entitle a person to parsonage. While courts *have* allowed unordained taxpayers to take parsonage,<sup>206</sup> no court has extended this to someone who has been commissioned but lacks both ordination and formal licensing. Entitling an unordained woman who lacks a formal certification constitutes an abuse of the tax exemption.

An internal and implicit commission and license should not replace formal certification. The court in *Salkov v. Commissioner* explains that a license is "an official document;"<sup>207</sup> an implicit licensing does not fit within the court's understanding of the statute. Moreover, the Regulations' minimum requirement is that a person is "ordained, commissioned, or licensed,"<sup>208</sup> and although it applies to "various classes of ministry within a particular religious body,"<sup>209</sup> a female Orthodox teacher who is both unordained and unlicensed should not be eligible. The court in *Wingo* states that "duly ordained, commissioned, or licensed . . . is

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> Broyde, *supra* note 131.

<sup>203</sup> 26 C.F.R. § 1.1402(c)-5(a)(1).

<sup>204</sup> Broyde, *supra* note 131.

<sup>205</sup> *Wingo v. Comm'r*, 89 T.C. 922, 933 (1987).

<sup>206</sup> See *Knight v. Comm'r*, 92 T.C. 199 (1989); *Wingo*, 89 T.C. at 922.

<sup>207</sup> *Salkov v. Comm'r*, 46 T.C. 190, 197 (1966).

<sup>208</sup> *Knight*, 92 T.C. at 204.

<sup>209</sup> *Id.* at 203.

disjunctive,”<sup>210</sup> but allowing a woman who fulfills only one of these three requirements constitutes an abuse of Section 107. No court has taken such a liberal approach, and there is no special reason why it should be applied to Orthodox women teaching in religious schools. Therefore, because Orthodox women are generally precluded from ordination, considering them “minister[s] of the gospel”<sup>211</sup> on the strength of an implicit commission and lack of a formal certification and license would be an exploitation of the parsonage exemption.

A central part of Broyde’s argument is based on *Knight*. Although unordained Orthodox Jewish women who teach in religious schools practice similar roles as the pastor in *Knight*, the ruling is not applicable. In *Knight*, the pastor was explicitly and formally licensed even though he was not ordained.<sup>212</sup> The pastor was a licentiate pursuant to the CPC constitution, despite being unable to perform all that an ordained CPC minister could.<sup>213</sup> The pastor had become a “licentiate,” and even just reaching this status was a “solemn occasion and a serious and necessary step toward ordination.”<sup>214</sup> The ruling in *Knight* should not apply to women who have not received a formal certification and are merely licensed because of the “functional commission by the yeshiva and the performance of sacerdotal functions.”<sup>215</sup>

Moreover, implicit in *Knight* is the notion that a person can only be considered a “minister of the gospel” when he or she satisfies the *Wingo* balancing test, with an emphasis on being formally certified, in some capacity, to perform sacerdotal functions.<sup>216</sup> Although Orthodox women might fulfill the three types of the ministerial services found in 26 C.F.R. Section 1.1402(c)-5,<sup>217</sup> courts also emphasize formal licensing and certification. Leniency in this matter would result in an exploitation of the parsonage provision.

Indeed, Broyde does concede that although a formal certification—which is not provided by a teacher’s functions in a religious school—would prevent abuse, it is nevertheless not required for entitlement to parsonage.<sup>218</sup> However, Broyde’s assertion is not supported by authority, and as per the decisions in *Knight* and *Wingo*, entitling an uncertified and unordained woman to parsonage *would* constitute abuse.

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<sup>210</sup> *Wingo v. Comm’r*, 89 T.C. 922, 933 (1987).

<sup>211</sup> 26 U.S.C. § 107.

<sup>212</sup> *Knight v. Comm’r*, 92 T.C. 199, 203 (1989). *See also id.* at 205.

<sup>213</sup> *Id.* at 203.

<sup>214</sup> *Id.* at 199.

<sup>215</sup> Broyde, *supra* note 131.

<sup>216</sup> *See Knight*, 92 T.C. at 205. *See also* Broyde, *supra* note 131 (formulating the language of the fifth prong of the *Wingo* balancing test as: “Does the person have a formal license, commission or ordination?”).

<sup>217</sup> 26 C.F.R. § 1.1402(c)-5 (requiring “ministration of sacerdotal functions . . . conduct of religious worship, and the control, conduct, and maintenance of organizations” within the congregation).

<sup>218</sup> Broyde, *supra* note 131.

*C. Identifying Legitimate Formal Certifications*

Courts place a strong importance on having an official license. Formal licensing is a way to ascertain whether a person is someone who promotes and possesses spiritual leadership. One of the five factors in *Wingo* is whether a taxpayer is “considered to be a spiritual leader by his religious body.”<sup>219</sup> This prong should not be construed as a discrete requirement—the ordination, license, and commission is a manifestation of the other factors as well. Accordingly, the required licensing should reflect a type of person who acts as a spiritual leader that “control[s], conduct[s], and maintain[s a] religious organization.”<sup>220</sup> Moreover, the Tax Court indicates that a “minister of the gospel”<sup>221</sup> must hold an influential position in a religious community, and his or her degree should certify that role.<sup>222</sup> Therefore, the certification and formal education must indicate a person’s spiritual and religious leadership. As such, determining the type of license which is meaningful for Section 107 is crucial to understanding the scope of the parsonage exemption.

A formal educational degree, which attests and certifies a person’s skill, knowledge, and aptitude in a particular discipline, should count as a formal license in that discipline. Therefore, a degree relating to spiritual leadership and religious observance should be considered a formal certification, one that can be meaningful for the purposes of Section 107.

A theological degree which certifies a person’s *religious* fitness and aptitude is the archetypal formal license. Being a spiritual leader is not a function of merely being knowledgeable; even a heretical person can be knowledgeable in the tenets and practices of a particular religion. The paramount concern is that a minister’s conduct and control of a community is within a spiritual capacity and that he or she is involved in life-cycle events.<sup>223</sup> A degree which merely reflects scholarship does not necessarily certify a person’s ability to serve as a spiritual leader who can control and maintain a religious organization.<sup>224</sup> As a result, parsonage is not merely a reward for being intelligent and knowledgeable in a particular religion, rather, Congress entitles those who are certified as spiritual leaders and religious guides to a specific tax exemption. Congress will consider someone who has been licensed with a theological degree that certifies that person’s ability to promote and

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<sup>219</sup> See *Knight v. Comm’r*, 92 T.C. 199, 204 (1989).

<sup>220</sup> *Id.* Some factors of the test, for example, are whether a taxpayer “conducts worship services,” if a taxpayer “performs services in the ‘control, conduct, and maintenance of a religious organization,’” and whether a taxpayer is “‘ordained, commissioned, or licensed.’” *Id.*

<sup>221</sup> 26 U.S.C. § 107.

<sup>222</sup> See *infra* text accompanying notes 229-36.

<sup>223</sup> See *Silverman v. Comm’r*, 57 T.C. 727, 731 (1972) (stating that petitioner had “performed marriages and officiated at funerals and services at houses of mourning.”).

<sup>224</sup> See *Wingo v. Comm’r*, 89 T.C. 922, 935-36 (1987).

engage in religious observance, rather than someone who has received an academic degree in a particular aspect of religion.

*D. Purpose of Parsonage Exemption and Application to Orthodox Jewish Women*

This approach, which emphasizes formal licensing and certification of a theological nature, is better understood by analyzing the statutory purpose of the parsonage exemption. Scholars have argued that parsonage has a legitimate purpose. Some maintain that Congress intended to confer a tax benefit to an economically deprived group.<sup>225</sup> Others suggest that the tax exemption of a clergy's home is because a clergyman's home is used for, and involved with, church related activities.<sup>226</sup> An alternate explanation can illustrate the legitimacy of the exemption and its relevance to unordained Orthodox Jewish women.

Parsonage is a form of indirect government support of religion. It allows a tax exemption to an individual who promotes religion and spiritual leadership. Although the United States Supreme Court has stated that tax exemptions for religious institutions only create a "minimal and remote involvement between church and state"<sup>227</sup>—tax exemptions still indirectly support religion.<sup>228</sup> Establishing that the legislative purpose of tax exemptions does not support or establish religion does not, by itself, indicate its constitutionality—its end result cannot hinge on excessive government entanglement.<sup>229</sup> The Supreme Court in *Walz* addressed this issue by stating that *allowing* an exemption results in less government entanglement; eliminating such exemptions would actually "expand the involvement of [the] government by giving rise to tax valuation of church property, tax liens, [and] tax foreclosures . . . ."<sup>230</sup> The Supreme Court indicates a necessary balance between direct involvement and conscious separation, yet ultimately, licensing through theological degrees indicates that parsonage indirectly encourages religious practice and observance though it does not directly support religious function.<sup>231</sup>

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<sup>225</sup> See *supra* text accompanying notes 92-95.

<sup>226</sup> See *supra* text accompanying notes 96-99.

<sup>227</sup> *Walz v. Tax Comm'n of the City of N.Y.*, 397 U.S. 664, 676 (1970).

<sup>228</sup> This is in contrast to Chemerinsky, *supra* note 119, at 735, who argues that parsonage is "blatant favoritism of religion."

<sup>229</sup> *Walz*, 397 U.S. at 674.

<sup>230</sup> *Id.* at 674.

<sup>231</sup> This unique approach to parsonage does not affect its constitutionality and is merely another element in the tension between the Establishment Clause and the Free Exercise Clause. Although some may argue that this fails the second prong of the *Lemon* test because its principal or primary effect advances religion, nevertheless, one can counter that irrespective of how Congress determines eligibility, because Congress is only "reinforce[ing] the desired separation" and "restrict[ing] the fiscal relationship between church and state," parsonage is not unconstitutional. *Id.* at 676.

Parsonage is more nuanced than a regular tax exemption because eligibility is limited to someone who can be categorized as a “minister of the gospel.”<sup>232</sup> The IRS rulings and pertinent case law have analyzed who fits into this category, and there is a striking pattern as to what kind of people have been entitled to this exemption. Throughout many decisions, courts have ruled that Congress grants the parsonage exemption to a person who is recognized as being a promoter of religious values, guidance, and beliefs.<sup>233</sup> This proposition may sound alarming, but the following cases highlight its merit.

In *Salkov v. Commissioner*<sup>234</sup> the court ruled that because a Jewish Cantor was perceived by his community to be a “spiritual official and leader,” it was a “further persuasive factor” in determining that the cantor was a minister for Federal tax purposes.<sup>235</sup> Hence, the character traits of the petitioner in *Salkov* were a necessary aspect of establishing his eligibility under Section 107.

Additionally, the court in *Silverman v. Commissioner* ruled that a cantor can be considered “commissioned” merely by “receiving a ‘call’ from the congregation which desires his services.”<sup>236</sup> The court emphasizes that being a messenger for a congregation’s prayer service and an emissary for the community<sup>237</sup> are driving factors in establishing entitlement to parsonage. The novelty of *Silverman* is that a person who is seen as a representative of a congregation actually fulfills one of the three requirements of 26 C.F.R. Section 1.1402(c)-5, namely, to be “duly ordained, commissioned, or licensed.”<sup>238</sup>

In *Knight*, the court adds that it is insufficient to merely establish whether a person is “ordained, commissioned, or licensed”—there is a further need to inquire “whether the taxpayer’s duties and functions were appropriate” for such a minister.<sup>239</sup> Implicit within this decision is that in order to qualify under Section 107, it is necessary to ascertain whether a person is serving a religious role and is spiritually influential, along with an official licensing or commission. Determining what kind of person promotes spirituality and advances religion is an essential part of establishing the kinds of formal licensing and degrees which can entitle a person to parsonage.

<sup>232</sup> 26 U.S.C. § 107.

<sup>233</sup> See *supra* text accompanying notes 205-13. See also Foster, *supra* note 10, at 167-68 (arguing that even if Congress would make receipt of a tax benefit conditional on the recipient’s occupation, because a clergy position has a religious quality, which is necessary for the benefit to be attached, it would hardly be considered “secular”).

<sup>234</sup> 46 T.C. 190 (1966).

<sup>235</sup> Wingo v. Comm’r, 89 T.C. 922, 933 (1987) (citing *Salkov*, 46 T.C. at 197-98).

<sup>236</sup> *Silverman v. Comm’r*, 57 T.C. 727, 731 (1972). No other decision has indicated that “licensing” or “ordination” can be established in such a way because these requirements demand a more formal certification.

<sup>237</sup> See *Salkov*, 46 T.C. at 198.

<sup>238</sup> 26 C.F.R. § 1.1402(c)-5(a)(1) (emphasis added). Congress refers to this definition in regards to self-employment tax purposes. *Id.* See *supra* text accompanying notes 124-27.

<sup>239</sup> *Knight v. Comm’r*, 92 T.C. 199, 203 (1989).

The potential for abuse and exploitation of the parsonage exemption is offset by Congress' requirement for a person who is commissioned and licensed to promote spiritual leadership and religious activity. To ensure that a person meets these criteria, the formal certification must reflect a person's ability to fulfill this objective. How, therefore, can an Orthodox Jewish woman who teaches in a religious school be entitled to parsonage?

*E. How Unordained Orthodox Women Can Receive Parsonage*

For unordained Orthodox Jewish women, there are some academic degrees which might be useful for entitlement to parsonage.<sup>240</sup> Ascertaining what kind of degree is considered wholly academic or theological in nature might create some administrative difficulty, but it is nothing beyond the capability of a trier of fact. Enumerated below are a few examples of degrees which could be helpful.

One avenue for an unordained Orthodox Jewish woman is a teaching certification by a teacher's seminary, such as the Bais Yaakov Teachers' Seminary.<sup>241</sup> This particular degree "certifies women" to instruct and teach Torah to Jewish children and unite their hearts to love and fear God."<sup>242</sup> Additionally, the degree stresses that a certified woman should "set the faithful, tender youth on a straight course and impress the path of life unto their hearts."<sup>243</sup> This degree appears to be wholly theological and is more than just a certification of knowledge; it certifies a person's ability to contribute as a spiritual leader within a community. Such a degree should be considered a formal license within Section 107.

The certificate of achievement for completing the Yeshiva University Graduate Program for Women in Advanced Talmudic Study ("GPATS")<sup>244</sup> could also be regarded as a theological degree.<sup>245</sup> Although women who complete the two year program are awarded a certificate for Advanced Talmudic Studies, "the goal of GPATS is to develop an elite cadre of female scholars . . . who will serve as leaders and role models for the Orthodox Jewish community."<sup>246</sup> Being that its functional purpose is to prepare women to be leaders in a community, the degree should be recognized by Congress as an official licensing and commission significant for Section 107.

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<sup>240</sup> See Broyde, *supra* note 131. Their entitlement is also contingent on performing services of sacerdotal duties and functions in the "control, conduct, and maintenance of a religious organization." *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> YeshivaUniversity.edu, Graduate Program for Women in Advanced Talmudic Studies, <http://www.yu.edu/gpats/> (last visited Oct. 31, 2010).

<sup>245</sup> See Broyde, *supra* note 131.

<sup>246</sup> YeshivaUniversity.edu, *supra* note 244.

A degree from GPATS is more meaningful within Section 107 than a graduate degree in Talmudic literature, a PhD in Jewish history, or a teaching degree from Azrieli Graduate School of Jewish Education and Administration. These degrees emphasize the goal of being knowledgeable and capable of teaching, lecturing, and instructing but are not expressly aimed at facilitating religiosity.<sup>247</sup> They are more academic in nature, and cannot be helpful for a female Orthodox teacher who wants to receive parsonage.

Interestingly, despite the aforementioned suggestions, Orthodox Jewish schools have started offering parsonage to unordained women, who lack a formal license of a theological form. These schools have begun allowing women who perform sacerdotal services which should entitle any duly licensed, commissioned or ordained person to parsonage, even though they have only graduated from Stern College for Women. Can an undergraduate degree from an Orthodox Jewish college be considered a “formal certification”? These schools must either rely on Broyde’s more liberal approach, or are assuming that Stern College for Women grants a formal certification along with a simple undergraduate bachelor’s degree. Indeed, Stern graduates receive an associate’s degree in “Hebrew language, literature, and culture” along with a bachelor’s degree.<sup>248</sup> It is possible that these schools consider this to be a formal certification, one that is meaningful for Section 107. The curriculum of this associate’s degree is merely academic in nature, as it provides Stern graduates with a comprehensive curriculum in Judaic Studies. It is not, however, theological. Thus, Orthodox Jewish schools that allow unordained female faculty members to take parsonage because of an associate’s degree are incorrectly assuming that such women have received a formal license.

A number of the aforementioned suggestions could prove to be beneficial for an Orthodox woman who is trying to benefit from parsonage. Being that this is a recent phenomenon, and that there is little documentation on point, only time will tell whether these degrees can be effective.

#### CONCLUSION

There are many layers to the parsonage exemption, and it continues to incite discussion and debate. Who is considered a “minister of the gospel”? What amount can be excluded? Although the exemption is still valid, how long is its constitutional shelf-life? One religious community—a small sliver of the

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<sup>247</sup> See YeshivaUniversity.edu, Azrieli School of Jewish Education and Administration: Our Mission, <http://www.yu.edu/azrieli/index.aspx?id=30962> (last visited Oct. 31, 2010). “Through its Master of Science curricula, Azrieli trains men and women who hold advanced knowledge in Jewish studies, for careers in Jewish elementary or secondary education. Programs leading to the Specialist’s Certificate and the Doctor of Education degree prepare promising educators for administrative, supervisory, communal and academic leadership in Jewish education.” *Id.*

<sup>248</sup> Yeshiva University.edu, Stern College for Women, <http://www.yu.edu/catalog/women.aspx?id=8102> (last visited Oct. 31, 2010).

population—highlights these issues, and in some cases, there is no resolution. Although scholarly discussions of parsonage’s purpose merely highlight the constitutional debate and do not provide a concrete outcome, it nevertheless provides insight for an unordained Orthodox Jewish woman’s entitlement to parsonage. Congress recognizes that a person who is certified to embody and promote religious leadership can be eligible for parsonage, and if a woman has such certification, she can be eligible to take parsonage. To allow an unordained and uncertified Orthodox Jewish woman to take parsonage constitutes an abuse, and only when such a woman has an official document will she be entitled to the provision. Thus, the door is not closed for these women, but the space is tight. There is a tension between the legitimacy of parsonage and considering unordained women for Section 107, and only when such women receive a form of theological certification will they be eligible for parsonage.