

# Notes

## Real Property Tax Exemptions for Religious Institutions in Ohio: *Bishop* Ordains a Faulty Progeny

### I. INTRODUCTION

Ohio courts continually face legal dilemmas surrounding the issue of real property tax exemptions for religious institutions. Today, two Ohio statutes govern church exemptions from real property taxes: the church exemption statute<sup>1</sup> and the split listing statute (“the split statute”).<sup>2</sup> Initially, the church exemption statute in Ohio had been restricted to “houses used *exclusively* for public worship.”<sup>3</sup> However, the 1949 *In re Bond Hill-Roselawn Hebrew School*<sup>4</sup> decision recognized that the statute need not “be so literally construed.”<sup>5</sup> In *Bond Hill*, the primary use test<sup>6</sup> was adopted, modifying the exclusive use language found in the church exemption statute, thereby making the primary, rather than the exclusive, use of the property determinative in granting an exemption for church-owned land.<sup>7</sup>

Only months after the *Bond Hill* decision the Ohio General Assembly adopted the split statute.<sup>8</sup> This statute grants exemption to any “separate entity” within a

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1. OHIO REV. CODE ANN. § 5709.07 (Page 1980). The church exemption statute reads in pertinent part: “[H]ouses used exclusively for public worship, the books and furniture therein, and the ground attached to such buildings necessary for the proper occupancy, use, and enjoyment thereof, and not leased or otherwise used with a view to profit . . . shall be exempt from taxation.”

2. OHIO REV. CODE ANN. § 5713.04 (Page 1980). The split listing statute reads in pertinent part: If a separate parcel of improved or unimproved real property has a single ownership and is so used so that part thereof, if a separate entity, would be exempt from taxation, and the balance thereof would not be exempt from taxation, the listing thereof shall be split, and the part thereof used exclusively for an exempt purpose shall be regarded as a separate entity and be listed as exempt, and the balance thereof used for a purpose not exempt shall, with the approaches thereto, be listed at its taxable value and taxed accordingly. Actually, the split statute was an amendment clause placed between two already-existing clauses in Ohio General Code § 5560.

3. OHIO REV. CODE ANN. § 5709.07 (Page 1980) (emphasis added).

4. 151 Ohio St. 70, 84 N.E.2d 270 (1949).

5. *Id.* at 73–74, 84 N.E.2d at 272. Justice Taft noted the following series of dilemmas faced by courts interpreting the exclusive use requirement of the church exemption statute:

There are many activities conducted in church buildings which do not constitute public worship but which are designed to encourage people to use the church for public worship. The use of a room in the church to entertain young children while their parents attend church services is not a use for public worship. The use of the church building for meetings of boy scouts is not a use for public worship. The use of part of the building for the preparation of food for a church supper and the eating of such food are not uses for public worship. Certainly it was not the intention of the people that their words “used exclusively for public worship,” should be so literally construed that any such uses would prevent tax exemption of a church building.

*Id.*

6. The primary use doctrine is a practical solution to the near-impossible standards demanded by exclusive use statutes. Courts have applied the doctrine to statutes containing exclusive use language. Because primary use is a less demanding standard than exclusive use, courts employ the doctrine when a strict interpretation of the statute would defeat the intent. When applied in the field of Ohio’s real property tax exemption statutes, the doctrine requires that only the primary, rather than exclusive, use of the property satisfy the statutory requirements. See *infra* text accompanying notes 162–64.

7. 151 Ohio St. 70, 75, 84 N.E.2d 270, 273 (1949).

8. *Bond Hill* was decided on February 16, 1949. The split listing amendment to Ohio Revised Code § 5713.04 (then Ohio General Code § 5560) took effect on October 27, 1949.

particular lot of real property, so long as that "entity" is "used *exclusively* for an exempt purpose."<sup>9</sup> Under the terms of the split statute, the exemption granted for a separate entity can be vertical, horizontal, or otherwise.<sup>10</sup> Any qualifying room can be split from a building and accorded separate tax treatment.

In December of 1982 the Ohio Supreme Court held by a unanimous decision in *Bishop v. Kinney*<sup>11</sup> that the primary use doctrine, previously restricted to cases involving general property exemption statutes<sup>12</sup> such as the church exemption statute, applies to the split statute.<sup>13</sup> In effect, the court in *Bishop* applied parallel statutory interpretation from the church exemption statute to the similar "used exclusively" language found in the split statute.<sup>14</sup> Through *Bishop*, the Ohio Supreme Court additionally diluted the statutory requirements of "public worship" to a far more lenient standard: "religious in nature."<sup>15</sup> Thus, under the current interpretation of the split statute, as elicited in *Bishop*, a religious institution need only show that a separate room in any building is primarily used for public worship that is religious in nature in order to gain exemption status for the property underneath it.

Although the supreme court hailed its decision in *Bishop* as a practical one, numerous negative repercussions have reverberated throughout the field of tax exemptions, and more can be expected. The broad interpretation of the two exemption statutes has complicated an already entangled judicial field. *Bishop* is the first in a series of Ohio Supreme Court decisions that has clouded the state's taxing system in the field of church real property exemptions. The purpose of this Note is to analyze the expansive repercussions of *Bishop* and to propose alternative methods for dealing with applications for exemption from real property taxes, focusing on church exemptions and the relationship between the church exemption statute and the split statute.

This Note will begin by addressing the constitutional issues raised by the taxation and exemption of church property, followed by a discussion of the foundations of real property taxes and the exemptions therefrom. After developing the pre-*Bishop* case law, this Note will examine the administrative problems raised by *Bishop* and its progeny. Finally, this Note will propose possible solutions to Ohio's present administrative quagmire.

## II. CONSTITUTIONAL ISSUES OF CHURCH PROPERTY EXEMPTIONS

The United States Constitution is the ultimate authority for determining the extent to which states may tax and exempt church property. The first amendment to the Constitution prohibits the government from interfering with or promoting religious beliefs: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."<sup>16</sup> However, "[t]he difficulty that

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9. OHIO REV. CODE ANN. § 5713.04 (Page 1980) (emphasis added).

10. Schnell, *Real Property Tax Exemptions in Ohio—A Review and Critique*, 17 CASE W. RES. 824, 827 (1966).

11. 2 Ohio St. 3d 52, 442 N.E.2d 764 (1982).

12. See, e.g., OHIO REV. CODE ANN. §§ 5709.07–.121 (Page 1980).

13. 2 Ohio St. 3d 52, 53, 442 N.E.2d 764, 766 (1982).

14. *Id.* at 54, 442 N.E.2d at 766.

15. *Id.*

16. U.S. CONST. amend. I, § 1.

has historically plagued courts in implementing these provisions stems in part from the fact that their purpose 'was to state an objective, not to write a statute.'"<sup>17</sup>

State jurisdiction to tax property owners extends to all real property within the limits of the state,<sup>18</sup> so long as "the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state."<sup>19</sup> The United States Supreme Court averred, in a statement covering the taxation of religious institutions, that "[e]ach value judgment under the Religious Clauses must therefore turn on whether particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so."<sup>20</sup> In other words, if a state takes action through its tax system that affects real property belonging to a religious institution, then the action must be justifiable under both clauses of the first amendment. Thus, the constitutional limits on taxing or exempting real property owned by churches must be delineated before examining Ohio's system of exemption.<sup>21</sup>

### A. *The First Amendment and Taxation*

The constitutional limits upon the taxation of religious institutions have been argued primarily in the context of income and social security taxation and their interference with the free exercise clause. In *United States v. Lee*,<sup>22</sup> an Amish farmer employed several other Amish to work on his farm and in his carpentry shop but then "failed to file the quarterly social security tax returns required of employers, withhold social security tax [sic] from his employees, or pay the employer's share of social security taxes."<sup>23</sup> After paying \$91.00 for the first quarter of 1973, he sued the federal government for a refund, "claiming that imposition of the social security taxes violated his First Amendment free exercise rights and those of his Amish employees."<sup>24</sup>

The District Court held the statutes requiring the payment of social security and unemployment insurance taxes unconstitutional as applied to the Amish employer.<sup>25</sup> However, the United States Supreme Court unanimously reversed, finding the social

17. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 813 (1978) (quoting *Walz v. Tax Comm'r*, 397 U.S. 664, 668 (1970)). This dual set of prescriptions was incorporated into the fourteenth amendment and applied to the states by the United States Supreme Court in *Cantwell v. Connecticut*, 310 U.S. 296 (1940), and *Everson v. Board of Educ.* 330 U.S. 1 (1947).

18. *Union Refrigerator Transit Co. v. Kentucky*, 199 U.S. 194 (1905) ("It is . . . essential to the validity of [an ad valorem property] tax that the property shall be within the territorial jurisdiction of the taxing power.").

19. *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940).

20. *Walz v. Tax Comm'r*, 397 U.S. 664, 669 (1970).

21. As noted in L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 815 (1978):

A pervasive difficulty in the constitutional jurisprudence of the religious clauses has accordingly been the struggle "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."

*Id.* at 815 (quoting *Walz v. Tax Comm'r*, 397 U.S. 664, 668-69 (1970)).

22. 455 U.S. 252 (1982).

23. *Id.* at 254.

24. *Id.* at 255.

25. *Lee v. United States*, 497 F. Supp. 180, 184 (1980), *rev'd.*, 455 U.S. 252 (1982). The Court noted that the Amish believe it sinful not to provide for their own elderly and needy and therefore are religiously opposed to the national social security system. However, this argument could just as easily be used to justify the Amish giving everything they have to the social security system in order to best guarantee that their elderly will be provided for in the event of their own deaths.

security requirements to be constitutional. Although the Court noted that the requirements violate Amish religious beliefs and that “compulsory participation in the social security system interferes with their free exercise rights,”<sup>26</sup> it concluded that “[n]ot all burdens on religion are unconstitutional.”<sup>27</sup> The Court reached its decision in poignant terms:

Congress and the courts have been sensitive to the needs flowing from the Free Exercise Clause, but every person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs. When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity. Granting an exemption from social security taxes to an employer operates to impose the employer’s religious faith on the employees. Congress drew a line in § 1402(g), exempting the self-employed Amish but not all persons working for an Amish employer. The tax imposed on employers to support the social security system must be uniformly applicable to all, except as Congress provides explicitly otherwise.<sup>28</sup>

Justice Stevens’ concurrence aptly restated the rule that “the religious duty must prevail unless the Government shows that enforcement of the civic duty ‘is essential to accomplish an overriding governmental interest.’”<sup>29</sup> In this case, the Court found such an interest.

In an earlier decision, *Wisconsin v. Yoder*,<sup>30</sup> the Supreme Court delimited to some degree the extent of governmental interests. The State of Wisconsin argued that the children of members of the Old Order Amish religion and the Conservative Mennonite Church were required to go to public or private school beyond the eighth grade. The Court established a test that

in order for Wisconsin to compel school attendance beyond the eighth grade against a claim that such attendance interferes with the practice of a legitimate religious belief, it must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause.<sup>31</sup>

After studying the importance of the law to the state, and balancing that interest with its effects on the Amish community, the Court held that “the First and Fourteenth Amendments prevent the State from compelling respondents to cause their children to attend formal high school to age 16.”<sup>32</sup>

26. 455 U.S. 252, 257 (1982).

27. *Id.* See also *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Reynolds v. United States*, 98 U.S. 145 (1879).

28. *Id.* at 261 (footnote omitted). The court added in the footnote a practical solution to the Amish debate: We note that here the statute compels contributions to the system by way of taxes; it does not compel anyone to accept benefits. Indeed, it would be possible for an Amish member, upon qualifying for social security benefits, to receive and pass them along to an Amish fund having parallel objectives. It is not for us to speculate whether this would ease or mitigate the perceived sin of participation.

*Id.* at n.12.

29. *Id.* at 261–62 (Stevens, J., concurring) (footnote omitted).

30. 406 U.S. 205 (1972).

31. *Id.* at 214.

32. *Id.* at 234. “In the face of our consistent emphasis on the central values underlying the Religion Clause in our constitutional scheme of government, we cannot accept a *parens patriae* . . . such sweeping potential for broad and unforeseeable application as that urged by the State.” *Id.*

Most recently, in a case involving arguments most similar to those present in *Bishop*, the Supreme Court ruled in *Tony and Susan Alamo Foundation v. Secretary of Labor*<sup>33</sup> upon whether the federal government's "imposition of the minimum wage and recordkeeping requirements will violate the rights of associates [employees of the Foundation] to freely exercise their religion and the right of the Foundation to be free of excessive government entanglement in its affairs."<sup>34</sup> The Court ruled on these claims under the two clauses of the first amendment separately.

First, the Court rejected the religious institution's free exercise claim under the doctrine of *United States v. Lee*.<sup>35</sup> The Supreme Court held "[i]t is virtually self-evident that the Free Exercise Clause does not require an exemption from a governmental program unless, at a minimum, inclusion in the program actually burdens the claimant's freedom to exercise religious rights."<sup>36</sup> The Court noted that because here the federal laws regulated wage earners competing in the open market, "[w]e therefore fail to perceive how application of the Act would interfere with the associates' right to freely exercise their religious beliefs."<sup>37</sup>

Second, the Supreme Court employed similar arguments in rejecting the establishment clause claims under the doctrine of *Lemon v. Kurtzman*.<sup>38</sup> The religious institution argued "that application of the Act's recordkeeping requirements would have the 'primary effect' of inhibiting religious activity and would foster 'an excessive government entanglement with religion.'"<sup>39</sup> The Supreme Court responded that "[t]hese requirements apply only to *commercial activities* undertaken with a 'business purpose,' and would therefore have no impact on petitioners' own evangelical activities or on individuals engaged in volunteer work for other religious organizations."<sup>40</sup> Thus, application of the federal statutes to the religious institutions' "commercial activities is fully consistent with the requirements of the First Amendment,"<sup>41</sup> and taxation of a religious institution is not a per se constitutional violation.

### B. *The First Amendment and Exemption*

An examination of the constitutional issues implicated in the exemption of church-owned property begins with *Walz v. Tax Commissioner*.<sup>42</sup> In *Walz* the United States Supreme Court considered a taxpayer's claim that New York's statute granting property tax exemptions to "houses of public worship" violated the establishment

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33. 105 S. Ct. 1953 (1985).

34. *Id.* at 1963.

35. *See supra* notes 22-29 and accompanying text.

36. 105 S. Ct. 1953, 1963 (1985).

37. *Id.*

38. 403 U.S. 602, 612-13 (1971) (quoting *Walz v. Tax Comm'r*, 397 U.S. 674 (1970)). *See infra* notes 56-59 and accompanying text.

39. 105 S. Ct. 1953, 1964 (1985).

40. *Id.* (emphasis added). "The Establishment Clause does not exempt religious organizations from such secular governmental activity as fire inspections and building and zoning regulations, . . . and the recordkeeping requirements of the Fair Labor Standards Act, while perhaps more burdensome in terms of paperwork, are not significantly more intrusive into religious affairs." *Id.*

41. *Id.*

42. 397 U.S. 664 (1970).

clause of the first amendment.<sup>43</sup> The Court indicated that it would find an unconstitutional establishment of religion if “the end result—the effect—”<sup>44</sup> of the exemption was “an excessive entanglement with religion.”<sup>45</sup>

In rejecting the taxpayer’s contention, the Court’s reasoning was two-fold. On the one hand, the Court held that the exemption of church-owned property did not have the purpose or effect of establishing religion, because the New York exemption system required only minimal church-state contact.<sup>46</sup> On the other hand, since the exemption apparently created only a minimal and remote involvement between church and state, the Court noted that this minimal contact was far less than would occur under a system of taxation of churches.<sup>47</sup> The Court concluded that the system of exemption “restricts the fiscal relationship between church and state, and tends to complement and reinforce the desired separation insulating each from the other.”<sup>48</sup> Thus, the Court ruled that the general practice of granting property tax exemptions to churches does not violate the establishment clause of the first amendment.

The *Walz* opinion left unanswered a number of serious questions regarding the taxation of church property. First, in holding that the exemption of church-owned property did not cause excessive entanglement, the Court indicated that the taxation of such property might result in excessive entanglement.<sup>49</sup> The Court noted that its holding could not be read to require that states exempt all church-owned property, because the contested exemption in New York, and those found in all of the fifty states, applied only to “places of worship,” and not to church-owned land used for recreational or social purposes.<sup>50</sup> Demonstrating that limits exist upon the constitutionality of exemption, the Court cited with approval to *Gibbons v. District of Columbia*,<sup>51</sup> an 1886 decision in which the Court upheld Congress’s denial of a “tax exemption as to land owned by but not used for the church.”<sup>52</sup> Mere ownership by a church is not sufficient under the establishment and free exercise clauses to require exemption for all church-owned property. Therefore, the Court’s opinion can be read to hold only that exemption or taxation of church-owned property is not per se unconstitutional.<sup>53</sup>

Second, the decision in *Walz* does not adequately resolve how to determine when taxation or exemption of church property results in an unconstitutional establishment of religion. In discussing this issue, the Court relied on two theories: one, on the historical acceptance of property tax exemptions for houses of public worship;<sup>54</sup> and two, on the present circumstance that no establishment of religion has

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43. *Id.* at 667.

44. *Id.* at 674.

45. *Id.*

46. *Id.* at 676.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. 116 U.S. 404 (1886).

52. 397 U.S. 664, 679–80 (1970).

53. *Id.* at 678.

54. *Id.*

resulted despite over two hundred years of exemption.<sup>55</sup> However, the Court's opinion left few guidelines for determining when a system of taxation or exemption of church-owned property would be unconstitutional.

The foregoing analysis was the precursor of the three-prong test set forth by the Court in *Lemon v. Kurtzman*<sup>56</sup> for determining when a law violates the establishment clause: "First, the 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.'" <sup>57</sup> Today the *Lemon* test is determinative of the standards which must be met in construing the constitutionality of exemption statutes.

Since *Lemon*,<sup>58</sup> the Court has decided establishment clause cases on the basis of this three-prong test. The Court has tended to gloss over the first two elements of the test and to focus instead on the entanglement issue.<sup>59</sup> However, in the area of property tax exemptions, the *Lemon* test in its entirety is critical to an analysis of *Bishop* and its progeny.

### III. THE FRAMEWORK OF REAL PROPERTY TAXATION AND EXEMPTION IN OHIO

#### A. *The Foundations of Taxation*

States have taxed their citizens to generate funds since our nation was founded.<sup>60</sup> The Ohio Constitution grants the General Assembly the power to "rais[e] revenue, sufficient to defray the expenses of the state, for each year, and also a sufficient sum to pay principal and interest as they become due on the state debt."<sup>61</sup> Accordingly, to raise revenue the Ohio Constitution provides that laws may be passed imposing income, estate, excise, and franchise taxes.<sup>62</sup> In addition, the constitution also provides for the taxation of real and personal property "according to value."<sup>63</sup> However, every law imposing a tax must "state, distinctly, the object of the same, to which only, it shall be applied."<sup>64</sup>

In Ohio the income, estate, excise, and franchise taxes, along with property taxes, have served to distribute the burden of financing the government throughout

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55. *Id.* "Nothing in this national attitude toward religious tolerance and two centuries of uninterrupted freedom from taxation has given the remotest sign of leading to an established church or religion and on the contrary it has operated affirmatively to help guarantee the free exercise of all forms of religious belief." *Id.*

56. 403 U.S. 602 (1971).

57. *Id.* at 612-13 (footnotes omitted).

58. *Id.* at 612.

59. *Id.* at 614.

60. Stimson, *The Exemption of Property from Taxation in the United States*, 18 MICH. L. REV. 411, 411 (1934).

"Those economic activities of society that are carried on by the social group collectively, commonly known as government functions, necessitate the diversion of a portion of the total income or wealth to government use." *Id.*

61. OHIO CONST. art. XII, § 4.

62. OHIO CONST. art. XII, § 3. See also OHIO CONST. art. XII, § 9.

63. OHIO CONST. art. XII, § 2. Article XII, section 2 also reads in pertinent part: "[G]eneral laws may be passed to exempt burying grounds, public school houses, *houses used exclusively for public worship*, institutions used exclusively for charitable purposes, and public property used exclusively for any public purpose." (emphasis added).

64. OHIO CONST. art. XII, § 5.

the state.<sup>65</sup> The real property tax is the most pragmatically effective because it involves the readily calculable figures of property acreage and land value. In fact, the real property tax is "the bulwark of local taxation and an important source of state revenue,"<sup>66</sup> accounting for over one-quarter of the state's collections.<sup>67</sup>

The "taxing authority"<sup>68</sup> of each subdivision within the state has the statutory power to levy taxes on all real property "within the subdivision for the purpose of paying the current operating expenses of the subdivision and acquiring or constructing permanent improvements."<sup>69</sup> Although the state of Ohio administers the annual collection of real property taxes, it does not control the spending of this revenue. The local taxing authority possesses the power to levy taxes and handle their distribution.<sup>70</sup> The revenue from real property taxes is distributed to the local taxing authorities during the next calendar year.<sup>71</sup> Depending on the local educational and governmental needs of the taxing districts, the millage<sup>72</sup> paid by the taxpayers may be adjusted locally. Since real property taxes are locally controlled, they are subject to voter approval.<sup>73</sup>

As a result, the administration of the real property tax in Ohio is awkwardly bifurcated: on the local level the tax is administered by an elected assessor and collector, the county auditor<sup>74</sup> and treasurer<sup>75</sup> respectively; on the state level the tax is administered and supervised by a centralized agency, the Ohio Department of Taxation.<sup>76</sup> The elected local representatives are under enormous political pressures that may affect the degree to which they pursue their obligations. They are elected by those whom they tax, and the more strictly they enforce the tax codes, the less likely they are to be reelected. The state agency, on the other hand, is constitutionally required to enforce the real property tax laws uniformly throughout Ohio, an obligation that is in continual conflict with the strong local pressures.

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65. Reitze, *Real Property Tax Exemptions in Ohio—Fiscal Absurdity*, 18 CASE W. RES. 64 (1966).

66. *Id.* Real property in Ohio is broadly defined as follows:

[The] land itself, whether laid out in town lots or otherwise, all growing crops, including deciduous and evergreen trees, plants, and shrubs, with all things contained therein, and, unless otherwise specified, all buildings, structures, improvements, and fixtures of whatever kind on the land, and all rights and privileges belonging or appertaining thereto.

OHIO REV. CODE ANN. § 5701.02 (Page 1980).

67. ANNUAL REPORT, DEPARTMENT OF TAXATION OF THE STATE OF OHIO (1984). In 1983, the state of Ohio assessed real property taxes of over \$3.3 billion, while the entire tax system generated slightly over \$12.2 billion. *Id.*

68. OHIO REV. CODE ANN. § 5705.01 (C) (Page 1980).

69. OHIO REV. CODE ANN. § 5705.03 (Page 1980); *see also* OHIO REV. CODE ANN. §§ 5705.01 (C), 5705.05 (Page 1980).

70. OHIO REV. CODE ANN. § 5705 (Page 1980).

71. ANNUAL REPORT, DEPARTMENT OF TAXATION OF THE STATE OF OHIO (1983).

72. Mill: "One-tenth of one cent. Many states use a mill rate to compute property taxes." BLACK'S LAW DICTIONARY 896 (5th ed. 1979).

73. OHIO REV. CODE ANN. § 5705.25 (Page 1980).

74. OHIO REV. CODE ANN. §§ 319.01, 5713.01 (Page 1980).

75. OHIO REV. CODE ANN. §§ 321.01, 323.08 (Page 1980).

76. OHIO REV. CODE ANN. § 5703.01 (Page 1980).



## B. The Foundations of Exemption

### 1. Theoretical Foundations of Exemption

Every tax is limited in some degree to a particular portion of society. For example, income taxes apply only to those who earn a taxable income and real property taxes apply only to those who own land. In the same way that the income tax is determined on the basis of the value in dollars of taxable income, the real property tax is determined on the basis of the valuation of land. Depending upon the actual method of taxation, certain groups in society can be viewed as carrying the burden of government to the degree that other groups are not being taxed.<sup>77</sup> Thus, if a government relies heavily upon real property taxation for revenue, then those in society who own no property will be exempted indirectly from carrying the burden of government.

Exemptions represent a more direct way of excluding specific groups of society from carrying the burden of government. Governments commonly exempt property used by governmental, charitable, educational, and religious institutions. When real property is exempted from taxation, the parcels of land are removed from the tax lists of the county auditors.<sup>78</sup> Accordingly, the owners of exempted parcels of property no longer contribute revenue to government based on the value of the property they own. As a result, the real property tax system becomes less uniform, since the burden of government is being shifted from property owners who receive exemptions to those who do not.

This shifting affects the system of taxation and exemption in two ways: the first, mathematically, and the second, proportionally. The mathematical effect focuses only upon the exemptions from real property taxation. "[A]ny reduction in the tax base brings an immediate reduction in revenue,"<sup>79</sup> however, every exempted parcel of land that is placed back on the tax lists will increase mathematically the local budget of the affected taxing district. Therefore, by placing exempt parcels back on the tax lists, the budget can be increased without raising the tax millage.

The proportional effect focuses on the relationship between the exempted and taxed parcels of real property. "[E]ach time a determination is made that a particular parcel of property is exempt from taxation, the tax burden placed upon the [taxed] property in the community is increased proportionately."<sup>80</sup> However, every exempt parcel of land that is placed back on the tax lists proportionally either increases the revenue available for the taxing district<sup>81</sup> or decreases the tax burden on the property owners.<sup>82</sup>

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77. Heisel, *Exemption from Taxation of Property Used for Religious, Educational and Charitable Purposes in Ohio*, 3 U. CIn. L. Rev. 40 (1929).

78. OHIO REV. CODE ANN. § 5713.01 (Page 1980).

79. Reitze, *supra* note 65, at 65.

80. Schnell, *supra* note 10, at 824.

81. If the millage remains unchanged, then the taxing district budget is increased proportionally to the amount of exempt property returned to the tax lists.

82. If the budget remains unchanged, then the tax millage payable by the taxpayers is reduced in proportion to the amount of property returned to the tax lists.

The importance of these two effects of exemption from real property taxation can be demonstrated through the use of the following simple tax formula: (Land Acreage) X (Millage) = (Budget). Two hypotheticals best illustrate the application of the formula. First, when the budget is fixed and the land acreage on the tax lists decreases through exemption, the millage applicable to the remaining land must be increased to maintain the budget. As a result, while each taxpayer's mathematical payments are increased to make up for the real loss of taxable property, his proportionate share of the fixed budget is also increased in relation to the amount of property exempted. Thus, if the taxing authority, for instance the local school district, is working under the strictures of a fixed budget, then the taxpayers with property remaining on the tax lists must make up the loss both mathematically and proportionally.

In a second hypothetical situation, when the millage is fixed and the acreage on the tax lists is again decreasing through exemption, the budget will decrease. As a result, while the budget is decreased mathematically as a direct consequence of the loss of taxed land acreage, the proportionate share of governmental services are also decreased in relation to the amount of property exempted. Thus, in either hypothetical situation the consequences of exemption from real property taxes exhibit both mathematical and proportional negative effects.

Despite the negative effects of real property tax exemption, the use of certain exemptions can be justified by several highly promoted theories, each of which seemingly builds upon the preceding theory while broadening the class of exemptions. These theories include (1) the circularity theory, (2) the state's work theory, (3) the humanitarian theory, and (4) the power politic theory.

The circularity theory acknowledges that because government owns and administers certain property for the benefit of the public, that property ought to be exempted from taxation. Accordingly, government property should not be taxed because the general public profits from the use, and the tax "would merely result in a return of public funds to the public."<sup>83</sup> A city taxing itself for the property containing a public park or the mayor's office is ludicrous. In essence, the exemption of public property is a simple solution to avoid the problem of a government taxing itself for the property under its dominion.

But if exemptions can be justified for government property, exemption should also be granted to nongovernment property that is being used for essentially the same purpose. The state's work theory embodies the government's "desire to assist [and promote] organizations doing the state's work."<sup>84</sup> Under this theory, the government "will gain if loss in revenue is exceeded by savings resulting from private performance of functions that would otherwise be the state's responsibility."<sup>85</sup> Viewed strictly, state's work property should be exempted only for uses that are identical to those performed by government. But under a less strict interpretation, the

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83. Schnell, *supra* note 10, at 825.

84. Note, *Exemption of Educational, Philanthropic and Religious Institutions from State Real Property Taxes*, 64 HARV. L. REV. 288, 288 (1950).

85. *Id.*

theory also allows exemption when the government otherwise would be obligated to expend energy in the same general area of exemption. Under the state's work theory, a trade-off for exemption is calculated: the savings resulting from the performances of the exempt function must outweigh the direct and immediate loss of revenue to the government.<sup>86</sup> Thus, although the government could tax these properties, the state's work theory is a legitimate means of exempting real property, because lines can readily be drawn distinguishing between governmental and nongovernmental activities.

Additionally, states often promote activities that they do not perform; activities which nonetheless are considered desirable to society because they "encourage morals and education from political and social as well as from ethical motives."<sup>87</sup> The "more generous theory which has been imputed to the legislature is that the state should encourage not only functions easing the state's burden, but all activities devoted to humanitarian goals."<sup>88</sup> This third, or humanitarian, theory underlies the majority of charitable and religious exemptions.

States are constitutionally barred from entering the field of religious instruction. However, states do encourage these humanitarian endeavors by churches:

The influence of churches upon the character of various members of society is said to be sufficiently desirable to warrant the removal of church property from the tax roll. Religious societies devote their efforts and their property to the moral uplifting of society, in most cases seeking no pecuniary profit for themselves.<sup>89</sup>

Thus, despite the strong relationships between moral and religious values, it is not improper for states to promote high moral beliefs, for society views religious institutions as but one of many sources that instill such values in our pluralistic society.<sup>90</sup>

The justification of exemption under the humanitarian theory is far more complex than under the first two theories. Circularity and state's work exemptions are laid out in relation to governmental functions that can be identified on their face. Many complex issues are raised in the field of exemptions, however, when distinguishing between the humanitarian and the nonhumanitarian or less-humanitarian activities. Many taxpayers participate in activities that are in some way beneficial to society, but that broad standard cannot be the sole criteria for exemption, lest only a few parcels of land be left to carry the entire tax burden. Because the justifications for humanitarian exemptions are difficult to distinguish, humanitarian exemption statutes must be interpreted strictly in order to preserve their value. If a judiciary interprets too broadly the language of such statutes, then the floodgates might be opened to unintended exemptions and increased adjudication.

The fourth, or power politic, theory justifies real property tax exemptions on the basis of the past use of the property, rather than upon the property's current or future

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86. Heisel, *supra* note 77, at 57.

87. *Id.* at 40.

88. Note, *supra* note 84, at 288-89.

89. Stimson, *supra* note 60, at 422.

90. 397 U.S. 664, 672 (1970).

uses. The owners of such property have traditionally possessed the power to maintain their exempt status by protecting it furiously. Powerful, political organizations have greater motivation and tenacity in seeking exemption because their potential gain is more apparent and immediate.<sup>91</sup> Exemption under the power politic theory has been viewed as the consequence of historical political struggles.<sup>92</sup> Under any of the three preceding theories, the power of the group seeking exemption is not a proper basis for determining the exemption status of real property. The unprincipled notion that might makes right cannot be supported by any state constitution or even the federal constitution.

By stubbornly guarding the exemption status of their immediate property, these exempted groups have withstood the elements of time. In turn, time becomes a powerful ally to exemptions. Although most would agree that "exemptions should not be granted merely because of custom or tradition,"<sup>93</sup> the "long tradition of exemptions acts to give them the legitimization of time. The special interests benefited by the exemptions are not likely to renounce willingly their benefits, while the public in general is not apt to be highly motivated to end the tax exemptions."<sup>94</sup> Exemptions are legislatively enacted; they are, therefore, political creatures that are revoked only grudgingly. Our political process prides itself on the creation of new legislation, not on the rejection of old laws. Even when there is not a broad base of support underlying exemptions, the political process has not eliminated them. Politically, there is often no more irrefutable argument than "we've always done it that way, so why change it?"

These four theories have led to the promotion of an exemption system that is reviewed by the public only periodically. One commentator has stated: "The most serious evil of tax exemptions is that a benefit is given by the public for which no *quid pro quo* need be given."<sup>95</sup> Under the circularity and the state's work theories, the quality of the exempt uses is to a degree checked: regulated in part by the voting process and in part by the demands of public funding. However, under the humanitarian and the power politic theories, the quality of the exempt uses is not subject to these checks. Once exempted, the humanitarian organization is responsible only to itself, and the power politic organization historically commands its own destiny. Thus, when an exemption has been granted for real property under the humanitarian theory, the process leading to the recommendation must be scrupulously adhered to by the deciding agencies.

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91. *Id.* at 683.

92. Reitze, *supra* note 65, at 65.

Exemptions from property taxation are as venerable as the tax itself. This should not be surprising, for it is an empirical fact that when a tax is created those affected will try to shift it to someone else. Eleventh and twelfth-century ecclesiastical and military exemptions were an accepted part of the English tax system. Church property was exempted, as it was no longer considered to be under human control when devoted to God. Military exemption provisions performed what was considered a societal function, serving to encourage protection of the community. Whether this reasoning convinced the populace is not known; however, the two groups were the only ones with sufficient power to gain exemptions.

*Id.*

93. Stimson, *supra* note 60, at 422.

94. Reitze, *supra* note 65, at 84.

95. *Id.* at 83.

## 2. The Foundations of Exemption in Ohio

In Ohio, all real property in the state is subject to taxation except that which is expressly exempted.<sup>96</sup> Article XII, section 2 of the Ohio Constitution grants the legislature the power to enact exemptions from real property taxes for certain classes of land described by their uses.<sup>97</sup> More specifically, the constitution provides that church exemptions may be granted only for "houses used exclusively for public worship."<sup>98</sup>

Amendments to the Ohio Constitution must be subject to a popular vote.<sup>99</sup> The Ohio Constitution has been amended several times, Article XII, section 2 not escaping modification.<sup>100</sup> Yet, the mechanical language describing church exemptions as being limited to "houses used exclusively for public worship" has remained constant as the electorate has affirmed each amendment to this section. Moreover, no attempts to reduce the standard for church property exemption from "used exclusively" to one of lesser use or only ownership, has succeeded. If the voters of Ohio desire a change in the statutory requirements, they may express their desire in any popular vote. They have not.

The Ohio General Assembly has exercised its authority under the Ohio Constitution to enact statutes exempting certain classes of property from taxation.<sup>101</sup> Since the initial adoption of a church exemption statute, Ohio statutes have required, consistent with the language of the Ohio Constitution, that property must be "used exclusively for public worship" before an exemption can be granted.<sup>102</sup> And today, the church exemption statute, as enacted and most recently amended, contains the constitutional language requiring exclusive use;<sup>103</sup> for the statute to require less would be a violation of the Ohio Constitution.<sup>104</sup>

The Ohio Supreme Court, in 1922, discussed the limits upon both the legislative

96. OHIO REV. CODE ANN. § 5709.01 (Page 1980). "Taxation is the rule and exemption the exception." *Cleveland Osteopathic Hosp. v. Zangerle*, 153 Ohio St. 222, 225, 91 N.E.2d 261, 262 (1950). For calendar year 1983 in Ohio, \$11.57 billion of real property or 13.05% of all land in the state, was exempt from taxation and separated from the tax base. ANNUAL REPORT, DEPARTMENT OF TAXATION OF THE STATE OF OHIO (1983).

97. OHIO CONST. art. XII, § 2. The constitution, however, in granting the General Assembly the power to enact certain delimited exemptions, does so "without limiting the general power."

98. OHIO CONST. art. XII, § 2.

99. OHIO CONST. art. XVI, § 1. This section states in pertinent part: "If the majority of the electors voting on the same [constitutional amendment] shall adopt such amendments the same shall become a part of the constitution . . ."

100. In 1905, an amendment to Article XII, section 2 exempting certain bonds from taxation was passed, then repealed in part in 1912, and reamended to its current status in 1918. The 1918 amendment also included a clause granting the legislature the power to pass laws protecting "against the double taxation that results from taxation of both the real estate and the mortgage or the debt secured thereby, or other lien upon it." The Great Depression of 1929 provided the impetus for motion toward passing the amendments to Article XII, section 2 in 1929 and 1933. The original mandatory language of Article XII, section 2 stating that "laws shall be passed" was replaced in 1929 with passive language that nonetheless granted to the legislature the power to enact certain real property tax exemptions. In addition, in 1933 a one percent of value limit upon the taxation of property was substituted for the one and a half percent limit commenced in the 1929 amendment. See OHIO CONST. art. XII, § 2 (as amended 1905, 1912, 1918, 1929 & 1933) (despite the extensive history of amendment to this section of the Ohio Constitution, the exclusive use of language was never changed).

101. See, e.g., OHIO REV. CODE ANN. §§ 5709.07-.121 (Page 1980).

102. See *infra* note 133.

103. OHIO REV. CODE ANN. § 5709.07 (Page 1980).

104. *In re Bond Hill-Roselawn Hebrew School*, 151 Ohio St. 70, 72, 84 N.E.2d 270, 272 (1949).

and the judicial branches when interpreting the constitutionality of exemption statutes:

The legislature should exercise its authority to the fullest extent within the constitution to encourage these worthy organizations in the accomplishment of their object, but it is not within the court's power to extend exemptions beyond the authority granted by the constitution or the acts of the legislature pursuant thereto.<sup>105</sup>

The Ohio Constitution and the Ohio church exemption statute have always limited the exemption for church property to "houses used exclusively for public worship." The judiciary must not interpret the exemption statute more broadly than the constitution allows. If enough popular support for broadening the base of exemptions for religious institutions exists, then the electorate will vote to amend the constitution. To date, the electorate has rebuked all attempts to alter the "exclusive use" language found in the constitution.<sup>106</sup>

### C. Ownership or Use Requirements as Elements of Exemption

An important distinction to note when interpreting real property exemption statutes is that an exemption:

may be either in personam or in rem, the latter form being the more common. When tax immunity is granted because of the peculiar status of the favored individual, it constitutes an exemption in personam. . . . When tax exemption is granted to individuals or organizations because their . . . property is owned by individuals or organizations engaged in specified activities, the exemption is in rem.<sup>107</sup>

In short, in personam describes an exemption based purely on ownership, while in rem describes an exemption based either purely upon use, or upon use and ownership in combination. If real property owned by a religious institution were exempted only because it was owned by a church, the exemption would be in personam since it is based upon ownership. If the same real property were required to be used in a certain way (for example, "used exclusively for public worship"), the exemption would be in rem since it is based upon use.

The case of *National Headquarters D.A.V. v. Bowers*<sup>108</sup> exemplifies the distinction between ownership and use in the interpretation of an exemption statute. In *Bowers*, property was used by the Disabled American Veterans organization ("D.A.V.") to assemble and distribute small plastic replicas of motor vehicle licenses that were sold to produce income for the organization.<sup>109</sup> The real property exemption statute, which required that the property be used exclusively for charitable purposes, was in rem. The Ohio Supreme Court conceded that the D.A.V. was organized for charitable purposes, but found that the property in question was not used exclusively for those purposes and therefore did not meet the test for exemption.

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105. *Wilson v. Licking Aerie*, 104 Ohio St. 137, 148, 135 N.E. 545, 548 (1922).

106. *See supra* note 100.

107. *Stimson, supra* note 60, at 411.

108. 171 Ohio St. 312, 170 N.E.2d 731 (1960).

109. *Id.* at 313, 170 N.E.2d at 732.

The court held: "The *use*, not the *ownership*, is the test. It is the property, not the institution, that is being taxed."<sup>110</sup> Additionally, under the in rem theory, it is irrelevant that the income generated from the use of the property is reinvested in the charitable institution. "The law looks to the property, as it finds it in *use*, and not to what is done with its accumulations."<sup>111</sup>

Although the terms of exemption statutes can vary considerably, Ohio currently allows exemption only in rem.<sup>112</sup> The Ohio church exemption statute is in rem, granting tax exemption not to property owned by religious organizations, but to "houses used exclusively for public worship." Since humanitarian exemption statutes are to be construed strictly,<sup>113</sup> the courts should require the actual use of the property to be in complete conformity with the statutory requirement. Thus, the term "exclusive use" must be construed as nearly as possible in accordance with the intention of the legislature.

#### D. Exemption Viewed as a State Subsidy

An exemption from real property taxation means that the owner of exempt property will not be contributing revenue to the government in proportion to the value of the land. In fact, those who receive property tax exemptions from the government are in turn being supported by the government and by the paying community. When one portion of society must carry the burden of government, those who are not paying are being subsidized by the government.<sup>114</sup> Exemption is not a direct subsidy; the government is not funding the property owner in order to pay the property taxes. Exemption is an indirect subsidy; the government simply does not collect that which it is owed. Yet, the exempt property owner possesses the land and demands the same government services (police, fire, zoning) as his neighbors, without contributing to the funding of those services.

Normally, when government subsidizes an activity, budgets are drawn up, requests are made, and the public is informed of how the community's money is being spent. But because tax exemptions are an indirect subsidy, it is difficult to determine precisely who is receiving the benefits, and what the cost of those benefits is to society. When exempt property loses its cost effectiveness,<sup>115</sup> the property should be placed on the tax lists. Unfortunately, this probably will not happen. Society has little opportunity to check up on the use of its tax exempt property. Exemptions "do not appear in any budget, and, therefore, no democratic process influences the exemption."<sup>116</sup>

Moreover, it is possible for the exemption subsidy to have no relation to its cost or to the value that society places on the activity. For example, if a small private

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110. *Id.* at 314, 170 N.E.2d at 733.

111. *Cleveland Library Ass'n v. Pelton*, 36 Ohio St. 253, 258 (1880) (emphasis added).

112. OHIO REV. CODE ANN. §§ 5709.07-.121 (Page 1980).

113. Reitze, *supra* note 65, at 76.

114. *Id.* at 83.

115. A use of real property loses its cost effectiveness when the value of the use that justified the exemption is less than the revenue produced from taxation of that property.

116. Reitze, *supra* note 65, at 83.

charity performs activities that could be subsidized by the government for \$1000 a year, on exempt property which, if taxed, would generate \$2000 of tax revenue yearly, the community would not support the activity. To be cost effective the amount of the aid in all cases should depend upon "the actual needs of the favored institution or the extent of its benefactions, rather than upon the value of the real property owned or used."<sup>117</sup> However, it is impracticable to perform cost effectiveness studies for every plot of land that might be exempted. In Ohio, as long as the use of the property qualifies for exemption under one of the statutes, exemption will be granted.

Exemption of church property is perhaps the most controversial of all the possible indirect subsidies.

Attacks on the subsidization of religious institutions through tax exemptions have been continuous. It is an anomaly that although no state can directly subsidize a church, these indirect subsidies have been unassailable. . . . In the foreseeable future, then, the large segment of the population not affiliated with any organized church can expect to continue to be coerced into supporting organized religion by their organized brethren.<sup>118</sup>

Religious property exemptions are often criticized as a product of the power politic theory.<sup>119</sup> Moreover, even if the indirect exemption subsidies were defined in the government budget, "the large segment of the population not affiliated with any organized church" could not legally withhold taxes to offset the subsidy. Only by eliminating the subsidy from the budget would those who complain of subsidizing "their organized brethren" be satisfied. But as one commentator states:

[U]nless there is first a loss of private political power it would be unrealistic to expect a termination of an exemption privilege merely because a societal benefit commensurate with the loss does not exist. Obviously, therefore, one of the obligation[s] of those living in a democracy is the privilege of subsidizing the majority's activities.<sup>120</sup>

Because this "privilege" will apparently continue well into the future in Ohio, the judiciary has a duty to interpret the statute as it is written and protect those in the minority.

#### *E. The Role of the DTE, the BTA, and the Ohio Supreme Court*

The Division of Tax Equalization ("DTE")<sup>121</sup> and the Board of Tax Appeals ("BTA")<sup>122</sup> are the executive appendages in charge of administering the real property tax exemption statutes. All applications for exemption from real property taxes must first be reviewed by the DTE.<sup>123</sup> The chief executive officer of the DTE is the Commissioner of Tax Equalization, who, under the authority of the tax

117. Stimson, *supra* note 60, at 423.

118. Reitze, *supra* note 65, at 72-73.

119. See *supra* text accompanying notes 91-94.

120. Reitze, *supra* note 65, at 67.

121. OHIO REV. CODE ANN. § 5715.01 (Page 1980). The DTE was initially created as an independent administrative department under House Bill No. 920 (eff. Oct. 11, 1976). Since 1983, however, the DTE has been a division of the Department of Taxation under House Bill No. 260 (eff. Sept. 27, 1983).

122. OHIO REV. CODE ANN. § 5703.02 (Page 1980).

123. OHIO REV. CODE ANN. § 5715.27 (Page 1980). The statute requires applicants to file with the tax commissioner of the Department of Taxation, but since the DTE is a division of that department the DTE in fact reviews the application.



commissioner, is charged with the supervision of local authorities in their duties relating to the assessment of real property, and the levy and collection of taxes.<sup>124</sup> Among the Commissioner's responsibilities is that of approving or rejecting applications for the exemption from real property taxes<sup>125</sup> and of remitting illegally assessed taxes and penalties.<sup>126</sup>

The purpose of the application is to enable the DTE to determine whether the actual use of the real property qualifies the owner for exemption under the Ohio statutes. In the case of a religious institution, the church exemption statute requires that the land contain a house "used exclusively for public worship." The DTE will often contact the church or its attorney informally, or in certain circumstances conduct a hearing.

Approximately 3000 applications were filed in 1984,<sup>127</sup> up considerably from the 2700 filed in 1983.<sup>128</sup> The upward trend in applications shows no sign of subsiding, nor will it subside as long as the judicial interpretation of the present laws continues to waver. Every aspect of the system encourages application: the applications and hearings are free; the attorney is often already salaried; and the changing case law on exemption lacks any principled guidelines. Hence, applicants denied exemption one year have every incentive to reapply the next year for exemption under a different code section.<sup>129</sup>

If an applicant is dissatisfied with the DTE recommendation—if the exemption was denied or only a split listing was granted—the applicant has the right of appeal to the BTA to review the DTE recommendation. The BTA at this point has full powers to act as a review board and to grant an exemption based upon its factual findings or statutory interpretation. Both the DTE and the BTA are required to record their decisions.<sup>130</sup> Thus, a fair amount of legal research is generated to support their written recommendations.

The process of determining whether property ought to be taken off of the tax lists is, as mentioned, exhausting and time consuming. "The prolific litigation further points to the rather unsatisfactory nature of most of the constitutional and statutory language relating to the church exemption—language which due to its imprecision and overly broad terminology, constitutes a veritable invitation to aggressive and conscientious tax officers to resolve any doubts against exemptions."<sup>131</sup> Yet, because

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124. OHIO REV. CODE ANN. § 5715.30 (Page 1980).

125. OHIO REV. CODE ANN. § 5715.01 (Page 1980).

126. OHIO REV. CODE ANN. § 5715.39 (Page 1980).

127. JOURNAL OF THE DEPARTMENT OF TAXATION, DIVISION OF TAX EQUALIZATION (1984).

128. JOURNAL OF THE DEPARTMENT OF TAXATION, DIVISION OF TAX EQUALIZATION (1983).

129. There is no limit placed on the number of applications that may be made under different exemption code sections. In addition, the administrative agencies differ in their interpretations of the laws with time. *See, e.g.*, The Columbus Dispatch, March 8, 1985, at 2B, col. 1 ("And when exemption cases were disputed 'the former Board of Tax Appeals was more liberal than it is now,' said Carol Mahaffey, an attorney for the tax department's division of tax equalization.").

130. OHIO REV. CODE ANN. § 5717.03 (Page 1980).

131. Alstyne, *Tax Exemptions of Church Property*, 20 OHIO ST. L.J. 461, 504 (1959). If the BTA rules against an applicant, the applicant may appeal the decision to the Ohio Supreme Court or the appropriate county court of appeals. Alternatively, the applicant may apply for a de novo hearing at the appropriate court of common pleas. OHIO REV. CODE ANN. § 5717.04 (Page 1980).

of the imprecise nature of the exemption statutes and their judicial interpretation, religious institutions refuse to accept any recommendation short of a full exemption. It is easy to equate the laudable goals of most churches with the statute's "public worship" language. The ideals of the humanitarian theory underlie both. The judiciary's interpretation must separate the humanitarian from the nonhumanitarian or less-humanitarian purpose to determine exemption. This subjective state of the law has led to the prolific litigation of exemption statutes.

One commentator has described the process that has resulted in the current state of the exemption laws:

Legislative "buck-passing"—"Let's pass the bill even if we don't understand it, because the courts will make clear what we meant"—is, of course, not uncommon; but in the tax exemption field it may have a particularly vicious impact. Vagueness of exemption language, coupled with the institutional dynamics of the assessor's position, tends, by inviting litigation, to impose a practical tax discrimination upon those churches which are most in need of financial assistance and least able to afford the costs, financial and otherwise, of such litigation.<sup>132</sup>

This all translates into money spent to determine whether the state and, in the end, local taxing districts, will lose revenue. Despite the built-in balances of appeals, one must question whether this system nonetheless discriminates because it is too time consuming, expensive, and arbitrary.

#### IV. THE JUDICIAL DEVELOPMENTS OF OHIO'S CHURCH EXEMPTION STATUTE

##### A. *The Era of Strict Construction*

All versions of the church exemption statute have contained the exclusive use requirement as derived from the Ohio Constitution.<sup>133</sup> Judicially, "Ohio has traditionally construed its tax exemptions for churches very strictly," following the legislated language.<sup>134</sup> The Ohio Supreme Court outlined the basis for this interpretation as follows:

It is manifest, from the carefully worded language of these provisions, that the legislature intended to place strict limitations upon exemptions, and great caution has been exercised in the terms expressed, so that the right of exemption conferred would not be abused or unduly enlarged, and such restrictions are essential to a fair and equitable sharing in the burdens of taxation.<sup>135</sup>

Thus, "used exclusively" is judicially interpreted in accordance with its dictionary meanings: "used purely" or "used for no other purpose."<sup>136</sup>

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132. *Id.* at 505.

133. *See, e.g.*, OHIO REV. CODE ANN. § 5709.07 (Page 1980); OHIO GEN. CODE § 5349; OHIO REV. STATUTES § 2732; OHIO SWAN & SAYLOR STATUTES § 761; OHIO SWAN & CRITCHFIELD STATUTES § 1440.

134. Reitze, *supra* note 65, at 76.

135. *Watterson v. Halliday*, 77 Ohio St. 150, 171, 82 N.E. 962, 966 (1907).

136. *Id.* at 174-78, 82 N.E. at 966-68.

In 1874 the Ohio Supreme Court rendered in *Gerke v. Purcell*<sup>137</sup> its first decision interpreting the boundaries of both Article XII, section 2 of the constitution and the church exemption statute. The dispute hinged on the possible exemption of a parsonage and the grounds surrounding the church building.<sup>138</sup> The court strictly interpreted the constitutional language and held that the grounds surrounding any church were exempt, but only to the extent that they were necessary for public worship.<sup>139</sup> Regarding the parsonage, the court asserted that:

A parsonage, although built on ground which might otherwise be exempt as attached to the church edifice, does not come within the exemption. The ground in such case is appropriated to a new and different use. Instead of being used exclusively for public worship, it becomes a place of private residence. The exemption is not of such houses as may be used for the support of public worship, but of houses used exclusively as places of public worship.<sup>140</sup>

“[H]ouses used exclusively for public worship” included only the church edifice itself and the property necessary for its proper use and enjoyment.

The 1907 case of *Watterson v. Halliday*<sup>141</sup> affirmed the *Gerke* holding. In an attempt to fall outside the non-exempt parsonage classification, the church argued that the residences of priests and bishops were used for the discharge of many duties of both a religious and charitable nature, and that the parsonage therefore should be exempted.<sup>142</sup> This reasoning was rejected by the court, which thought it significant that the legislature used the word “exclusively” throughout the exemption statute.<sup>143</sup>

The court emphasized the distinction between use and mere ownership: “There is no presumption of exemption from taxation because the institution claiming it is of a religious or charitable nature, for it is perfectly competent for such institutions to own property clearly subject to taxation.”<sup>144</sup> Even though the parsonages were being used only in connection with church activities, they were considered to be primarily residences, and thus not “houses used exclusively for public worship.”<sup>145</sup> To qualify for exemption, the property had to be used in a manner consistent with the language of the exemption statute.

The strict interpretation of the church exemption statute remained fairly constant for forty more years. As late as 1941, in *Congregational Union v. Zangerle*,<sup>146</sup> the Ohio Supreme Court held that a parking lot did not qualify for an exemption since it was not necessary for the proper use and enjoyment of a church building.<sup>147</sup> The only

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137. 25 Ohio St. 229 (1874).

138. *Id.* at 247.

139. *Id.* at 248.

140. *Id.* at 230.

141. 77 Ohio St. 150, 82 N.E. 962 (1907).

142. *Id.* at 152–59. Note: the argument for the plaintiff is not printed in the regional reporter.

143. *Id.* at 167–73, 82 N.E. at 965–66.

144. *Id.* at 170, 82 N.E. at 965.

145. *Id.* at 180, 82 N.E. at 968.

146. 138 Ohio St. 246, 34 N.E.2d 201 (1941).

147. *Id.* at 247, 34 N.E.2d at 202. The facts relied upon by the court were somewhat unusual. The grounds not exempted contained a parking lot. However, the property had a separate parcel number from the exempted property and was purchased by the church six years after the church lot had been obtained. The parking lot was contiguous to the church structure. In reaching its decision, the court held the use of the nonexempt lot was not necessary for the proper use and occupancy of the church under the church exemption statute.

entity that qualified for exemption was that which the statute clearly contemplated: a church building and the green space necessary for its existence.

In 1948, however, the Ohio Supreme Court portended its adoption of an ever-expanding view of the church exemption statute. In *Mussio v. Glander*<sup>148</sup> the court faced the contemporary problem of the multipurpose church building. In the past, when a church sought exemption for a single lot that contained both exempt and nonexempt portions, such as a church and a parsonage, the property was split into separate entities by a sale through a strawman. Through this process, the portion of the property containing the house “used exclusively for public worship” maintained its exclusive status. Consequently, it was eligible for exemption. The separate lot, which contained the parsonage, remained on the tax lists. The system was arguably inefficient, but the integrity of the exemption system remained intact.

Multipurpose buildings, however, unlike separate buildings on a lot, could not be split by floor level through a strawman sale. Although frustrated with the result, the *Mussio* court affirmed the judicial course by holding that the tax exemption statute was to be strictly read. However, anticipating the passage of a statute that would virtually eliminate the need for strawman sales, the court remarked: “Taxing authorities are not authorized to split the listing of a separate parcel of real property owned by a single charitable institution so as to tax a portion and exempt the rest of the property from taxation.”<sup>149</sup>

#### B. Bond Hill and the Primary Use Test

In the term following the *Mussio* decision, the Ohio Supreme Court abandoned its strict construction of the “used exclusively” language contained in the church exemption statute. In *In re Bond Hill-Roselawn Hebrew School*<sup>150</sup> the court interpreted “exclusive” to mean “primary,”<sup>151</sup> thereby creating the primary use doctrine.<sup>152</sup> The church in *Bond Hill* sought exemption for a one and a half story multipurpose building,<sup>153</sup> the first floor of which was admittedly used exclusively for public worship.<sup>154</sup> A man who acted as caretaker for the building was permitted to live with his family rent-free in the rooms above the church. The court held that as long as the primary use of the building was for public worship, then the entire building could be exempted under the church exemption statute.<sup>155</sup> The *Bond Hill* court viewed the building as a single unit and asked whether, on the whole, the

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148. 149 Ohio St. 423, 79 N.E.2d 233 (1948).

149. *Id.* at 425, 79 N.E.2d at 234.

150. 151 Ohio St. 70, 84 N.E.2d 270 (1949).

151. *Id.* at 75, 84 N.E.2d at 273.

152. *See supra* note 6.

153. Multipurpose buildings are at the heart of the problem regarding real property tax exemptions for churches. They typically contain many rooms, each of which has numerous uses, ranging from church administration and religious ceremony to bingo fund raising and caretaker habitation. Because most churches suffer from financial shortages, most of these buildings were not developed through legal planning—they are being used merely for what the church members at that time feel is important for their parish.

154. 151 Ohio St. 70, 71, 84 N.E.2d 270, 271 (1949).

155. *Id.* at 77, 84 N.E.2d at 274.

structure was primarily used as a house of public worship.<sup>156</sup> The residential use, consequently, could be viewed as “incidental” to the overall use and purpose of the building.<sup>157</sup> “In the instant case, the primary use of the building is for public worship. It is not reasonable to say that because the caretaker and his wife and child lived in a relatively small portion, the building was not a house which was used exclusively for public worship.”<sup>158</sup>

The court saw the primary use test as a solution for complex exemption situations:

Such a literal construction [of “exclusive use”] could prevent any exemption being given under these words of the Constitution [Article XII, section 2]. It would not be difficult to show some slight use of any church building for a purpose other than public worship. It would probably be impossible to prevent such use. The building must be open to all members of the public if it is to qualify as one used for “public worship.” If someone comes into the building and misuses it, is the exemption to be denied? Such a literal construction would clearly not be a reasonable construction. The people certainly intended that the words they used in the Constitution should be given a reasonable meaning.<sup>159</sup>

Thus, the primary use test replaced the court’s strict interpretation of the “exclusively used” requirement.

Ohio courts today generally agree that the primary use test is a valuable judicial tool, one that aids them in achieving justice.<sup>160</sup> But in the exemption field, the adoption of the primary use test is troublesome. First, the test is little more than a case-by-case problem solver that places numerous legislative functions in the hands of the judiciary. In *Bond Hill*, for instance, the court prefaced its conclusion with the phrase, “In the instant case,”<sup>161</sup> which can only suggest to other potential applicants that they too will qualify as an exception to the rule. Second, the test is to some degree a fiction. Despite the court’s plethora of verbiage, there is in reality no difference between the use of part of a building as a caretaker’s quarters and the use of a separate building as a parsonage. Both uses are residential. Last, the test requires the judiciary to perform several legislative functions. Not one word in the exemption statute interpreted by the court had been changed since it was enacted. The court took it upon itself to replace “exclusively” with “primarily” when looking at the building as a whole. Although the resulting primary use test is based upon sound logic and has simplified certain exemption decisions, the test as espoused in *Bond Hill* has allowed the courts to legislate their own standards, on a case-by-case basis, as to when property is eligible for exemption. These problems have only been exacerbated by the court’s interpretations of the split statute as it applies to the church exemption statute.

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156. *Id.* at 76–77, 84 N.E.2d at 274.

157. *Id.* at 77, 84 N.E.2d at 274.

158. *Id.*

159. *Id.* at 72, 84 N.E.2d at 272. The court later noted: “Although constitutional provisions for exemption from taxation should be given a strict construction, that construction should be reasonable and one which will not defeat the intention which the people expressed by the words which they used.” *Id.* at 73, 84 N.E.2d at 272.

160. *See, e.g.,* *Moraine Heights Baptist Church v. Kinney*, 12 Ohio St. 3d 134, 135–36, 465 N.E.2d 1281, 1282 (1984).

161. 151 Ohio St. 70, 77, 84 N.E.2d 270, 274 (1949). No evidence exists showing that the statute was enacted as a reaction to the *Bond Hill* decision.

### C. *The Split Statute and the Church Exemption Statute*

Only months after the Ohio Supreme Court decided *Bond Hill*, the Ohio General Assembly amended General Code section 5560, now Ohio Revised Code section 5713.04, to include a clause described as the split statute.<sup>162</sup> The split statute provides exemption for portions of improved or unimproved property when the applicant adequately demonstrates the following: first, that the entire property is under single ownership; second, that the portion of the property to be exempted qualifies as a separate entity; and third, that the separate entity is used exclusively for exempt purposes. The split statute does not look at the building as a single unit and decide whether the whole building qualifies for exemption. Rather, it looks at the building room by room to determine whether any room qualifies for exemption. When a split exemption is granted for a portion of property, the property used for nonexempt purposes will be listed separately and taxed accordingly.<sup>163</sup> A split listing can be applied vertically, horizontally, or otherwise,<sup>164</sup> and any exempt portion of a building or property, for example a church service room, will be separated and taken off of the tax lists. Unfortunately, the split statute has caused as many legal dilemmas as it was intended to resolve.

Until 1982 the split statute and the church exemption statute each possessed independent histories of judicial interpretation. Despite the exclusive use language found in both the split statute and the church exemption statute, the latter was read to require only primary use while the former was held strictly to its wording.<sup>165</sup> Because the split statute was enacted after the *Bond Hill* decision, albeit by only a matter of months, the primary use test was not applied to the split statute in that case—indeed, it can be argued that the court would not have created the primary use test at all if the enactment of the split statute had preceded *Bond Hill*.

The split statute can be used in either a positive or a negative manner.<sup>166</sup> To use the split statute positively, the courts can carve out an exempt “entity” that otherwise would remain taxed because the whole parcel of property is not used for an exempt purpose. Using the statute negatively, the courts can retain the nonexempt portions of property that otherwise would have escaped taxation under the primary use test on the tax lists because their nonexempt qualities are not great enough to disqualify the whole parcel of property. In either case, the split statute provides a more accurate assessment of the exempt and nonexempt uses of the property.

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162. See *supra* note 2. The split statute requires the entity separated to be “used exclusively for an exempt purpose.” According to *Goldman v. The L.H. Harrison*, 158 Ohio St. 181, 107 N.E.2d 530 (1952), the separation cannot be based on either time or area-ratio percentages. If a certain area within a multipurpose building is used 80% of the time as a church or charity, it does not qualify for exemption under the statute. Or, even if four-fifths of the building can be described as “used exclusively for public worship,” the division is not determined by percentage. Rather the exempt four-fifths of the building must be separated out and recorded as exempt, while the final fifth is subject to taxation.

163. OHIO REV. CODE ANN. § 5713.04 (Page 1980).

164. Schnell, *supra* note 10, at 827.

165. *Bishop v Kinney*, 2 Ohio St. 52, 53, 442 N.E.2d 764, 765 (1982).

166. The strategy for exemption from the applicant’s perspective is to claim exemption under the statutes as follows: when only a small portion of the property is used for exempt purposes (for example, as a church), claim that the portion used exclusively for an exempt purpose qualifies under the split statute; but when only a small portion of the property is used for nonexempt purposes (for example, leased for a business), claim that the whole property is primarily used for an exempt purpose under an exemption statute.

The statute, additionally, resolves previously unanswerable questions regarding exemption for multipurpose buildings.<sup>167</sup> The split statute was designed as a quick solution to the situations in which a strawman sale under the church exemption statute alone was infeasible.<sup>168</sup> Previously, the property was exempt only if the entire multipurpose church building was used primarily as a house of public worship. Although the primary use as a house of public worship might not be diminished by the use of the second floor as a caretaker residence,<sup>169</sup> it would be destroyed by the use of the second floor as a preacher's residence (parsonage);<sup>170</sup> then none of the property containing the church would be exempted. To prevent such divergent results for multipurpose buildings, courts today can use the split statute to retain nonexempt portions of property on the tax lists while freeing exempt portions from the tax lists.

The price, however, for such accuracy is high, because exemption under the split statute is overly complex. Although the state hearing boards might occasionally save time in separating out the exempt portions of property from the nonexempt, the county auditors are required to spend a great deal of extra time relining the property records to match up with the split listings. In addition, a great deal of time will be spent recording the justifications of split listings because the hearing boards must record all denials of exemption. The system is not as efficient with the split statute, and the lack of efficiency costs the taxpayers more money.

In an ideal universe, the split statute does make sense. It is fair to exempt a church entity located on one level of a large multipurpose building when the church is no different from other exempted churches. A multipurpose building containing a church should not be in an inferior position because it did not happen to develop with separate and unique structures for church and parsonage. That notion of fairness underlays the legislative enactment. The Ohio legislature, however, did not anticipate the judicial quagmire that resulted. The churches realized a new weapon they could wield in order to gain exemption for every room remaining on the tax lists. They are now waging a war of attrition against the state that set up the system in the first place.

## V. *BISHOP v. KINNEY* AND ITS REPERCUSSIONS

### A. *Bishop v. Kinney*

#### 1. *The Primary Use Test Applied to the Split Statute*

In *Bishop v. Kinney*, the Bishop of the Roman Catholic Diocese of Cleveland sought exemption from real property taxes for the land containing a three level multipurpose building divided roughly into the church, the parsonage, and the parish hall.<sup>171</sup> The Board of Tax Appeals denied exemption for the parish hall, and the Roman Catholic Diocese appealed the decision, taking its case to the Ohio Supreme

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167. See *supra* notes 153–54.

168. See *supra* text accompanying notes 148–49.

169. *Watterson v. Halliday*, 77 Ohio St. 150, 82 N.E. 962 (1907).

170. *In re Bond Hill-Roselawn Hebrew School*, 151 Ohio St. 70, 84 N.E.2d 270 (1949).

171. *Bishop v. Kinney*, 2 Ohio St. 3d 52, 52, 442 N.E.2d 764, 764 (1982).

Court.<sup>172</sup> The court held that because the primary use of the parish hall was “religious in nature,” and the Tax Commissioner had conceded “such use constitutes ‘public worship’ within the meaning of [the church exemption statute], . . . [the] appellant is entitled to a tax exemption for the parish hall” under the split statute.<sup>173</sup>

The facts of *Bishop* clearly reveal the dilemmas facing both the courts and the administrative agencies today. The many facets of the split statute had to be applied in the context of a multipurpose building serving many uses. The church level of the multipurpose building was exempted as a separate entity, and the parsonage level denied, exhibiting the positive and negative manners in which the split statute can be used.<sup>174</sup> The Roman Catholic Diocese argued that the remaining portion of the multipurpose building, the parish hall, was also used primarily for religious purposes.<sup>175</sup> The parish hall in the multipurpose building was itself a multipurpose room:<sup>176</sup>

The parish hall is a large room with movable partitions which can be used to create four classrooms. Two days per week, religion classes are held in the hall. Faculty training programs and curriculum workshops for the parish school of religion are also held in the hall. The hall is also used for retreats, summer bible school and engagement encounters. Two Sundays per month, breakfasts are held in the hall after Mass. Church groups, girl scout groups and other civic organizations hold their meetings in the hall. One night per week, bingo games are conducted in the hall.<sup>177</sup>

These buildings with multiple uses and the rooms within them have become commonplace for parishes conserving their resources.

The question faced by the court was whether the portion of the church multipurpose building described in *Bishop* qualified under the split statute as a separate entity being used exclusively as a house of public worship. In reaching its decision the Ohio Supreme Court held that it could find no authority “which would support appellee’s contention that the enactment of the split-listing statute diminished the viability of the primary use test enunciated in *Bond Hill*,” and thereby applied the primary use doctrine to the split statute.<sup>178</sup>

The court, however, limited the scope of the questions it was answering. The court held that three requirements had to be met before the parish hall could be exempted under the split statute.<sup>179</sup> First, the church had to establish that the portion of the multipurpose building used as the parish hall was indeed “a separate entity” from the rest of the building. The court agreed that the self-contained hall was a

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172. *Id.*

173. *Id.* at 54, 442 N.E.2d at 766. It is unclear why the court substituted the “religious in nature” use test for the traditional “public worship” test. See *supra* text accompanying note 15.

174. The positive use of the split statute was the exemption of a portion of property containing the church level from otherwise nonexempt property. The negative use of the split statute was the splitting off of the nonexempt parsonage level from what otherwise might have been exempt property used for a church. The reason that this is negative is that under the primary use doctrine the split parsonage might have been exempted along with the church. See *supra* notes 150–61 and accompanying text.

175. 2 Ohio St. 3d 52, 52, 442 N.E.2d 764, 764 (1982).

176. See *supra* note 153.

177. 2 Ohio St. 3d 52, 52, 442 N.E.2d 764, 764 (1982).

178. *Id.* at 53, 442 N.E.2d at 765.

179. *Id.* at 52–53, 442 N.E.2d at 765.



separate entity.<sup>180</sup> Second, the court had to find that the multipurpose building containing the parish hall was under single ownership. This was uncontested.<sup>181</sup> Last, the court had to decide whether the parish hall was being “used exclusively for exempt purposes” according to the split statute requirements.

The Tax Commissioner took a defensive position regarding the requirement that in order to be exempted the entity must be used exclusively for some exempt purpose. Rather than arguing that the parish hall level was not used “exclusively” for public worship, or even that it was not used “primarily” for public worship, the Commissioner accepted that the use of the parish hall level was “religious in nature,” and argued that the primary use doctrine articulated in *Bond Hill* was not applicable since it was decided before the split statute was enacted.<sup>182</sup>

The *Bishop* court, however, construed the exclusive use language found in both the split statute and the church exemption statute as requiring a parallel interpretation.<sup>183</sup> The court then agreed with the BTA that the primary use was “religious in nature” and, incredibly, asserted that such use qualified for exemption under the split statute. Consequently, the court held that the exclusive use language contained in the split statute required that a portion of a building be exempted when primarily used for public worship.<sup>184</sup> In support of its holding that “religious in nature” satisfies the exclusive use requirements of the statutes, the court supported its reasoning with a list of cases possessing parallel fact situations, where “rooms similar to the parish hall have been granted exempt status.”<sup>185</sup>

The Ohio Supreme Court referred to a passage in *Bond Hill* that discussed the problems arising under the strict construction of exclusive use language.<sup>186</sup> The *Bishop* court then asserted: “We find this rationale equally applicable whether the focus of inquiry is the whole building, as in *Bond Hill*, or a portion thereof as now authorized by the split-listing statute.”<sup>187</sup> The split and church exemption statutes are more analogous to an apple and an orange than to a matched pair. To employ the split statute is first to determine whether an exempted use exists (for example, for “houses used exclusively for public worship”) and then to apply that use to the exclusive use language within the split statute. These are two different statutory jobs, and the fact that both statutes have similar language is irrelevant. Accordingly, several problems were created by the *Bishop* interpretation.

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180. *Id.* at 52, 442 N.E.2d at 764 (“The parish hall is a large room with movable partitions which can be used to create four classrooms.”). The issue of what is a separate entity has plagued the courts since the inception of the split statute. *See, e.g.*, *New Haven Church v. BTA*, 9 Ohio St. 2d 53, 223 N.E.2d 366 (1967).

181. 2 Ohio St. 3d 52, 52, 442 N.E.2d 764, 765 (1982) (“Appellant, the Bishop of the Roman Catholic Diocese of Cleveland, Trustee for St. Patrick Church in Wellington, Ohio . . .”).

182. *Id.* at 54, 442 N.E.2d at 766.

183. *Id.* at 53, 442 N.E.2d at 765 (“We find this rationale equally applicable whether the focus of inquiry is the whole building, as in *Bond Hill*, or a portion thereof as now authorized by the split-listing statute.”).

184. *Id.* at 54, 442 N.E.2d at 766.

185. *Id.* *See* *Operation Evangelize v. Kinney*, 69 Ohio St. 2d 346, 432 N.E.2d 200 (1982); *Episcopal Parish v. Kinney*, 58 Ohio St. 2d 199, 389 N.E.2d 847 (1979); *New Haven Church of Missionary Baptist v. Board of Tax Appeals*, 9 Ohio St. 2d 53, 223 N.E.2d 366 (1967); *Trustees of the Church of God v. Board of Tax Appeals*, 159 Ohio St. 517, 112 N.E.2d 633 (1953).

186. 2 Ohio St. 3d 52, 53, 442 N.E.2d 764, 765 (1982).

187. *Id.*

## 2. *The Creation of a New Standard Defining Public Worship: "Religious in Nature"*

The judiciary, performing its duty in applying statutes to specific factual situations, must interpret the component statutory language within a certain spectrum of reasonableness.<sup>188</sup> In *Bishop*, however, the Ohio Supreme Court did not stop its expansive interpretation of real property tax exemptions with the primary use test; it promoted a new, broader standard of public worship for exemption. The court held that public worship which is "religious in nature" satisfies the requirements of the church exemption statute, which exempts only "houses used exclusively for public worship."<sup>189</sup> Apparently, through the court's parallel interpretation under the primary use doctrine of the requirements for both the church exemption and split statutes, a separate entity within a parcel of property need only be used in a manner that is religious in nature to qualify for exemption. Exempt uses are no longer limited to whole tracts of property under the church exemption statute, but are extended through the split statute to include any "separate entity" within any building—be it a church edifice, retreat lodge, television office, or radio station—so long as that separate entity is used for purposes that are merely religious in nature.

If "religious in nature" is to be the new standard of public worship under the church exemption statute, then the courts will be forced to rule regarding similar situations. In *Watterson v. Halliday*, for example, the priests conducted numerous religious functions in the parsonage, services that often take place in the church.<sup>190</sup> These services can be described as no less religious in nature than the uses of the parish hall in *Bishop*. Indeed, the record notes that no services were conducted in the parish hall that could have been held in the church as public worship.<sup>191</sup> The court's distinction between the degree of the religious use is that the parish hall is exempt and the parsonage is not; in effect, the court is legislating what ought and ought not to be exempt.

Additionally, the court in *Bishop* alters judicial techniques by placing the burden upon the hearing boards and the BTA to demonstrate that "the building or rooms in question [are] primarily used for a non-exempt purpose."<sup>192</sup> In effect, the court not only lowered the standards necessary to qualify for exemption, but it also imposed the burden of persuasion on administrative hearing boards.

The *Bishop* decision has greatly altered the interpretation of Ohio's church exemption statute. Presently it appears that all that must be shown for exemption of a room in a parish hall is that the room is used primarily in a manner that is "religious in nature." This is a far cry from the supreme court's use of strict construction 100

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188. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 504-07 (1979) (Neither the language of the statute nor its legislative history discloses any affirmative intention by Congress that church-operated schools be within the NLRB's jurisdiction, and, absent a clear expression of Congress' intent to bring teachers of church-operated schools within the NLRB's jurisdiction, the Court will not construe the Act in such a way as would call for the resolution of difficult and sensitive first amendment questions.).

189. *Bishop v. Kinney*, 2 Ohio St. 3d 52, 54, 442 N.E.2d 764, 766 (1982).

190. 77 Ohio St. 150, 162-67, 82 N.E. 962, 963-65 (1907).

191. 2 Ohio St. 3d 52, 52, 442 N.E.2d 764, 764 (1982).

192. *Id.* at 53, 442 N.E.2d at 765-66.

years ago while interpreting the same Ohio Constitution.<sup>193</sup> If this is really the test, then one must ask why parsonages located in separate buildings have not been exempted. A parsonage like the one described in *Watterson* is no less “religious in nature” than the parish hall in *Bishop*. There are no logical distinctions. Thus, *Bishop*’s repercussions leave the courts with no coherent analysis.

### B. *The Progeny of Bishop v. Kinney*

Since its decision in *Bishop*, the Ohio Supreme Court has continued on a course of ambivalence toward real property exemptions for religious institutions. The progeny of *Bishop*, *Summit United Methodist Church v. Kinney*<sup>194</sup> and *Moraine Heights Baptist Church v. Kinney*,<sup>195</sup> exemplify the judicial predicament that has arisen. In both decisions, the court seemingly upheld the “religious in nature” standard first promoted in *Bishop*, while denying both churches exemption for their respective properties, a day care center and a forty-nine acre camp. Yet, what is most important about these decisions is the obvious conflict between the state and the religious institutions.

In *Summit*, the religious institution sought exemption under the church exemption statute for a parish center (multipurpose building) comprised of a sanctuary and an educational wing with rooms on three floors. Summit’s exemption request was denied by the DTE and the BTA, leading Summit to appeal to the Ohio Supreme Court.<sup>196</sup> The BTA, perhaps reflecting on its failed tactics in *Bishop*, argued that the primary use of the rooms was not religious in nature. The court agreed:

The educational wing is used on Sundays by the Appellant for Sunday school classes, but during the week the facilities are leased and used by the Ohio State University, which operates a day care center for children of its faculty, staff and students. The University had a five-year lease on the property and paid rent of \$9,309 in 1978, plus utilities on the property. The day care center is under the control of Ohio State University and it charges a sliding scale fee to those families [sic] and personnel that use it.<sup>197</sup>

Exemption was denied under the church exemption statute.

However, what is crucial to note is that two years earlier the Summit church had attempted to gain exempt status for the same property, but under the charitable use statute.<sup>198</sup> The supreme court held that a church cannot be a charity, and denied exemption for the day care center.<sup>199</sup> Summit Church, undaunted, reapplied under the church exemption statute claiming that the property was really used as a church,<sup>200</sup> and waged another year-long battle with the forces of taxation.

Summit might have perceived that using the day care center for Sunday school

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

194. 7 Ohio St. 3d 13, 455 N.E.2d 669 (1983) (hereinafter cited as *Summit II*).

195. 12 Ohio St. 3d 134, 465 N.E.2d 1281 (1984).

196. *Summit II*, 7 Ohio St. 3d 13, 14, 455 N.E.2d 669, 670 (1983).

197. *Id.*

198. *Summit United Methodist Church v. Kinney*, 2 Ohio St. 3d 72, 442 N.E.2d 1298 (1982) (hereinafter cited as *Summit I*).

199. *Id.* at 73, 442 N.E.2d at 1298 (1982).

200. *Summit II*, 7 Ohio St. 3d 13, 14, 455 N.E.2d 669, 670 (1982).

classes would satisfy the more lenient religious in nature test. After all, one could argue that the religious instruction classes taught in the day care center of a church are religious in nature. Yet, one must always return to the statute for guidance, and the statute reads "houses used exclusively for public worship." Perhaps Summit hoped that it could receive a split exemption for the Sunday school classrooms. However, the court refused to follow this logic, and bound itself by the BTA holding that the day care center as a whole was not religious in nature.<sup>201</sup> The church, confused and probably bitter, believes that it performs meritorious functions for society and does not understand why its property was denied exemption: it only wants to know how to obtain exempt status for its land.

In *Moraine Heights*, the religious institution sought exemption for a forty-nine acre camp that contained a tabernacle and numerous outdoor facilities.<sup>202</sup> Moraine Heights first applied under the church exemption statute. The court agreed with the BTA decision exempting only the land containing the tabernacle, holding that the other forty-nine acres "are, at best, merely supportive of appellant's goal to promote worship."<sup>203</sup> The court denied Moraine Heights Church the right to an appeal on the charitable exemption statute along with the church exemption statute,<sup>204</sup> leaving that cause of action open for future litigation that the church will more than likely pursue. In both *Summit* and *Moraine Heights*, however, the glaring uncertainty of whether the court might happen to grant exemption is evident, and both churches obviously felt that it was worth a spin at the roulette wheel to gain exemption.

## VI. PROPOSALS

On January 20, 1985, Oral Roberts discussed church property exemptions on his Sunday morning television revival. Mr. Roberts declared that "they" want to take away "our exemptions" by the turn of the century. He continued, saying that any such action would pit "Christians against non-Christians in America." Before asking for support, Mr. Roberts expressed his belief that the ensuing conflict would be "a trial for all of us."<sup>205</sup>

There is little doubt that the various religions feel threatened by any type of statutory reform. Perhaps they reason that if the laws are subject to change, at some point they may be changed against them. Yet, as churches push the exemptions to their financial limits, revision will become inevitable. For the present, however, the unsettled condition of the exemption statutes is creating an administrative quagmire for the state of Ohio.

The system of tax exemptions in Ohio must be revised, for the statutes are too subjective in nature. To judge property purely by its use rather than by ownership adds an infinite number of variables to what ought to be a simple determination: whether or not to exempt real property from taxation. The problems that have resulted

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201. *Id.* at 15, 455 N.E.2d at 671.

202. 12 Ohio St. 3d 134, 136, 465 N.E.2d 1281, 1282-83 (1984).

203. *Id.* at 136, 465 N.E.2d at 1283.

204. *Id.*

205. Oral Roberts Television Program, CBS Television (January 20, 1985).

are two-fold. On the one side, there are the applicant taxpayers who will aggressively pursue any potential opportunity to reduce their own tax liability. On the other side are the aggressive government agents who must enforce the oblique conceptions of exclusive use to the best of their ability. In effect, the state of Ohio is holding a nebulous carrot before the attentive eyes of the religious institutions, resulting in numerous conflicts.

The inevitable clash of the two forces on either side of the tax exemption debate can be avoided, however, by making the present church exemption statutes more objective. A simple, more in personam<sup>206</sup> system would well serve the state.<sup>207</sup> Any qualified, not-for-profit religious institution managing property containing a church building could receive exemption for the property up to a set measure of acreage.<sup>208</sup> Under this system, the religious institutions can use the property as they choose.<sup>209</sup> The semantic debates involved in distinguishing between concepts such as caretaker residences and parsonages would be eliminated, as would the incessant church lobbying for multiple-use exemptions: if the multipurpose building is on the acreage containing the church building and is not used commercially,<sup>210</sup> it will be exempt from real property taxation.

However, if the system cannot be revised, then the language of the church exemption statute, as derived verbatim from the Ohio Constitution, must be adhered to by the supreme court. No amendment to either has ever altered the exclusive use requirement, and no reasonable interpretation of either's exclusive use requirement should equate that standard of public worship with "religious in nature."<sup>211</sup> In addition, the language of the split statute must be interpreted strictly when employed in conjunction with the church exemption statute and in granting exemption only for entities "used exclusively for exempt purposes." To allow a looser interpretation of either is to increase exponentially demands for partial exemptions. Presently, fractional acreage measurements holding church buildings on immense parcels of property are being exempted through the split statute, churches with measurements

206. See *supra* notes 107–13 and accompanying text.

207. See, e.g., Ky. CONST., § 170. The constitution reads in pertinent part:

There shall be exempt from taxation . . . places actually used for religious worship, with the grounds attached thereto and used and appurtenant to the house of worship, not exceeding one-half acre in cities or towns, and not exceeding two acres in the country; . . . all parsonages or residences owned by any religious society, . . . and occupied as a home, and for no other purpose, by the minister of any religion, with not exceeding one-half acre of ground in towns and cities and two acres of ground in the country appurtenant thereto; . . . [and] all laws exempting or omitting property from taxation other than the property above mentioned shall be void.

208. In Kentucky, the set measure is either one-half or two acres. Ky. CONST., § 170.

209. The exemption granted by the Kentucky constitution on its face contains exclusive use language. Ky. CONST., § 170 ("places actually used for religious worship"). However, the ambiguity of that language is nullified by the acreage limits also established in the constitution—limits not present in the Ohio Constitution. Because of these limits, the religious institution must show only that the one-half or two acres of land contain a church in order to obtain the exemption.

210. *Broadway Christian Church v. Commonwealth*, 112 Ky. 448, 66 S.W. 32 (1902) (a church parsonage that is not occupied by the minister but is rented to another, is not exempt from real property taxes, though erected on the church lot, and though the rent is paid to the minister).

211. This line of judicial reasoning has been followed in Kentucky. *Broadway Christian Church v. Commonwealth*, 112 Ky. 448, 454, 66 S.W. 32, 33 (1902) ("When the framers of the Constitution undertook to define in exact terms what should be exempt, we are not at liberty to add to the terms which they selected with so much care and precision.").

costing less in yearly tax assessments than the applicant may have spent to drive with an attorney to Columbus for a hearing on the property!<sup>212</sup>

## VII. CONCLUSION

The focus of this Note is not to promote one standard for exemption over another, but rather to promote the enactment of firmly constructed statutes. Whether the exemption statute is to require exclusive use or mere ownership, whether Ohio is to exempt church property or any property, the procedure is clear: it is for the legislature to establish the statutory requirements and for the judiciary to interpret them reasonably. By altering exemption requirements to satisfy its view of justice, the court has created an administrative and judicial quagmire. As a result, the state is being forced to spend ever-increasing sums of money to discover whether in any particular situation the state should be denied future revenue.

The Ohio Supreme Court has entered a game from which it cannot bow out. The court has interpreted the exemption statutes, written in clear language, parallel to that of the Ohio Constitution, beyond any reasonable limits. As the system of real property taxation and exemption stands today, time and money are being wasted in the case-by-case legislating that has arisen from overly flexible judicial interpretation. More importantly, real property is being removed from the tax lists, further reducing the tax base while raising the burden for those whose property remains on the lists. Whatever decisions are reached in Ohio regarding exemption standards, the legislature will have to make them. The system as it stands is inequitable, and the stakes are too high for the legislature to fold its hand.

*John R. Cummins*

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212. See, e.g., *Moraine Heights Baptist Church v. Kinney*, 12 Ohio St. 3d 134, 465 N.E.2d 1281 (1984). According to the DTE files, the Moraine Heights church rests on 49 acres of land. The property supporting the church (actually a tabernacle) was assessed at a value of \$21,000. The state employs a figure at 35% of the assessed value to obtain the taxable value of the land. Here, the taxable value is equal to \$7,350. The millage for Greene County, where the tabernacle is located, is approximately 40 mills. Thus, the church sought exemption that was worth approximately \$300 per year. DTE Case #JE 951, filed on 2-28-79, Journal entry on 10-3-80.