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John Lundquist

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CASE NOTES

CONSTITUTIONAL LAW—THE CONSTITUTIONALITY OF CHURCH PROPERTY TAX EXEMPTIONS UPHELD BY THE “BENEVOLENT NEUTRALITY” OF THE SUPREME COURT

Frederick Walz, an elderly attorney, was the owner of a 22x29 foot plot of land on Staten Island, valued at $100.00, and was paying a property tax of $5.24 per year. Mr. Walz's small plot of land had been artfully described as “0.0146 of a weed-choked acre”. Disregarding the small economic burden that he had to bear, Mr. Walz contended that his property tax would be even lower if certain other tax exempt organizations, mainly the churches, were required to pay property taxes. At issue, specifically, was the constitutionality of the privileged tax status of churches and other religious organizations, who paid no real property tax on certain church-owned property.

Mr. Walz sought an injunction in the New York courts to prevent the New York Tax Commission from granting property tax exemptions to religious organizations for religious properties used solely for religious purposes. Mr. Walz, burdened with his assessed property tax, contended that in tax exemption afforded the churches by the government was unconstitutional as a violation of the Establishment Clause of the first amendment which was made applicable to the states by the fourteenth amendment. *Walz v. Tax Commission of the City of New York*, 397 U.S. 664 (1970).

The Supreme Court’s decision in the *Walz* case had been awaited with great interest by the legal profession and the public. At stake was the real estate tax exemption for every church and religious organization in the country. For the major religions, this was of vital importance, because

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1. N.Y. Times, June 20, 1969 at 35, col. 2 (late city ed.).
2. TIME, May 18, 1970, at 44.
4. As an indication of the major religions' interest in the outcome of the *Walz* case the following religious organizations filed briefs, as *amicus curiae*, for affirm-
over the decades from the founding of the nation they had acquired a large vested interest in the nation's real estate.\(^5\)

It was Mr. Walz's contention that he was, in effect, being forced unconstitutionally to support religious institutions by virtue of the New York property tax exemption\(^6\) afforded religious institutions. It was Mr. Walz's position that the tax he was required to pay was a forced subsidy to churches because he was "required" by law to pay the assessed tax or risk punishment for nonpayment or partial payment. It was his logical argument that if the great amount of church property were taxed, all other taxpayers' property taxes would be proportionately reduced.\(^7\) In addition to the financial burden on each taxpayer, the tax exemption was, he contended, violative of both the Establishment Clause of the first amendment and the Due Process Clause of the fourteenth amendment.\(^8\)

The first amendment provides that the "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."\(^9\) The fourteenth amendment provides that "no person shall be deprived of . . . property, without due process of law."\(^10\)

Reading these two amendments together, Mr. Walz argued that the granting of a tax exemption to churches or religious organizations was an "aid" which promotes the "establishment of religion."\(^11\) Because the tax exemption had the force and effect of law, and this "law" aided religions, the Congress had promoted the "establishment of religion." The net effect of the tax exemption was that each taxpayer, whether he desired to or not, had to make an indirect contribution to religion.


\(^5\) The value of U.S. church and synagogue property has been estimated to be $102 billion—all of it tax exempt. TIME, May 18, 1970, at 44. The Annual Report of the Tax Commission for the Fiscal Year 1968-1969, cited in TIME, supra at 33, 35, shows the religious tax exemption to be $726,010,645. There appears to be a stern reluctance on the part of religious officials to release actual real estate figures; therefore, most estimations, such as TIME's, supra, are merely guesses. For a rather biased discussion of the evaluation problems, see "Should we tax church wealth?" LOOK, supra note 3.

\(^6\) N.Y. CONST. art. 16, § 1.

\(^7\) Mr. Walz should be commended for his frugality because his tax is a "whopping" $5.24. Supra note 2.

\(^8\) U.S. CONST. amend. I and XIV, § 1.

\(^9\) U.S. CONST. amend. I.

\(^10\) U.S. CONST. amend. XIV, § 1.

\(^11\) Without the financial burden of paying taxes, the churches are relieved of a constant and heavy drain on their treasuries.
Mr. Walz did not choose to attack a vague, nebulous statute of doubtful validity. He had chosen to question the validity of a concept steeped in tradition and history. In the words of Mr. Justice Holmes: "If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to effect it."\(^{12}\)

Mr. Walz, nevertheless, armed with his logical argument, decided to fight the inertia of history and tradition and filed suit. Mr. Walz's suit immediately ran into trouble when the Tax Commission's motion for a summary judgment was granted. This ruling was affirmed unanimously by the other lower New York courts,\(^ {13} \) and, on appeal, the New York Court of Appeals stated that the tax exemptions were "firmly imbedded in the law of the State" and affirmed.\(^ {14} \) The Supreme Court noted probable jurisdiction,\(^ {15} \) bringing the case before the Court for final determination.

The Supreme Court affirmed, seven to one, with four justices writing opinions.\(^ {16} \) The majority and concurring opinions base their decision on the long established history of allowing the tax exemption, their interpretation of the intent of the Establishment Clause, and the attempts by the Court to find a "neutral course" between the two religious 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."\(^ {17} \)

From a technical legal viewpoint there are valid arguments to both sides of the points upon which the Court rendered its decision. It will be the purpose of this case note to familiarize the reader with the case, relate the relevant law on the subject to the case, and ultimately lead the reader to the significance of the *Walz* decision. As an introductory aside, the *Walz* decision may be indicative of a "new attitude" of the Court. This attitude may permit apparent contradictions among or between various judicial interpretations of the Constitution. Justification for the permissive position may be based upon a doctrine of "benevolent neutrality." Keeping this as yet unclear and nebulous doctrine of "benevolent neutrality" in mind throughout the discussion of the contradictory church tax exemption arguments should permit the reader to draw his own conclusion as to the ultimate effect of the *Walz* decision.

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16. Mr. Chief Justice Burger delivered the majority opinion, with Justices Brennan and Harlan concurring. Mr. Justice Douglas delivered the sole dissenting opinion in a seven to one decision.
The first point, *i.e.*, the inertia of history and tradition, could be dispensed with merely by stating that the Court has in the past overruled long standing statutory provisions, discarding tradition and history.\(^{18}\) To dispense with the weight of history and tradition requires careful analysis and verbal gymnastics. This is not, however, the type of case where the Court could dispense with this question so easily.

Religious institutions in the United States have enjoyed tax exemptions on their real property for nearly two-hundred years.\(^{19}\) Mr. Justice Brennan reflects this in his concurring opinion:

The more longstanding and widely accepted a practice, the greater its impact upon constitutional interpretation. History is particularly compelling in the present case because of the undeviating acceptance given religious tax exemptions from our earliest days as a Nation. Rarely, if ever has this Court considered the constitutionality of a practice for which the historical support is so overwhelming.\(^{20}\)

The question arises just how longstanding and widely accepted was this practice to make its historical support so overwhelming?

From the founding of the Nation, the churches have maintained a privileged position. In the early days, it was common for state and local governments to grant direct subsidies to churches.\(^{21}\) Taxes were, therefore, not levied upon the churches because this would amount to self-taxation.\(^{22}\) With the adoption of the Constitution in 1791, and the expressed doctrine of the separation of church and state, this rationale was no longer

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18. For example: Abington School District v. Schempp, 374 U.S. 203 (1963) overruled the established custom of reading passages from the Holy Bible because they were in preference to the Christian religion. Murray v. Curbet, 228 Md. 239, 179 A.2d 698 (1962) prohibited the mere reading of "any passage" because this preferred "all" religions over non-religions or atheism. Baker v. Carr, 369 U.S. 186 (1962) overruled long standing apportionment statutes, while Brown v. Board of Education, 347 U.S. 483 (1954), broke the traditional custom of racial segregation in public schools. The Court's reasoning for overruling long established statutes, or constitutional provisions is usually determined on a "case-by-case" basis; therefore, a study of the Court's reasoning would also have to be on a case-by-case analysis.


21. Stimson, *The Exemption of Property from Taxation in the United States*, 18 MINN. L. REV. 411, 416 (1934). Today such a direct grant or subsidy would clearly be unconstitutional. Mr. Walz might logically contend that the method is not as important as the effect. The method may be either direct subsidy or some other indirect method, for example, a tax exemption, but the effect is still the same, *i.e.*, economic assistance to the churches.

valid. Nonetheless the exemption continued. Due to the close relationship that continued in practice between the church and state, even though theoretically expressed and declared to be "separated," the practice of granting tax exemptions grew. By 1970, all the states had some type of provision exempting churches from taxation on their property.

Just how deeply rooted the practice was can be ascertained by considering its universality and large scale enshrinement in state constitutions. Today, more than two-thirds of the state constitutions provide for the exemption of church property from taxation. Of these, one-half make the exemption mandatory; the remaining require legislative action. The net result is that all states have either a constitutional or legislative provision exempting religious property from taxation.

In the present case, tax exemptions are granted specifically by Art. 16 § 1 of the New York Constitution which provides:

Exemptions from taxation may be granted only by general laws. Exemptions may be altered or repealed except those exempting real or personal property used exclusively for religious, educational, or charitable purposes as defined by law and owned by any corporation or association organized or conducted exclusively for one or more of such purposes and not operating for profit.

23. Stimson, supra note 21, at 416.
25. See generally, Cobb, The Rise of Religious Liberty in America (1902) and authorities cited supra notes 21, 22.
26. Infra note 27.
27. The constitutional language is mandatory in: ALA. CONST. art. IV, § 91; ALASKA CONST. art. 9, § 4; ARK. CONST. art. 16, § 5; KAN. CONST. art. 11, § 1; KY. CONST. § 170; LA. CONST. art. X, § 4; MINN. CONST. art. IX, § 1; N.J. CONST. art. 8, § 1, par. 2; N.M. CONST. art. VIII, § 3; N.Y. CONST. art. XVI, § 1; N.D. CONST. art. XI, § 176; OKLA. CONST. art. X, § 6; S.C. CONST. art. X, § 4; S.D. CONST. art. XII, § 6; UTAH CONST. art. XIII, § 2; VA. CONST. art. XIII, § 183.
28. In the following constitutions the language is permissive: ARIZ. CONST. art. 9, § 2; FLA. CONST. art. IX, § 1; GA. CONST. art. VII, § 2-5404; ILL. CONST. art. IX, § 3; IND. CONST. art. 10, § 1; MO. CONST. art. X, § 6; MONT. CONST. art. XII, § 2; NEB. CONST. art. VIII, § 2; NEV. CONST. art. 8, § 2; N.C. CONST. art. 5, § 5; OHIO CONST. art. XII, § 2; PA. CONST. art. IX, § 1; TENN. CONST. art. II, § 28; TEX. CONST. art. VIII, § 2; W. VA. CONST. art. X, § 1.
29. In addition to the weight given any provision or custom by such long usage, the universality of its usage gives the provision added strength. The strength and weight based on its universality and history had to effect the Court's determination. The question remains as to how great the effect was. The Court did not answer the question.
30. Art. 16, § 1 of the New York Constitution is implemented by § 420, subd. 1, of the New York Real Property Tax Law which states: "Real property owned by a corporation or association organized exclusively for the moral or mental improvement of men and women, or for religious, bible, tract, charitable, benevolent, missionary, hospital, infirmary, educational, public playground, scientific, literary, bar association, library, patriotic, historical, or cemetery purposes . . . and used ex-
Tax exemptions are also granted generally by provisions of the New York Real Property Tax Law.\(^{81}\)

However, the provision for exemption is made, it must be noted that the power and authority to exempt from taxation, as well as to tax, is intrinsically governmental.\(^{32}\) Accordingly, a legislature may exempt a person, a corporation, or any class as it sees fit "according to its views of public policy or expediency."\(^{33}\)

The discretion of the legislature to grant tax exemptions appears generally very broad. In *Gibbons v. District of Columbia*,\(^{34}\) the question before the Court was whether real estate taxes assessed on land owned by, and adjacent to, a church in Washington, D.C., but not used by that church, were valid. At that time, the Congress granted real estate tax exemptions to buildings devoted to art, institutions of public charity, libraries, cemeteries, and church buildings, and the grounds actually occupied by such buildings. In denying the tax exemption as to land owned by, but not used for, the church, but rather to produce income, the Court concluded:

_in the exercise of this (taxing) power, Congress, like any State legislature unrestricted by constitutional provisions, may at its discretion wholly exempt certain classes of property from taxation, or may tax them at a lower rate than other property._\(^{35}\)

The Court thus affirmed the legislature's power and authority in tax matters even though they denied a tax exemption to a church which did not use the property for church related purposes.

From the foregoing discussion it appears that history and tradition favor the exemptions, and that the legislatures have the authority and power to grant exemptions in their sound discretion. Although this appears to be a formidable barrier to Mr. Walz's argument, the Court has in the past easily dispensed with the argument that history or tradition of statute lends weight to its validity.\(^{36}\)

Mr. Chief Justice Burger, in *Walz*, discusses the point without applying it:

\(^{31}\) New York Const. art. 16, § 1.


\(^{33}\) Lawrence Univ. v. Outagamie County, 150 Wis. 244, 246, 136 N.W. 619, 620 (1912).

\(^{34}\) 116 U.S. 404 (1886).

\(^{35}\) _Id._ at 408.

\(^{36}\) _Supra_ note 18.
It is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it. Yet an unbroken practice of according the exemption to churches, openly and by affirmative state action, not covertly or by state inaction, is not something to be lightly cast aside.  

Mr. Justice Brennan agrees, stating that "the existence from the beginning of the Nation's life of a practice, such as tax exemptions for religious organizations is not conclusive of its constitutionality."  

Although the Court has reaffirmed the fact that it is not bound by history or tradition, it appears to have relied on them in this case. The Court, in effect, has agreed with Mr. Justice Holmes' great quote that "a page of history is worth a volume of logic."  

The second basis upon which the Court relies in supporting its position is its interpretation of the intent of the men who wrote the Religion Clause of the first amendment. The Court aptly states that "... it seems clear that the exemptions were not among the evils which the framers and ratifiers of the Establishment Clause sought to avoid."  

The Court interprets the framers' intent to have connoted "sponsorship, financial support, and active involvement of the sovereign in religious activity." If the framers meant to prohibit "sponsorship or financial involvement" of the government in religious activity, then what is a tax exemption? The Court admits that it is an indirect economic benefit. Being a government-sponsored economic benefit, it must be violative of the Establishment Clause, because Congress has made a law "respecting," in the establishment of religion.  

If this were the only problem, the solution would be simple—abolish tax exemptions to churches. Alas, no constitutional question has only one side. On the other side of the coin is the "free exercise" provision of the same amendment. This requires that the government cannot interfere with religion to the end that religion is suppressed or controlled by government.  

To restate the problem in simpler terms: if the Free Exercise Clause requires tax exemptions in certain situations to avoid excessive government entanglement with religion, how can one reconcile the interpreta-
tion that the Establishment Clause forbids tax exemptions in the same situation? In other words, a perfect dilemma exists.\textsuperscript{43}

Mr. Chief Justice Burger, in a clever understatement, rationalizes that even though "[t]he Establishment and Free Exercise clauses of the First Amendment are not the most precisely drawn portions of the Constitution . . . [T]he purpose was to state an objective, not to write a statute."\textsuperscript{44}

Herein lies the problem: how is the Court to interpret that objective? How can the Court interpret the Religion Clause to be compatible to an unstated objective when to enforce its contradictory clauses creates a perfect dilemma?

One horn of the dilemma, as stated in \textit{Torcaso v. Watkins},\textsuperscript{45} is that neither the State nor Federal Government can 'constitutionally' pass laws or impose requirements which \textit{aid all religions} as against nonbelievers, and neither can aid those religions founded on a belief in the existence of God as against those religions based on different beliefs.\textsuperscript{46}

The inference from \textit{Torcaso} is that the Constitution prohibits the government from "aiding" religion. To carry this argument to a logical conclusion both direct and indirect methods of aid are prohibited.

The landmark case of \textit{Everson v. Board of Education}\textsuperscript{17} reaffirms this position. In \textit{Everson} an attack was made upon the constitutionality of a New Jersey school transportation statute,\textsuperscript{48} pursuant to which the Board of Education had authorized the reimbursement of parents for amounts expended by them for the transportation of their children, not only to public schools, but also to non-profit parochial schools. The Court, though declaring that the prohibition of the first amendment against "laws respecting the establishment of religion" was applicable to the states through the fourteenth amendment, nonetheless held the statute valid. The Court interpreted the Establishment Clause to mean at least this:

Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, \textit{aid all religions}, or prefer one religion over another . . . no tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to

\textsuperscript{43} Note, \textit{Constitutionality of Tax Benefits Accorded Religion, 49 Col. L. Rev.,} 968, 990-91 (1949).
\textsuperscript{44} \textit{Supra} note 4, at 668.
\textsuperscript{45} 367 U.S. 488 (1961).
\textsuperscript{46} \textit{Id.} at 495.
\textsuperscript{47} 330 U.S. 1, 15-16 (1947). Similar expressions may even be found in the dissenting opinion at 24, 27, 33, 44.
teach or practice religion. . . In the words of Jefferson, the clause against the establishment of religion by law was intended to erect 'a wall of separation' between church and state.49 To maintain an effective "wall of separation" between church and state would thus require that government could not support religion by giving them indirect economic aid as here in the form of a tax exemption.

In the case of ex rel McCollum v. Board of Education,50 the United States Supreme Court invalidated a "released time" program. An Illinois statute provided for the release of students during school hours from public school classes so that they might receive instruction in the doctrines of their respective religious faiths in the rooms within the public school building. In permitting the use of tax supported school buildings for the dissemination of religious doctrines, the state afforded an "invaluable aid" to sectarian groups in that it helped provide pupils for their religious classes through the use of the State's "compulsory" school machinery. The Court held this was not a sufficient separation of church and State.

From the landmark Everson and McCollum cases, it appears that the state or Federal governments cannot "aid" religious organizations because this would be prohibited by the Establishment Clause of the first amendment. Applying this by implication to the Walz case, a tax exemption is an "aid" and should therefore be invalidated.51 The implication at the time of the Everson and McCollum cases was that the constitutional doctrines might outlaw even the common practice of relieving the religious institutions from the burden of taxation.52 Mr. Justice Reed, the sole dissenter in the McCollum decision, feared that the majority were adopting a conception of "aid" to religion which might "bar every friendly gesture between Church and State."53

There seems to be little question that a tax exemption is an "aid." By granting the church a tax exemption, the state has taken action favorable to religious organizations, since they are thereby freed from the finan-

49. Supra note 47.
51. In McCollum the court recognized "... the well known fact that all churches receive 'aid' from the government in the form of freedom from taxation." Id. at 249.
53. Supra note 50, at 255-56. His conclusion was in part, based upon a recognition that national custom has long accepted a certain intermixture of church and state, citing tax exemption as an example. Id. at 249.
This creates, in effect, an indirect subsidy—an abbreviated form of appropriation. Analysis dispels the distinctions between outright grants to religious organizations, clearly invalid under the Everson and McCollum decisions, and tax exemptions to such organizations. Exemptions have been defined as simply an abbreviated form of appropriation; they obviate the necessity for an initial outlay of funds by such an organization in advance of a return to it of those funds by a direct government subsidy.

Thus the landmark cases of Everson and McCollum appear, at least by implication, to cast doubt upon the validity of tax exemptions. If Everson requires that the government cannot "aid all religions" and McCollum states that activities which are "invaluable aids" to religion are prohibited, then both would be sound precedents to overrule tax exemptions because tax exemptions are both "aids" and "invaluable." Mr. Justice Douglas adds, in his dissent in Walz, that "one of the best ways to 'establish' one or more religions is to subsidize them, which a tax exemption does."

There is another important effect to the granting of a tax exemption that should be discussed. This is the economic effect or consequences that fall on the taxpayers like Mr. Walz. Tax exemptions, "just as in the

54. See generally, supra note 43, at 985, for a review of tax benefits accorded religion in general property taxes, inheritance, estate and gift taxes, income taxes, miscellaneous excise taxes, and employment taxes. See also, Van Alystyne, Tax Exemption of Church Property, 20 Ohio St. L.J. 461 (1957). Van Alystyne surveys the present constitutional and statutory law of the United States relating to property tax exemptions of church property and examines the ways in which legislative policies have been judicially applied to various types of church property. Van Alystyne discusses the exemptions to the house of worship, church land, tangible personal property of churches, church endowment and intangibles, living quarters for clergymen and church personnel, church cemeteries, church affiliated schools and colleges, and other church activities.

55. See also Curtiss, Tax Exemption of Educational Property in New York, 52 Cornell L. Rev. 551, 554 (1967).

56. See Brown, Church and State in Contemporary America 100, 123 (1936); Gabel, Public Funds for Church and Private Schools 566 (1937). "Such public favor, i.e., exemption from taxation, was granted in the early day of U.S. history and was considered in the same light as direct grant or appropriations." Hunter, Tax Exemption—A Subsidy, 8 Tax Mag. 332, 352 (1930); Stimpson, supra note 21.

57. For a broader discussion of this subject, see Baker, Tax Exemption Statutes, 7 Tex. L. Rev. 50 (1928). Baker's view of exemptions is that they merely "amounts to a gift [to the exempted organization] from the treasury of the state." Id. at 53.

58. Tax exemptions are so invaluable to churches that without them, there is little doubt that the poorer churches would perish.

59. Supra note 4, at 701.
case of a direct appropriation . . . result in the infliction of a greater burden on the mass of taxpayers. The exemption granted to churches or other religious organizations necessitates the imposition of a higher tax rate upon the general public to supply the revenues which would otherwise be forthcoming from those sources excused.

The burden that Mr. Walz complains of is well stated in Snyder v. Town of Newton:

An exemption from taxation is the equivalent of an appropriation of public funds, because the burden of the tax is lifted from the back of the potential taxpayer (the church, emphasis added) who is exempted and shifted to the back of others. [e.g. Mr. Walz].

The ultimate effect of the shifted burden is that all taxpayers must indirectly support religious organizations because the government has to obtain their tax support from somewhere. If one taxpayer is exempted or doesn't pay his full share, the other taxpayers must bear the difference.

In addition to bearing the difference, the taxpayers are "required" by the tax laws to pay the assessed tax. If one does not pay, he is liable for the deficiency and may incur criminal punishment under the tax evasion or tax delinquency laws. The ultimate effect of the tax regulations is that the government has "required" the taxpayer's support of religious institutions. The taxpayer thus has no means of avoiding the support of religious instruction. His support is guaranteed by the State itself. The guarantees are the various tax laws which require compliance and have punishment for evasion. It is difficult to deny that tax exemptions are indirectly an aid to religion. Literally, tax exemptions are laws "respecting" the establishment of religion.

The privilege or "aid" given the churches has reached an alarming proportion. By a conservative estimate, one-third (over $280 billion) of

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60. Supra note 43, at 985. See also 11 MINN. L. REV. 541, 555 (1927); 3 RUTGERS L. REV. 115, 122 (1949).
62. 147 Conn. 374, 161 A.2d 770 (1960).
63. Id. at 379, 161 A.2d at 776.
64. 9 STAN. L. REV. 336, 374 (1956).
65. During the fiscal year of 1964, each American family, by virtue of the taxing statutes of the several states and the federal government, involuntarily contributed an estimated $32.00 in support of religious institutions. The same statutes that indirectly compelled each American family to contribute $32.00 in support of religious institutions are those which exempt from taxation religiously owned prop-
the total value of real property in the United States is exempt from real property taxation. Mr. Walz's contention that his taxes would be substantially lower appears to be well-founded.

In light of the preceding facts, there must be some justification for permitting the tax exemption to continue. The defenses usually expounded to mitigate the economic tax loss resulting from the tax exemptions are: 1) to reward the private institutions for rendering socially desirable services; 2) to compensate the private institutions for rendering services, (e.g., education) which, but for the performance by the private institution, would have to be performed by government; 3) to encourage religious teaching because such teaching improves the moral tone of the community; 4) to promote or encourage the particular activity or function conducted by the institution; 5) to encourage their unique contributions to the pluralism of American society by promoting diversity of viewpoint, enterprise, and association.

It has been said that the substantive effect of granting a tax exemption, although often obscured by form, is no less than an appropriation of public funds to the private institution in consideration for rendered or future services. The argument has also been made that the organ-

67. In New York City alone, if religious institutions were taxed on their exempt property, an additional $35 million in revenue would have been realized in the fiscal year 1969. N.Y. Times, June 17, 1969, at 1, col. 6.
73. Supra note 62.
nizations rendering or contemplating services beneficial to the general public “merit subsidy in the form of tax privileges.”

With the merits in mind of both the arguments concerning tax exemptions, one has to wonder how the Court will interpret the meaning of “establishment” with regard to the separation doctrine prohibiting the government from “aiding” religious organizations. The Court has three views on the meaning of “separation”: 1) active cooperation; 2) absolute separation; 3) cooperative separation. Active cooperation means only that the government cannot give one religion preferential treatment over others. This doctrine has been rejected by the Court in the past two decades.

Absolute separation rejects all intercourse between the sphere of governmental activity and religious activity, direct or indirect. This doctrine derives its strength and validity from a literal interpretation of the phraseology of the first amendment—“no law respecting an establishment of religion.” Accordingly, any law that recognized a particular religious activity and allowed it to continue would be repugnant to the meaning and intent of the first amendment. This doctrine was rejected by the Court in Zorach v. Clauson.

Cooperative separation, although recognizing the principle of the separation of church and state, rejects the view that an application thereof necessarily prohibits all intercourse between church and state. If all intercourse between church and state is not necessarily prohibited, then some intercourse must be permissible. The question is thus one of degree. Is a tax exemption within the permissible degree of intercourse between church and state?

Where has the preceding discussion of the history and tradition of tax exemptions, the intent of the framers of the Religion Clause, and the real

74. KILLOUGH, EXEMPTIONS TO EDUCATIONAL, PHILANTHROPIC, AND RELIGIOUS ORGANIZATIONS IN TAX POLICY LEAGUE, TAX EXEMPTION 23, 28-29 (1939).
75. See KONVITZ, FUNDAMENTAL LIBERTIES OF A FREE PEOPLE, Ch. 9 (1957).
76. Supra note 47, at 15-16. “Neither state governments nor the Federal Government can pass laws which aid one religion, all religions, or prefer one religion over another.”
77. In support of a doctrine of absolute separation, see the dissenting opinion of Mr. Justice Rutledge in Everson v. Board of Education, supra note 47.
78. U.S. Const. amend. I.
79. See also Zorach v. Clauson, 343 U.S. 306, 315 (1952), “We cannot read into The Bill of Rights such a philosophy of hostility to religion.”
80. Speaking for the majority in Zorach v. Clauson, Mr. Justice Douglas summarized the attitude of the Court: “The Constitutional standard is separation of church and state. The problem, like many problems of constitutional law, is one of degree.” Id. at 314.
economic effect of the tax exemption led us? It has led us to the point where the Court knows the facts, the legal arguments, and the probable outcome. All that is left is for it to render its decision.

This necessitates the third point, i.e., the efforts by the Court to maintain a neutral position with regard to the Religion Clause. The ability of the Court to dodge the real issue and come up with a "modified" neutrality rule was the downfall of Mr. Walz. The Court probably didn't feel it was the proper time to "sink the boat" in reference to the Religion Clause although it has gently rocked it in previous decisions.81

The Court states that "the general principle deducible from the First Amendment . . . is that we will not tolerate either governmentally established religion or governmental interference with religion . . . . [T]here is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference."82

"No perfect or absolute separation is really possible; the very existence of the Religion Clause is an involvement of sorts—one which seeks to mark boundaries to avoid excessive entanglement."83 "Grants of exemption historically reflect the concern of authors of constitutions and statutes as to the latent dangers inherent in the imposition of property taxes; exemption constitutes a reasonable and balanced attempt to guard against these dangers."84

"Elimination of exemption would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes."85 The end result, therefore, is to avoid an excessive government entanglement with religion. The test is one of degree.

"The exemption creates only a minimal and remote involvement between church and state and far less than taxation of churches. It restricts the fiscal relationship between church and state, and tends to complement and reinforce the desired separation insulating each from the other."86

Where does the Walz decision leave use? One can honestly repeat what has been said many times before the Walz case:

81. As an example, consider the school prayer cases, supra note 18.
82. Supra note 17, at 668-70.
83. Supra note 17, at 670.
84. Supra note 4, at 673.
85. Supra note 4, at 674.
86. Supra note 4, at 676.
One of the most persuasive and firmly established anomalies in American law is the permissibility of subsidation of religious institutions through tax exemptions in a legal order constitutionally committed to the separation of church and state.\(^8^7\)

The colonial custom of levying taxes to support religious institutions thus has not completely disappeared upon the disestablishment of church and state; only the form thereof has changed.\(^8^8\)

The Supreme Court has apparently laid to rest the argument that any aid to religion is unconstitutional. The Court appears again to have traversed successfully the "tightrope" of constitutional issues by utilizing the approach of "benevolent neutrality." This approach is a far cry from the absolutists' interpretation of the "wall of separation" doctrine expounded for so many years. The question still remains, however, as to whether this doctrine of "benevolent neutrality" can avoid the problem of "excessive entanglement."

John Lundquist

\(^8^7\). See generally, Johnson and Yost, Separation of Church and State in the United States (1948); Pfeffer, Church, State, and Freedom (1953); Audspeth, Separation of Church and State in America, 33 Tex. L. Rev. 1035 (1955); Konvitz, Separation of Church and State: The First Freedom, 14 Law & Contemp. Prob. 44 (1949); Sutherland, Due Process and Disestablishment, 62 Harv. L. Rev. 1306 (1949); Van Alystyne, supra note 54.

\(^8^8\). Comment, Constitutionality of Tax Exemptions Accorded American Church Property, 30 Albany L. Rev. 58 (1966).