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Constitutional Law: Tax Exemption and Religious Freedom

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RECENT DECISIONS

Constitutional Law: Tax Exemption and Religious Freedom: For nearly two hundred years, the various governmental units of the nation have granted property tax exemptions to religious organizations where the property is used for religious purposes. *Walz v. Tax Commissioner of the City of New York*,[1] however, marks the first time that the United States Supreme Court has been called upon to rule on the constitutionality[2] of this practice.

In *Walz* the appellant was a real estate owner in Richmond County, New York, who sought an injunction to prevent the Tax Commissioner of New York City from granting property tax exemptions on property owned by religious groups and used solely for religious purposes, as per a statutory enactment.[3] He argued that such an exemption constitutes a subsidy and indirectly requires him to make a contribution to religious organizations in violation of his First Amendment Religious Freedoms.

The depth with which this practice has become engrained in our society is displayed by the unanimity with which both the New York Supreme Court, Appellate Division[4] and the New York Court of Appeals[5] reached their decisions, virtually without comment. It was not until the case reached the United States Supreme Court that a dissenting voice was raised, the dissent being lodged by Justice Douglas.

The Supreme Court, in an opinion written by Chief Justice Burger, noted that the twin Religion Clauses[6] of the First Amendment are cast in absolute terms which, if carried to a logical extreme, would tend to

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[1] 397 U.S. 664 (1970).

[2] In Gibbons v. District of Columbia, 116 U.S. 404 (1886), however, the court did rule that a specific church was not entitled to a tax exemption on specific property under the wording of a District of Columbia law, without ever questioning the constitutionality of the law itself.

[3] Real Property Tax Law, N.Y. Consol. Laws, c 50-A § 420 which in its pertinent parts reads:

"Real property owned by a corporation or association organized exclusively for the moral or mental improvement of men and women, for religious, bible, trust, charitable, benevolent, missionary, hospital, infirmary, educational, public playground, scientific, literary, bar association, medical society, library, partiotic, historical, or cemetery purposes .. . and used exclusively for carrying out thereupon one or more such purposes . . . shall be exempt from taxation as provided in this section."

The statute was enacted under authority granted by the New York State Constitution, article 16 § 1 which states:

"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."

[4] 30 App. Div. 2d 778, 292 N.Y.S. 2d 353.

[5] 24 N.Y. 2d 30, 298 N.Y.S. 2d 711, 246 N.E. 2d 517.

[6] "Congress shall make up no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."

clash with each other. The purpose of these clauses is to state an objective and to mark the boundaries to avoid excessive entanglement between church and state. As the court observed, rigidity in application could well defeat the basic purpose of these provisions.

In *Walz,* the court held that the question of tax exemptions for religious organizations falls within a neutral area between the twin prohibitions. The court has employed this reasoning and argument in some of its previous decisions,[7] but in those cases the argument was used to reject any contention that government hostility to religion is necessary to meet anti-establishment guarantees of the constitution. *Walz* goes further than these cases by directly recognizing, for the first time, the possibility and permissibility of benevolence in neutrality.[8] Thus, hostility is not required and benevolence is not completely forbidden.

The court noted that either taxation or exemption requires some governmental interference. Since complete and total separation of church and state is virtually impossible, it therefore is not so much a question of whether there is involvement, but rather, whether the involvement is excessive. In determining whether the involvement is excessive, it shall be necessary to ascertain whether "it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement."[9]

The sole dissent by Justice Douglas[10] was based on the contention that *Torcaso v. Watkins*[11] governs the case rather than *Everson v. Board of Education.*[12] In *Torcaso* the plaintiff was denied a government appointment because he refused to take an oath affirming his belief in the existence of God. There the court ruled that government could not constitutionally pass laws that aid all religions and all believers as opposed to nonbelievers. *Everson,* on the other hand, as Douglas points out, involved an activity where the State could act independently of, as well as concurrently with, the Church—such as in providing for the safety of students by furnishing transportation to school.[13] Douglas

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[7] Board of Educ. v. Allen, 392 U.S. 236 (1968) (providing secular textbooks for both public and parochial school students), Sherbert v. Verner, 374 U.S. 398 (1963), Engel v. Vitale, 370 U.S. 421 (1962), Torcaso v. Watkins, 367 U.S. 488 (1961) (depriving public benefits or office to those whose religious practices conflict with the predominant religion), McGowan v. Maryland, 366 U.S. 420 (1961), Braunfeld v. Brown, 366 U.S. 599 (1961) (Sunday "Blue Laws"), Zorach v. Clausen, 343 U.S. 306 (1952), Illinois ex rel McCollum v. Board of Educ., 333 U.S. 203 (1948) (use of "released time" programs in public schools to provide for religious instruction), Everson v. Board of Educ., 330 U.S. 1 (1947) (public transportation of parochial school pupils).

[8] 397 U.S. at 669.

[9] Id. at 675.

[10] *Id.,* at 700-727.

[11] 367 U.S. 488 (1961).

[12] 330 U.S. 1 (1947).

[13] 397 U.S. at 697.

continues that since government cannot provide a place of worship, an exemption for churches is a constitutionally invalid subsidy.

Applying the reasoning of *Torcaso* to this case, Douglas contended that since believers, as organized in church groups, are exempt from real estate taxes, while non-believers, whether organized or not, must pay the real estate tax at the usual rate, the grant of tax exemption is unconstitutional. But what is actually involved here is the tax exempt status of religious *organizations*. The believer, like the non-believer, still pays at the usual tax rate for the real property that he owns. The tax exemption merely means that the believer's decision to engage in religious activity does not result in an indirect contribution of an additional tax because of his religious beliefs.

On the organizational level it could be observed that generally believers organize while non-believers do not. However, this does not necessarily mean that non-believers could not take advantage of the tax exemption should they choose to organize and as such to own real estate. Justice Harlan in a concurring opinion "supposed" that the tax exemption would extend to "groups whose avowed tenets may be anti-theological, atheistic and agnostic."[13] Justice Douglas assumed just the opposite.[14] Although the court did not pass judgment on this question, it wouldd appear that since secularism is, to a large extent, a "religous" belief of its own, any policy that would cast special burdens on believers over non-believers would be an action that would favor one "religion' over others in violation of the First Amendment's Religious Guarantees. In this case, taxation of churches would favor those with secular beliefs, since the exercise of their "religion" involves no formal organization of ownership of real estate which would be subject to that tax which believers, through their church organizations, would have to pay. An exemption, on the other hand, treats all religious attitudes equally, since no religion bears an extra burden because of a special feature of its practice.

Distinguishing the present case from *Everson,* Douglas noted that while in that case the church activity being supported was one which the government could independently engage in, a tax exemption goes directly to support the practice of religious worship—an activity forbidden to the government. Thus, Douglas argues, a distinction must be made between church qua church and church qua non-profit, charitable institution.[15] While government aid and support may be given to church activities falling in the latter category, it may not do so for those falling in the former area. The straight tax exemption makes no such distinction.

[14] *Id.*, at 713.
[15] *Id.*, at 708.
[16] *Id.*, at 674.

Such a distinction could very well lead to government interference, involvement and entanglement in religion which the neutrality doctrine seeks to minimize.[16] The majority pointed out that to give exemptions only to the extent the church operated as a non-profit, charitable organization would require government evaluation and standards as to the worth of the programs. This would be necessary since the extent and type of such welfare services would vary from church to church depending upon such factors at the location of the church (urban or rural) and the weath of its congregation. In addition, as Justice Brennan observed in his concurring opinion, such a distinction for taxation purposes assumes that church owner property can be described as either wholly secular or wholly religious in its use.[17] Furthermore, the majority argued, the effect of such a distinction would be to tax churches that could afford it the least, since "poor" churches could not sustain the type and extent of welfare activities which the "rich" churches could engage in. Thus, the distinction favored by Douglas could work to the benefit of some religions over others, depending upon the success of the dogma and, more importantly, the wealth of its constituency.[18]

Douglas concluded his dissent with an expression of his fear of gradual encroachment upon our religious liberties by decisions such as this one. The fear is, of course, one which Douglas' colleagues have expressed in the past, such as Justice Black in his dissent in *Board of Education v. Allen.*[19] In *Walz,* however, his colleagues evidently thought that the fear was misplaced and inappropriate. As Chief Justice Burger stated "if tax exemption can be seen as this first step toward 'establishment' or religion, as Mr. Justice Douglas fears, the second step has been long in coming."[20]

In analyzing *Walz,* the general purpose of tax exemption cannot be ignored. The purpose of such a policy is to encourage the existence of private institutions that foster the communities' "moral and mental improvement." Thus, at issue here, is whether some institutions which fall within this category should be excluded because they are religious in nature. The majority in *Walz* held that, in this instance at least, there isn't any serious establishment or interference of religion involved that would necessitate denying groups a tax exemption, granted under

[17] *Id.,* at 688.
[18] *Id.,* at 674.
[19] Board of Education v. Allen, 392 U.S. 236 (1968), upheld the right of states to provide secular textbooks to all pupils, regardless of whether they attended public or parochial schools. Justice Black, in dissent, while noting that the law did not formally adopt or establish a state religion, maintained that ". . . it takes a great stride in that direction and coming events cast their shadows before them." Black, Douglas and Fortas (in separate opinions) all felt that such a law would encourage each religion to look toward complete domination and supremacy of their particular religion through both the school board and the state legislature.
[20] 397 U.S. at 678.

sound public policy, just because they are religious. "The State has an affirmative policy that considers these groups as beneficial and stabilizing influences in community life and finds this classification useful, desirable and in the public interest."[21]

Unlike earlier cases, the court refrained from making any sweeping and specific statement as to what is and is not permissible under the Religious Guarantees of the First Amendment, noting that such statements make it difficult to develop general principles on a case-by-case basis.[22] But here the court did attempt to describe a general approach—the benevolent neutrality doctrine—and to propose a standard—the continuing, official surveillance test. Such general principles, of course, still leave unanswered questions, most notably those including the various types of aid being given to the faltering parochial school systems, such as the state and federal funds to build and improve the facilities of church affiliated college campuses and as the shared time programs of some public secondary school systems. In addition, questions involving the tax-exempt status of church-owned profit making property may soon be presented.[23]

Significantly, *Walz* also leaves the constitutionality of taxing religious organizations in question. In the past the court has found license taxes on religious activities to be especially abhorrent to the First Amendment, noting the destructive influence of taxation in general, and stating that "[t]he power to tax the exercise of a privilege is the power to control or suppress its enjoyment."[24] *Walz* itself helps raise the question when it points out that although both exemption and taxation require some involvement, taxation requires the greater amount, as it gives 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."[25] On the other hand,

> 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.[26]

Indeed, applying the *Walz* test of excessive involvement, one could argue that taxation would call for "official and continuing surveillance leading to an impermissible degree of entanglement" in religious activities. With the almost universal application of tax exemptions for religious groups, however, this question is one that probably will not arise soon.

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[21] *Id.* at 676.
[22] *Id.* at 674
[23] *Id.* at 674.
[24] Murdock v. Pennsylvania 319 U.S. 105 (1943).
[25] 397 U.S. at 674.
[26] *Id.*

Beyond its immedate impact of upholding tax exemptions on religious properties, the importance of *Walz* lies (1) in its recognition of benevolence in neutrality and (2) its adoption of the continuing, official surveillance test. The general nature of these rules quite likely will reduce the importance in future decisions of the more sweeping and specific utterances found in the *Everson* Rule. Adoption of the *Walz* Rules undoubtedly adds a new, significant, and substantial element to church-state questions which means that many hard decisions face the court in applying these principles to questions in the area of the religious freedoms.

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RECENT DECISIONS: NUISANCE

As the concern for environmental protection mounts, interest in the use of the private nuisance action as an antipollution weapon has increased.[1] Two recent cases may have an impact on the continuing usefulness of this method of air pollution control. One, a Wisconsin Supreme Court Case, has reaffirmed the appropriateness of an award of damages in a private nuisance action regardless of any counterveiling social utility of the polluter's enterprize. The other, handed down by the prestigious New York Court of Appeals, has severely limited the utility of such an action when court-ordered abatement is the only effective remedy.

Nuisance: Air Pollution and the Doctrine of Comparative Injury: In *Jost v. Dairyland Power Cooperative*,[1] the Wisconsin Supreme Court allowed money damages in a nuisance action without balancing the gravity of the harm against the social utility of the offending conduct.

Jost was an action for damages only, brought by three farmers against their local electric utility for injury to their crops and land caused by sulphurous gases emitted into the atmosphere by the power company's plant. The jury found these emissions to be both a continuing nuisance and the cause of the injury suffered by the plaintiffs and set the total damage to the plaintiffs' crops at $1,080. The jury also found a $500 loss of market value to one of the plaintff's farms.

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[1] Recent commentary on the private remedies to environmental pollution includes the following: Schuck, *Air Pollution as a Private Nuisance*, 3 Natural Resources Law 475 (1970); Note, *Role of the Private Nuisance Law in the Control of Air Pollution*, 10 ARIZ. LAW REV. 107 (1968);
Comment, *Private Remedies for Water Pollution*, 70 COLUM. LAW REV. 734 (1970); Comment, *Private Legal Action for Air Pollution*, 19 COLUM. LAW REV. 480 (1970); Note, *Water Quality Standards in Private Nuisance Actions*, 79 YALE LAW J. 102 (1969).

[1] 45 Wis. 2d 164, 172 N.W.2d 647 (1969).