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New Jersey's Religious Property Tax Exemption: An Erroneous Quid Pro Quo Exchange

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Introduction

"Without Thomas Jefferson and James Madison, there would have been no Virginia Statute on Religious Freedom, and no basis for the most precious clause of our most prized element of our imperishable Bill of Rights - the First Amendment to the United States Constitution."

— Christopher Hitchens

The teachings of Presidents Thomas Jefferson and James Madison envisioned a society in which the state is not dominated by or entangled with religion and a society that granted the opportunity of an individual to freely choose his religion and not be persecuted by that choice. Few concepts are more deeply embedded in the fabric of our national life than for the government to exercise benevolent neutrality toward churches and religious exercise. Generally, this practice was acceptable so long as no church was favored over others and none suffered interference.[1] It was upon this foundation that many of our nation's laws were created, including the religious property tax exemption. The religious property tax exemption is an opportunity for a religious organization to obtain preferential tax treatment on a piece of property, which in turn allows the religious organization to allocate more of their financial capital toward the improvement of their community. Thus, the religious property tax exemption is a quid pro quo exchange for a benefit derived for the community. It is in this manner that the government can indirectly assist local communities through religious organizations while preserving the teachings of Presidents Jefferson and Madison.

[1] *Walz v. Tax Com. of N.Y.*, 397 U.S. 664, 677 (1970).

Unfortunately, the implementation of the religious property tax exemption has not been so decisive. Courts have struggled to properly implement the religious property tax exemption because of the strict application of the ecclesiastical abstention doctrine. The ecclesiastical abstention doctrine and its prohibition from government definition of religion has caused ambiguity within the property tax exemption and has led many New Jersey courts to make religious determinations on a case-by-case basis. On the one hand, courts and states have promoted deference towards religious groups and granted exemptions willingly, to avoid getting entangled in church affairs by asking too many questions. This has led to a situation in which it has become fairly easy to get an exemption, even if it was not deserved and in response, many New Jersey courts have respected the independent nature of religious institutions and granted applications for exemption without a thorough analysis on the merits. On the other hand, when one is given an exemption but another is not, there must be principled distinctions we can draw or else it could indicate possible discrimination and preference based on religion.[2]

States, such as New Jersey with its leading property tax rates, need to find a balance appropriate to the constitutional separation of the Church and State. Religious property tax exemptions, in their very nature, are a governmental determination of religion for tax purposes and thus, violate Jefferson's wall of separation between Church and State.[3] However, society has deemed the probative value bestowed upon community as far outweighing the potential entanglement issue. This reasoning is why all of the 50 States provide for tax exemption of

[2] The court in *Larson v. Valente*, 456 U.S. 228, 244 (1982), held that the Establishment Clause's clearest command prevents discrimination among religions by selecting one over another valid option. However, *Larson's* rare use likely reflects that legislatures seldom pass laws that make "explicit and deliberate distinction between different religious organizations" as contemplated in *Larson*. *Id*. at 247 n. 23; *see also Church of the Lukumi Babaul Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 523 (1993). Thus, states often do not grant some organizations an exemption and hinder other applicants due to the facially neutral creation of the law.

[3] *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982).

places of worship, most of them doing so by constitutional guarantees.[4] Thus, the process and determination of the religious property tax exemptions must be monitored and amended to limit government's constant entanglement with religion.

Currently, New Jersey has an affinity towards religious deference and municipalities often grant applications of religious tax exemption to all types of religious property. Taxpayers who abuse this exemption create a reciprocal effect among taxpayers of the same municipality, as a decrease in one property's taxation shifts the tax burden onto another taxpayer's property. New Jersey's religious property tax exemption codified in N.J.S.A. § 54:4-3.6, must be amended to deter abuse and prevent individuals and organizations from scheming to receive an improper exemptions. This Note recommends that N.J.S.A. § 54:4-3.6 be amended to remove both dual functioning and residential property from the list of property types eligible for consideration of the religious property tax exemption. The removal of these two types of property from N.J.S.A. § 54:4-3.6 will prevent and deter taxpayers that attempt to avoid paying their property taxes by having their property classified for religious use.

First, to establish context, this Note will examine and discuss relevant federal case law from *Walz v. Tax Com. of N.Y.* to the present. Second, it discusses relevant New Jersey case law of N.J.S.A. § 54:4-3.6, and will examine the two mechanisms upon which New Jersey taxpayers can seek religious property tax exemptions, New Jersey's parsonage exemption and New Jersey's church building exemption. Finally, it discusses the ecclesiastical abstention doctrine, its effects on N.J.S.A. § 54:4-3.6, and suggests a possible amendment to N.J.S.A. § 54:4-3.6, based on federal jurisprudence, to avoid future abuse by prohibiting the eligibility of both dual functioning and residential properties from claiming the religious property tax exemption.

[4] *Walz*, *supra* note 1, at 676.

I. Federal Case Law: the Constitutional Framework for State Religious Property Tax Exemptions.

As a threshold matter, the Religion Clauses of the First Amendment provide: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[5] The first of the two Clauses, commonly known as the Establishment Clause, commands a separation of church and state penned by Presidents Jefferson and Madison; and the second, the Free Exercise Clause, requires government respect for and noninterference with, the religious practices of our general public. Accordingly, while the two Clauses express complementary values, they often exert conflicting pressures, especially if government attempts to avoid a free-exercise problem by creating a religious exemption to existing law, that exemption may give rise to an Establishment Clause violation.[6] Nevertheless, both clauses remain as constant foundation of all religious jurisprudence in our judicial system.

The decision in *Walz v. Tax Com. of N.Y.* holds that the religious property tax exemption is constitutional. The decision does not explain in what situations the exemption should or should not be allowed and reserves that matter to the states. The court held that the legislative purpose of a tax exemption is not aimed at establishing, sponsoring, or supporting religion.[7] Exempted status is also not governmental sponsorship of a religion since the government does not transfer part of its revenue to a church but simply abstains from demanding that the church support the state.[8] In *Walz*, a real estate owner in Richmond County, New York, sought an injunction in the New York courts to prevent the New York City Tax Commission from granting property tax

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[5] *U.S.c.s. Const. Amend*. 1.
[6] *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005); *See Locke v. Davey*, 540 U.S. 712, 718 (2004). ("These two Clauses . . . are frequently in tension."); *Walz, supra note 1*, 397 U.S., at 668-669 ("The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other.").
[7] *Walz, supra* note 1, at 674.
[8] *Id*. at 675.

exemptions to religious organizations for religious properties used solely for religious worship.[9] The court reasoned, "[i]n the exercise of this [taxing] power, Congress, like any State legislature unrestricted by constitutional provisions, may at its discretion wholly exempt certain classes of property from taxation, or may tax them at a lower rate than other property."[10]

In *Texas Monthly, Inc. v. Bullock*, Justice Brennan wrote that it is the court's duty to ensure that any scheme of exemptions adopted by the legislature does not have the purpose or effect of sponsoring certain religious tenets or religious belief.[11] The law must remain neutral and avoid any entanglement with religion. In *Texas Monthly*, Texas Monthly Inc., a nonreligious publisher, claimed the local tax exemption for religious publications promoted religion and was a violation of the First Amendment's Establishment Clause.[12] The court agreed with Texas Monthly Inc., that the exemption for religious publication violated the Establishment Clause by advancing religion.[13] Applying the *Lemon v. Kurtzman* test,[14] Justice Brennan, for the plaurality, found that the Texas statute did not pass constitutional muster because a class of taxpayers that benefited from the exemption did not reflect "a secular purpose and effect."[15] Unlike the property tax exemption at issue in *Walz*, which extended benefits to a broad class of nonreligious entities in addition to religious groups, the Texas statute was narrowly tailored to benefit religious

[9] *Id*. at 666.
[10] *Id*. at 679-80.
[11] *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 16-17, 109 S.Ct. 890, 900 (1989).
[12] *Id*.
[13] *Id*.
[14] *403 U.S. 602 (1971)* (Writing for the Court, Justice Burger stated that the new three-part test, which was designed to evaluate whether a law violated the Establishment Clause, would avoid "the three main evils against which [that clause] was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity. "'Thus, the Lemon test first provides that a "statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion.").
[15] *Tex. Monthly*, *supra* note 11, at 5 (plurality opinion).

organizations alone.[16] The holding in *Texas Monthly* suggests that the federal government should only allow exemptions if they are narrowly tailored to a secular purpose.

The outcome in *Texas Monthly* was a direct reference to Justice Brennan's concurrence in *Walz*. It is important to individually address Justice Brennan's position in *Walz* because it was in *Walz* that he postulated that government entanglement was likely if exemptions were granted to religious organizations. Justice Brennan recognized, that "governmental purposes for granting religious exemptions may be wholly secular, exemptions can nonetheless violate the Establishment Clause if they result in extensive state involvement with religion."[17] His reasoning does not "embrace the entanglement/accommodation reasoning," but rather, that the government has two basic secular purposes for granting real property tax exemptions to religious organizations, societal welfare and a pluralistic society.[18] Proponents of religious exemptions can argue that exemptions promote societal welfare because they contribute to the well-being of the community in a variety of nonreligious ways, and thereby bear burdens that would otherwise either have to be met by general taxation.[19] Furthermore, it can be argued that religious exemptions serve the benefit of the community at large because they promote a pluralistic society by encouraging individuals to form a variety of private, nonprofit groups that contribute to the diversity of association, viewpoint, and enterprise essential to a vigorous, pluralistic society.[20]

This promotion of societal welfare and a pluralistic society establishes the framework for the constitutional concern with regards to balancing the religious property tax exemption and the

[16] *See* Id.
[17] *Walz*, supra note 1, at 689-90 (Brennan, J., concurring).
[18] *See* Id.
[19] *Id*.
[20] *Id*.

government's fear of entanglement. The Supreme Court has long recognized that "the government may . . . accommodate religious practices . . . without violating the Establishment Clause."[21] The Court reaffirmed that "there is room for play in the joints between"[22] the Free Exercise and Establishment Clauses, and allows the government to accommodate religion beyond free exercise requirements, without offense to the Establishment Clause. It is in-between these joints that the state real property tax exemption laws are crafted and enforced. It is between these joints that potential for abuse at the local level is also possible.

The government, due to the wall of separation between church and state, must remain neutral and cannot favor one side in particular. The government in their attempt to accommodate both sides often stress deference toward religious decisions but this decision often brings about the potential for abuse. Deference often creates too much room between the joints and leaves the government granting an exemption and receiving nothing in return. Nevertheless, the Supreme Court has often held that governmental exemptions need not concern itself with this predicament because religious property tax exemptions to churches are an indirect economic benefit and also gives rise to some, but yet a lesser, involvement than taxing them.[23]

II. Relevant New Jersey case law of N.J.S.A. § 54:4-3.6 – New Jersey's Tax Exempt Property Statute.

New Jersey residents are always in a consistent struggle against the government because of the state's expensive cost of living and rising property taxes. According to the Tax Foundation, in 2008, New Jersey ranked first in property taxes per capita and first in percentage

[21] *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144-145 (1987); *Locke*, *supra* note 6, 540 U.S. 712.
[22] *Davey*, 540 U.S. at 718 (*quoting Walz*, supra note 1, at 669.).
[23] *Walz*, supra note 1, at 674.

of the median value of an owner occupied house.[24] New Jersey (like most states) has designed programs and policies to alleviate the tax burden on certain religious organizations despite the high property tax burden on most of the state's population. In fact, all of the 50 States provide for tax exemption of places of worship, most of them doing so by constitutional guarantees.[25] The allowance of a religious tax exemption is not unconstitutional sponsorship and governmental entanglement since the government does not transfer part of its revenue to religious organization but simply abstains from demanding that the religious organization support the state.[26] New Jersey courts have repeatedly held that an exemption is granted as a quid pro quo for the benefit conferred upon the community and has granted each exemption on a case-by-case basis.[27] The preferential tax treatment each religious organization receives is a form of "aid" that allows them in turn, to allocate more of their assets toward the community. Thus, religious property tax exemptions become an indirect aid from the government to the community.

New Jersey codifies its tax exempt property statute under *N.J.S.A.* 54:4-3.6. The statute divides the religious property tax exemption into two categories: the parsonage exemption and the church building exemption. The parsonage exemption allows for members of the clergy to live in church-provided housing—often called a parsonage—either on the church grounds or on a nearby church-owned property. This exemption provides tax-free housing for clergy in an exchange for them being able to meet the needs of their congregations by conducting church affairs in an alternative location, possibly a location outside the house of worship. The church building exemption is a tax exemption granted to a religious organization for up to two pieces of

[24] http://www.njslom.org/SG-Property_Taxes.html (last visited on December 19, 2014 at 4:42PM).
[25] *Walz, supra* note 1, at 676.
[26] Id. at 675.
[27] *Chester Borough v. World Challenge, Inc.*, 14 N.J. Tax 20, 26 (1994); *See Kimberley Sch. v. Montclair*, 60 A.2d 313, 314 (N.J. Sup. Ct. 1948); *Young Women's Christian Ass'n of Phila. v. Monmouth County Bd. of Taxation*, 92 N.J.L. 330 (N.J. Sup. Ct. 1919).

additional church owned property. The church building exemption provides an exemption for additional property outside the house of worship if it is being exclusively used for religious purposes. Currently, the owner of a piece of property in New Jersey could apply for a religious property tax exemption using either category and denial of one exemption would not prohibit the application in the alternative.

a. Religious Purpose Exemption: Parsonage Exemption.

Most states have parsonage exemptions. A parsonage is a piece of church owned property that is used and occupied as a residence by the officiating clergymen of a church. The parsonage exemption is therefore derived from the association of the parsonage with an exempt church. If there is no exempt church there can be no parsonage exemption.[28] New Jersey's Legislature created an exemption for parsonages in order to facilitate the efforts of religious corporations to serve the citizens of New Jersey and to some extent, relieve the State of its burden to care for the social welfare of its citizens.[29] This classification strikes a balance between the State's constitutional requirement to equally distribute its tax burden and the State's interest in facilitating religious corporations' efforts to serve the citizens of New Jersey.[30]

The parsonage exemption gives rise to an important question: does a church have to be an officially recognized institution by the municipality to qualify for the parsonage exemption or can someone claim the exemption for a personal church/synagogue inside their home? The statute does not differentiate between the two options but does list the pertinent factors to be satisfied before a piece of property can gain parsonage tax exempt status. The determining factors of a parsonage pursuant to *N.J.S.A.* 54:4-3.6 are: (1) the building(s) must be occupied as a

[28] *Mesivta Ohr Torah of Lakewood v. Twp. of Lakewood*, 24 N.J. Tax 314, 329 (2008).
[29] *Grace & Peace Fellowship Church v. Cranford Tp.*, 4 N.J. Tax 391, 399 (Tax Ct.1982).
[30] *World Challenge, Inc., supra* note 27, at 30-31.

parsonage by the officiating clergyman of a religious corporation; (2) the entity claiming the exemption must not be conducted for profit, nor may the building or land be conducted for profit; (3) the entity claiming the exemption must own the property; (4) the entity must be authorized to carry out the purposes of a parsonage; and (5) the buildings, not exceeding two, actually occupied as a parsonage by the officiating clergymen of any religious corporation of this State.[31]

New Jersey courts, in determining what qualifies as a church and its subsequent parsonage, have stressed the need for substance over form. A physical location is less important than the teachings and contents inside said location. "A church [or synagogue] is something more than merely a building in which the actual religious services are held; a church [or synagogue] is a building set apart for public worship, . . . but the conclusion does not follow that every place in which religious services are conducted is a church [or synagogue]."[32] In the case of *Mesivta Ohr Torah of Lakewood v. Township of Lakewood*, the Tax Court of New Jersey held that two homes owned by a religious organization are entitled to the parsonage exemption under New Jersey law.[33] Lakewood had denied exemption on grounds that plaintiff did not operate a synagogue or serve a congregation as the parsonage exemption mandates, but rather, it ran a school that served the members of the community. The Tax Court found, different than the town, that "while the synagogue is situated on school property and in a building that also houses educational pursuits, the plaintiff maintains a separate and independent synagogue at the facility."[34] There is no requirement in *N.J.S.A.* 54:4-3.6 that a house of worship occupy the entire building in which it is located, however, the court concludes that the separate physical facilities

[31] *Friends of Ahi Ezer Congregation, Inc. v. Long Branch City*, 16 N.J. Tax 591, 593-94 (1997).
[32] *Id.* at 598 (*quoting State v. Cameron*, 100 N.J. 586, 595, 498 A.2d 1217 (1985)).
[33] *See Mesivta Ohr Torah of Lakewood v. Twp. of Lakewood*, *supra* note 28, at 329.
[34] *Id*. at 331.

for the synagogue in this case are sufficient to satisfy statutory requirements for a maintaining a house of worship.[35] The court acknowledged that they must therefore proceed with caution when determining whether a congregation exists for purposes of *N.J.S.A.* 54:4-3.6.[36]

b. Religious Property Use Exemption: Church Building Exemption.

As religious organizations grew in size and expanded within the community the need for a second religious based property tax exemption developed. The church building exemption was established to meet the growing presence of a religious organization as well as the societal need for assistance. The church building exemption allows for religious organization to have other property outside the principle place of worship deemed tax exempt if it has a positive benefit for the community. This exemption would obviously apply to houses of worship and also to other traditional buildings associated with houses of worship, such as, religious community centers, administrative buildings located on church campgrounds, health care properties, educational facilities, and retail space. To qualify for church building exemption, the second alternative under *N.J.S.A.* 54:4-3.6, a corporation, association or institution must show that (1) it is organized exclusively for a tax exempt purpose; (2) its property is "actually and exclusively" used for the tax exempt purpose; and (3) its operation and use of its property is not conducted for profit.[37]

To establish the first prong of the three-part test, New Jersey courts have held that if a religious corporation, non-profit association, or religious institution was incorporated for the moral and mental improvement of society and the benefit of its community then it could qualify for the church building property tax exemption. Judge Lawrence Carton explained in *Chester*

[35] *Id.*
[36] *Id*. at 330.
[37] *Paper Mill Playhouse v. Millburn Township*, 95 N.J. 503, 506, 472 A.2d 517 (1984).

Theatre Group v. Bor. of Chester, that "[t]here is no legislative delineation of the 'moral and mental improvement' classification in the exemption statute."[38] Consequently, without a legislative definition of "moral and mental improvement," courts are being forced to examine a religious organization's corporate documents to determine whether an organization is organized exclusively for the moral and mental improvement of men, women, and children. While this approach is generally accurate, courts are not barred from considering other extrinsic information if relevant to ascertaining the meaning of the corporate documents.[39] This approach must be accomplished on a case-by-case determination and it often lacks consistency from jurisdiction to jurisdiction.[40] Courts may also look to historical circumstances surrounding an organization to determinate whether the corporation was established for the benefit of the community.[41]

In addition, New Jersey courts have held that an organization must use its property exclusively for the benefit of the local community in order to gain tax-exempt status based on its church building exemption. The New Jersey Tax Court conceived that a critical issue is "whether a minimum level of activity is required to obtain a tax exemption for property used for religious worship or religious purpose."[42] The determining factor of church building exemption is based on the underlying usage of the property rather than how any potential funds are generated by the property.[43] Courts can make a quick assessment of the property's visible usage but determining its effective "use" as required by New Jersey church building exemption jurisprudence is more challenging. It is possible that a piece of property may lose its tax exempt status if that property

[38] *Chester Theatre Grp. of Black River Playhouse v. Chester*, 115 N.J. Super. 360, 364, 279 A.2d 878, 880 (Super. Ct. App. Div. 1971).
[39] *See Int'l Sch. Services, Inc. v. W. Windsor Tp.*, 22 N.J. Tax 659, 661, 381 N.J. Super. 383, 384, 886 A.2d 204, 205 (Super. Ct. App. Div. 2005).
[40] *See 1711 Third Ave., Inc. v. City of Asbury Park*, 16 N.J. Tax 174, 180-81 (Tax 1996).
[41] Id.
[42] *Paper Mill Playhouse*, *supra* note 37, at 506.
[43] *See Christian Research Inst. v. Town of Dover*, 5 N.J. Tax 376 (N.J. Tax Ct. 1983).

fails to maintain its actual and exclusive usage.[44] However, case law does not discuss exactly when a piece of property is no longer is being used for the effective purpose, and also does not define definitively the statutory guidelines of permitted and prohibited property.

The current test used to evaluate the second prong, "whether property is 'actually and exclusively used for a tax exempt purpose[,] is whether the property is 'reasonably necessary' for such purpose."[45] The property's usage for the moral and mental improvement of men, women, and children is a quid pro quo exchange from the property tax exemption. In applying this test, the New Jersey Supreme Court has decided that "necessary" is not the same as "absolutely indispensable."[46] New Jersey courts often state that when considering whether buildings are reasonably necessary for the tax exempt purpose, it evaluates the usage of each building in terms of how it served the particular organization as well as the community.[47] However, in *St. Ann's Catholic Church v. Hampton Bor.*,[48] Judge Hamill held the court must be careful when determining the actual and exclusive usage of a property because to construe the factors of the church building exemption more strictly than other exemptions would raise the issue of discrimination against property of religious organizations under the First Amendment. Therefore, the court accordingly must apply a test of "reasonable necessity" in which the claimant must demonstrate a compelling need for the services performed by the property for which exemption

[44] *Roman Catholic Archdiocese of Newark v. E. Orange City*, 17 N.J. Tax 298, 319-20 (1998).
[45] *City of Long Branch v. Monmouth Med. Ctr.*, 351 A.2d 756, 760 (N.J. Super. Ct. App. Div. 1976), aff'd 373 A.2d 651 (N.J. 1977)).
[46] *Boys' Club of Clifton, Inc. v. Jefferson*, 371 A.2d 22, 28 (N.J. 1977).
[47] *Id.*
[48] 14 N.J. Tax 88, 90 (1994) (In *St. Ann's Catholic Church*, the property at issue was located adjacent to a church cemetery and was in close proximity to the church. A caretaker employed by the church to perform various tasks lived on the property rent-free. The church argued that the property was exempt from local property taxation because it was property that was reasonably necessary to carry out the church's religious functions. The court determined that the requirement under N.J.S.A. § 54:4-3.6 that the property had to be "exclusively used" for religious purposes was to be interpreted literally. The court concluded that the church's ownership of the property was not reasonably necessary to carry out the church's functions.).

is claimed, and also that those services are integrated with the exempt functions of the entity.[49] Judge Mary Hamill reasoned that the then-existing requirement of "actual and exclusive" use of the property could no longer be interpreted literally after the New Jersey Appellate decision in *City of Long Branch v. Monmouth Med. Ctr.* that held several office buildings of the hospital that were not actually and exclusively for the exempted purpose.[50]

Finally, New Jersey courts have held to establish the third prong of the church building exemption a property must not be used for profit. Courts have not held that the property cannot generate any profit at all but any money generated by the organization should be reinvested into the community for the moral improvement of men, women, and children. This is the reasoning that allows the church building exemption to apply to other property outside the principle place of worship such as, religious community centers, administrative buildings located on church campgrounds, health care properties, educational facilities, and retail space so long as the property is benefitting the moral improvement of the community. The New Jersey Supreme Court has held that "an occasional or incidental nonexempt activity, or a regular nonexempt activity which is of an inconsequential or de minimis character[,] will not preclude an organization from obtaining tax-exemption for its otherwise tax exempt property."[51] However, anything more than de minimis action would violate the quid pro quo exchange for the benefit of

[49] *Id.* at 100.
[50] *City of Long Branch v. Monmouth Med. Ctr.*, supra note 45, at 760 (In Monmouth Med. Ctr., The division of tax appeals held that several hospital buildings were exempt from property taxes under *N.J.S.A.* § 54:4-3.6. The court ruled that a statute that granted a tax exemption must be construed strictly against the one claiming the exemption. The test to be used in determining whether property is actually and exclusively used in the work of a hospital was whether the property was reasonably necessary for such purposes. The court reversed and held that several office buildings of the hospital that were not actually and exclusively used for hospital purposes.).
[51] *See Greenwood Cemetery Ass'n of Millville, Inc. v. City of Millville*, 1 N.J Tax 408, 414 (N.J. Tax Ct. 1980); (citing *Boys' Club of Clifton, Inc. v. Jefferson*, 371 A.2d 22 (N.J. 1977); *Princeton Univ. Press v. Borough of Princeton*, 172 A.2d 420 (N.J. 1961)).

the community. This third prong guarantees that religious organizations use the benefits of the property tax exemption for the community and thus, secures the quid pro quo exchange.

III. New Jersey Must Amend and Narrowly Tailor N.J.S.A. § 54:4-3.6 to Comply with the Ecclesiastical Abstention Doctrine and to Deter Abuse

a. What is the Ecclesiastical Abstention Doctrine?

The ecclesiastical abstention doctrine, sometimes called the church autonomy doctrine, is rooted in the First Amendment to the United States Constitution, and its purpose is to prevent the civil courts from engaging in unwarranted interference with the practices, internal affairs, and management of religious organizations.[52] The Supreme Court first articulated the principles that became the ecclesiastical abstention doctrine in *Watson v. Jones*.[53] In *Watson*, the Court held that church decisions as to "questions of discipline, or of faith, or ecclesiastical rule, custom, or law" must be accepted as final.[54] The *Watson* court went on to assert that it would be a "total subversion" of these religious bodies if anyone dissatisfied with the result of a religious body's decision could subsequently appeal and have the religious decision overturned.[55]

The constitutional provision guaranteeing the separation of church and state has often prevented many courts from analyzing the individual facets of a religious organization to determine its merit for claiming a religious property tax exception by examining a religious organization's foundational documents. The lack of transparency within religion because of the ecclesiastical abstention doctrine has allowed for religious property exemptions in situations where it would normally not be applicable. Moreover, Establishment and Free Exercise Clause concerns often prevent the Legislature and Judiciary from defining the most basic of religious

[52] *Watson v. Jones*, 80 U.S. 679, 727 (1871).
[53] *Id*.
[54] *Id*.
[55] *Id*. at 728-29.

terms for purposes of determining the parsonage exemption, for example, what is a "religious corporation or congregation" and what is an "officiating clergyman." Thus, potential abuse of N.J.S.A. § 54:4-3.6 still persists, due to the ecclesiastical abstention doctrine and its prohibition against defining parts of religion necessary in the determination of the religious property tax exemption.

Religious organizations have repeatedly argued that "a congregation has the right to determine how its minister performs his or her religious duties" and by extension a congregation, not the legislature or a dictionary definition, can determine who is worthy of a tax exemption.[56] However, in recent years, the Supreme Court has begun to question the automatic approval and deterrence toward religious based decisions. This blind deference toward religion is exactly what Justice Rehnquist forewarned in his dissent in *United States of America and Canada v. Milivojevich*.[57] Justice Rehnquist, dissenting, argued that the only reason the Court has demonstrated such deference toward the religious associations was precisely because of their religious nature, and for a court to rubber-stamp ecclesiastical decisions of hierarchical religious associations, when such deference is not accorded similar acts of secular voluntary associations, would, in avoiding the free exercise problems petitioners envision, itself create more serious problems under the Establishment Clause.[58] This same principle should apply to the application of religious property tax exemptions codified under N.J.S.A. § 54:4-3.6.

b. The Ecclesiastical Abstention Doctrine and its Effects on N.J.S.A. § 54:4-3.6.

Beginning in the late nineteenth century, and until very recently, judicial interpretations of both the Free Exercise and Establishment Clause reflected a strict "separationist"

[56] *Goodwill Home and Missions, Inc. v. Borough of Garwood*, 281 N.J. Super. 596, 604 (App. Div. 1995).
[57] 426 U.S. 696, 734 (1976) (Rehnquist, J., dissenting).
[58] *Id.*

understanding of religion as a distinctive constitutional category deserving special treatment.[59] In cases involving the application of a statute to a religious organization, courts generally analyze whether the statute may be applied without violating the Establishment Clause by using a three-prong test: (1) whether the statute has a secular purpose, (2) whether its purpose or primary effect neither advances nor inhibits religion, and (3) whether it fosters an excessive government entanglement with religion.[60] It was under this guidance that N.J.S.A. § 54:4-3.6 was crafted and enacted by the New Jersey State Legislature. However, the federal test does not address the issue presented by the ecclesiastical abstention doctrine and places the burden of defining what property qualifies for either religious property tax exemption with the Legislature and the members of Judiciary.

New Jersey courts, in their determination of N.J.S.A. § 54:4-3.6, "examine the extent of the clergyman's activities within the religious organization, looking not to one particular factor but rather the entirety of the individual's relationship to the congregation."[61] Over forty years ago, the court defined "congregation" as "an assemblage or union of persons in society to worship their God publicly in such manner as they deem most acceptable to Him, at some stated place and at regular intervals."[62] Thus, an institution that conducts religious services several times a week in one location and trains people in its religious tenets as followers of Jesus Christ must be considered a religious congregation, i.e., "an assemblage . . . of persons . . . to worship

[59] Christopher R. Farrell, *ecclesiastical abstention and the crisis in the catholic church*, 19 J. L. & Politics 109, 115 (2003).
[60] *Lemon*, *supra* note 14, at 612-13.
[61] *Temple Emanu-El v. City of Englewood*, 21 N.J. Tax 462, 466 (Tax 2004) (citing *Friends of Ahi Ezer Congregation*, *supra* note 32, 16 N.J. Tax 591).
[62] *Id*. (citing *St. Matthew's Lutheran Church for the Deaf v. Div. of Tax Appeals*, 18 N.J. Super. 552, 558, 87 A.2d 732 (App.Div.1952)).

their God publicly in such manner as they deem most acceptable to Him, at some stated place and at regular intervals."[63]

This liberal definition of congregation allows for the possibility that an individual who created their own religious organization can claim a parsonage exemption for their residential home because they could establish the requirements of "assemblage of persons to worship their God publicly in such manner as they deem most acceptable to Him, at some stated place (their home) and at regular intervals."[64] This possibility, although statutorily legal, is troubling and runs counter to legislative intent. The parsonage exemption is a tool to assist religious organization due to their quid pro quo benefit to the community, not for usage by individuals of religious denomination and faith.

N.J.S.A. § 54:4-3.6 also does not define a minister for the purposes of the parsonage exemption. There is the question of whether the State Legislature or Judiciary has the ability to define a minister. For years, the doctrine of church autonomy has prevented the State Legislature or Judiciary because of constitutional concerns from establishing an official definition of what is a minister for the parsonage exemption. Religious organizations have consistently argued that "[i]f the duties sound like those performed by congregational leaders of all religious denominations, the clergyman is considered an officiating clergyman of the religious corporation"[65] and thus, it is clear that it is not status or title, but the services performed that determine if the exemption will apply.[66] Religious organizations would perfer minimal

[63] *Id.*
[64] *Id.*
[65] *City of Long Branch v. Ohel Yaacob Congregation*, 20 N.J. Tax 511, 517 (Tax) (quoting *Friends of Ahi Ezer Congregation*, *supra* note 32, 16 N.J. Tax at 595) (quotations omitted), aff'd, 21 N.J. Tax 268 (App. Div. 2003).
[66] *Congregation Ahavath Torah v. City of Englewood*, 21 N.J. Tax 318, 320 (2004).

governmental inquiry into how a minister allocates the performance of his or her religious duties and deem any inquiry into these duties as an improper intrusion into the activities of religion.[67]

Church autonomy and its prohibition from government definition has caused ambiguity in the law and has led New Jersey courts to make religious determinations on a limited case-by-case basis. Some progressive courts have attempted to find definitional meaning of what is a minister by using sources outside of religion itself. Some courts have looked toward the State Income Tax Regulations for guidance and found that "[t]he regulations do not attempt to say what a 'minister' is, but only what a 'minister' does."[68] In *Knight v. Commissioner of Internal Revenue*, the court in their determination of a clergyman considered whether the claimant: (1) performs sacerdotal functions under the tenets and practices of the particular religious body constituting his church or church denomination; (2) conducts worship services; (3) performs services in the control, conduct, and maintenance of a religious organization that operates under the authority of a church or church denomination; (4) is ordained, commissioned, or licensed; and (5) is considered to be a spiritual leader by his religious body.[69]

Moreover, some courts have sought definition of contested terms such as "minister" or "clergyman" by parsing through dictionaries for definition. Supreme Court Justices, and countless lower courts, typically rely on one, or at most two, dictionaries to define a contested word; they use general and legal dictionaries interchangeably and adopt individualized yet uneven approaches to their preferred dictionary brands.[70] For example, in *Cresskill v. N. Valley Evangelical Free Church*, a New Jersey court used the Webster's Third New International

[67] *Id.*
[68] *Id. at* 322.
[69] 92 T.C. 199, 205 (1989).
[70] *See* James J. Brudney & Lawrence Baum, *Oasis or Mirage: The Supreme Court's Thirst for Dictionaries in the Rehnquist and Roberts Eras*, 55 Wm. & Mary L. Rev. 483, 566 (2013).

Dictionary to define "clergyman" as, "a member of the clergy: an ordained minister: a man regularly authorized to preach the gospel and administer its ordinances: one in holy orders"; and "clergy" as, "the body of men and women duly ordained to the service of God in the Christian church: the body of ordained ministers: clergymen and clergywomen."[71]

Strict compliance with the ecclesiastical abstention doctrine has caused possible overuse of the religious property tax exemption and the statute must be amended to remove the "rubber stamp" of approval of all religious property. A common example of this occurrence is a residential property that doubles as religious congregation or synagogue. As aforementioned in *Mesivta Ohr Torah of Lakewood v. Township of Lakewood*, the Tax Court of New Jersey held that two separate entities within one residence owned by a religious organization are entitled to a property tax exemption under New Jersey law.[72] The Tax Court found, that "while the synagogue is situated in a building that also houses educational pursuits, plaintiff maintains a separate and independent synagogue at the facility."[73] The property in *Mesivta Ohr Torah* maintains a dual function, and while economically astute it can create massive problems in the determination of property tax exemptions because of the automatic approval granted by the ecclesiastical abstention doctrine. The failure of the government to properly inspect a religious organization's use of its property permits an application of exemption on property that might not qualify for an exemption. This allows residential properties to classify as religious exempt property and creates slippery slope in regards to a potential entanglement with governmental establishment. A simpler analysis of an application for exemption must be conducted to determine the appropriate usage of the religious property tax exemption.

[71] 125 N.J. Super. 585, 586, 312 A.2d 641, 641 (Super. Ct. App. Div. 1973) (citing Webster's Third New International Dictionary (1966)).
[72] *See supra* note 28.
[73] *Id*. at 331.

c. Complying with The Ecclesiastical Abstention Doctrine by Removing Residential Property from N.J.S.A. § 54:4-3.6.

The government must remain secular in its determination of property tax exemptions, even with its analysis of religious based exemptions. New Jersey has carefully crafted its statute in order to maintain some control over the exemption and prohibit abuse. However, the liberal interpretation of N.J.S.A. 54:4-3.6 along with the principles of ecclesiastical abstention have allowed for the exemption to encompass any piece of property associated with religious use. Religious autonomy should be respected but the quid pro quo exchange that is promised within the religious property tax exemption should permit the religious organization to concede some autonomy in a limited set of circumstances.

In order to curtail abuse within N.J.S.A. § 54:4-3.6, New Jersey must amend its religious property tax exemption statute based on federal religious tax exemption jurisprudence stated in *Texas Monthly*.[74] New Jersey's Legislature should "narrowly tailor" N.J.S.A. § 54:4-3.6 in order to remove any potential conflict due to the ecclesiastical abstention doctrine. This would resolve many of ambiguities our courts face in the determination of whether a particular piece of property is eligible for exemption. Justice Brennan recognized in *Texas Monthly*, that "governmental purposes for granting religious exemptions may be wholly secular, exemptions can nonetheless violate the Establishment Clause if they result in extensive state involvement with religion."[75] Therefore, the religious property tax exemption should be applicable only in a limited set of circumstances such as houses of worship, camps, theaters, educational facilities, and other locations that provide for the moral and mental improvement of men, women, and

[74] *See supra* note 11.
[75] *Walz*, *supra* note 1, 397 U.S. at 689-90 (Brennan, J., concurring).

children. The exemption should be narrowed by removing from consideration all dual functioning property as well as all residential property.

If the religious property tax exemption is narrowed to exclude all dual functioning property and all residential property then many of New Jersey's courts will be spared from having to make a determination of whether a piece of property qualifies for exemption because of its religious usage. This amendment would not prohibit all church property from acquiring the religious property tax exemption under N.J.S.A. § 54:4-3.6. Church property, such as the church itself and other non-residential property, would still qualify for the church building exemption and ministers would still be eligible for the parsonage exemption. However, all residential property would be barred from claiming a religious property tax exemption. This amendment would promote a fair and balanced tax system throughout the state. Proper determination of a valid property tax exemption is simplified with both exemptions narrowly tailored toward non-residential property. No longer would judicial officers, municipal officials and assessors, or applicants need to question whether a piece of property qualified for an exemption because there would be no ambiguity in the law as well as no potential abuses.

Currently, New Jersey municipalities are individually determining whether the property is being exclusively used as a parsonage or qualified church building. Without amendment, there could be a situation where some individuals might try to claim church building exemption or parsonage exemption when they do not qualify or improperly claim an exemption when they should not have been qualified. A common example of this in New Jersey is in regards to Shuls, which is Yiddish for a synagogue.[76] New Jersey has a strong Orthodox Judaism culture and is heavily concentrated throughout the state. It is common for many individuals from the Orthodox

[76] http://www.merriam-webster.com/dictionary/shul (visited November 6, 2014 at 1:16pm).

Judaism culture have a Shul inside their own home and thus, request permission to use the parsonage exemption or church building exemption. The New Jersey judiciary has determined, as they did in *Mesivta Ohr Torah*, that if an organization cannot qualify for the parsonage exemption that it could, in the alternative, qualify for New Jersey's church building exemption and often grant property tax exemption in this area.[77] Situations similar to *Mesivta Ohr Torah* can be avoided if residential property and dual functioning properties were prohibited from qualifying for the property tax exemption. The court in *Mesivta Ohr Torah* was troubled by the principle that the "guaranties of the Free Exercise Clause of the federal constitution and the religious freedom clauses of our State constitution restrict inquiry into what is an organized religion, who is a member of its clergy and what constitutes a 'congregation' of a religious body."[78] The religious property tax exemption should be given only to religious organizations for the purposes of the moral and mental improvement of men, women, and children as the legislature intended. This amendment N.J.S.A. § 54:4-3.6 would create clarity within the statute for both exemptions as well as remove the judicial determination of religion and religious property.

Conclusion

Our country has encouraged the usage of religious tax exemptions, the opposite approach preached from the teaching of Presidents Jefferson and Madison and their complete separation of church and state. Truthfully, the religious property tax exemption has become one of the most effective means of state action to assist men, women, and children in their communities, religiously affiliated or nonspiritual. Tax exemptions, when properly awarded, provide great

[77] *See supra* note 28.
[78] *Id.*at 330 (citing *Goodwill Home*, *supra* note 56, at 599 (citing U.S. Const. amend. I; N.J. Constit. art. I, pars. 3 and 4)).

benefit to those religious corporations, institutions, and organizations that in turn help their community, but currently, religious property tax exemptions are being overused and abused. The determination of the religious property tax exemption should always be based upon the merits but that is not always routine and increasingly, politics have influenced the administration of tax exemptions. The original intent and the legislative purpose of the religious property tax exemption has been glossed over for the sake of an organization's or an individual's greed. A potential repeal of all religious property tax exemptions would not resolve matter. In fact, if the legislature in response to this abuse were to decide to discontinue enactment of religious property tax exemptions, the government's involvement with religion would increase, not reduce. The potential taxation created by repeal will create a detrimental effect on a religious organization's resources allocable for the community activities that they now promote.[79] New Jersey's only option to resolve this abuse is to amend N.J.S.A. § 54:4-3.6.

If the New Jersey Legislature were to amend N.J.S.A. § 54:4-3.6 to prohibit the exemption from applying to both residential and dual functioning property then the government can avoid excessive entanglement with church autonomy. There is a line between what a state may do in encouraging community development and what a state may not do by using its resources. The current system is working, however, it requires slight amendment to ensure that the spirit of the property tax exemption is being properly followed. As a society and country, we have deemed the probative value of the religious property tax exemption to far outweigh the concerns over the separation of Church and State. For the exemption to be fully effective in its goals to the benefit of the community, both sides must participate evenly in the quid pro quo exchange. Presently, the government is giving out an exemption to dual functioning residential

[79] *Walz, supra* note 1, at 692 (Brennan, J., concurring).

property claiming to be congregations and is receiving nothing in exchange back for the benefit of the community, except higher property taxes.