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Constitutional Law -- Exemption of Church Property From Taxation

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. . . is with the raw abuse of power by a police officer . . . and not with simple negligence on the part of a policeman or any other official."[27] The decision to reject section 1983 claims based on simple negligence is not an irrational line drawing. Assuming that the purpose of the statute is punitive and corrective, as well as compensatory,[28] courts are not unreasonable to require that the defendant should have intended to do the act resulting in the deprivation—or at least to have behaved so recklessly or arbitrarily that the courts will view his actions with the same level of indignation heretofore reserved for intentional deprivations. Simple negligence, even when resulting in the deprivation of constitutional rights, does not carry the same weight of culpability.

The *Jenkins* decision turns heavily on the factual situation. The court does not suggest a readily apparent standard for the type of conduct now required for a section 1983 action, other than "gross or culpable negligence"—a particularly imprecise concept. One suspects that the decision is a visceral one—more emotional than objective.[29] Its utility in future litigation will depend upon how readily a future court is shocked by the circumstances of the case then before it.

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Constitutional Law—Exemption of Church Property From Taxation

Since the birth of the nation, Congress and the states have afforded religious organizations a favored status under tax legislation.[1] An important example of that benevolence is the universal practice of exempting from ad valorem taxation property owned by religious organizations and used exclusively for religious purposes.[2] *Walz v. Tax Commission of City*

[27] *Id.* at 1232.

[28] *See* Monroe v. Pape, 365 U.S. 167, 170-87 (1961).

[29] Notice, for example, the considerable space Judge Sobeloff gives to recounting the rather remarkable testimony given at the trial. 424 F.2d at 1230-31.

[1] *See, e.g.*, Stimson, *The Exemption of Churches from Taxation*, 18 TAXES 361 (1940); Zollman, *Tax Exemptions of American Church Property*, 14 MICH. L. REV. 646 (1916); Note, *Constitutionality of the Real Property Church Exemption*, 36 BROOKLYN L. REV. 430 (1970).

[2] A representative provision is N.C. CONST. art. 5, § 5. State constitutional and statutory provisions for the property tax exemptions are collected in Van Alstyne, *Tax Exemption of Church Property*, 20 OHIO ST. L.J. 461 (1959); Note, *The Establishment Dilemma: Exemption of Religiously Used Property*, 4 SUFFOLK L. REV. 533 (1970).

of New York[3] has resolved the much debated issue[4] of whether such exemptions *necessarily* violate the establishment clause of the first amendment.[5] They do not. This note examines *Walz* in terms of its relation to the precedent under the establishment clause, and the impact the decision may have upon the future of that clause.

Appellant Walz[6] sought to enjoin the exemption from ad valorem taxes of property owned by religious organizations and used solely for religious worship, arguing that the exemptions indirectly required him to make a contribution to religious groups. In New York, exemptions for such property, as well as for a broad class of property including nonprofit educational and charitable facilities, are required by a statute[7] implementing a provision of the state constitution.[8]

It is hardly surprising that the Court upheld the New York exemption. Twice before, the Court had been presented the issue on appeals from state court decisions sustaining religious exemptions and had dismissed for want of a substantial federal question.[9] No prior Court decisions holding

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The pecuniary importance of the property exemption is illustrated by the fact that the exempted church property in New York City is valued at 692,000,000 dollars. The revenue gained from taxation of that property at the prevailing fiscal 1969 rate would have been 35,000,000 dollars. N.Y. Times, June 17, 1969, at 1, col. 6.

[3] 397 U.S. 664 (1970).

[4] *E.g.*, Kauper, *The Constitutionality of Tax Exemptions for Religious Activities*, in THE WALL BETWEEN CHURCH AND STATE 95 (D. Oaks ed. 1963); Bittker, *Churches, Taxes and the Constitution*, 78 YALE L.J. 1285 (1969).

[5] U.S. CONST. amend. I provides in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

[6] It is possible that Walz bought his twenty-two by twenty-nine foot Staten Island lot, valued at one hundred dollars and on which the annual property tax is five dollars and twenty-four cents, to qualify as a taxpayer having standing to bring the suit. N.Y. Times, June 20, 1969, at 1, col. 3.

[7] The statute provides in pertinent part:

> 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, medical society, library, patriotic, historical or cemetery purposes . . . and used exclusively for carrying out thereupon one or more of such purposes . . . shall be exempt fom taxation as provided in this section.

N.Y. REAL. PROP. TAX LAW § 420(1) (McKinney Supp. 1970).

[8] N.Y. CONST. art. 16, § 1.

[9] General Fin. Corp. v. Archetto, 93 R.I. 392, 176 A.2d 73 (1961), *appeal dismissed*, 369 U.S. 423 (1962); Lundberg v. County of Alameda, 46 Cal. 2d 644, 298 P.2d 1, *appeal dismissed sub nom.*, Heisey v. County of Alameda, 352 U.S 921 (1956).

legislation unconstitutional were in point. New York had not singled out churches for special treatment, but had included them in a broad class of exemptees.[10] The historical fact of long practice weighed heavily in favor of a constitutional interpretation sustaining the exemption. Possibly, the Court was not unmindful of the vituperative public reaction that followed the school prayer cases[11] and wished to avoid a similar spectacle. Although the decision could be viewed as virtually "preordained," it is nevertheless significant, for in reaching its result the Court rejected some of the earlier establishment clause reasoning, and at the same time retained, expanded, and fashioned some anew.

In *Everson v. Board of Education*[12] the Court transformed the establishment clause from an apparition into a reality when it applied that clause to the states through the fourteenth amendment and yet upheld the practice of reimbursing parents for the costs of transporting their children to public and nonprofit private schools, including sectarian schools. In *Everson* the Court made the classic statement of the establishment clause limitations:

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[10] *See* note 7 *supra*. The breadth and character of the groups afforded preferred treatment could be especially important factual variants. Problems of statutory construction are thoroughly discussed in Van Alstyne, *Tax Exemption of Church Property*, 20 OHIO ST. L.J. 461 (1959).

Of particular interest are the issues of whether the courts may and in what manner they should or must define the term "religious" in the exemption statutes. See Rabin, *When is a Religious Belief Religious: United States v. Seeger and the Scope of Free Exercise*, 51 CORNELL L.Q. 231 (1966); Comment, *Defining Religion: Of God, the Constitution, and the D.A.R.*, 32 U. CHI. L. REV. 533 (1965); Note, *Qualifying for State and Federal Religious Statutory Exemptions*, 1969 U. ILL. L.F. 249.

Must a group whose avowed tenets are atheistic but which otherwise has the characteristics of a church be numbered among the "religious" exemptees? The majority in *Walz* did not speak to the problem. In his concurring opinion in *Walz*, Justice Harlan assumed that the New York statute did extend the exemption to such groups and therefore satisfied the requirement of government neutrality between religion and nonreligion. 397 U.S. at 697. Justice Douglas, the lone dissenter in *Walz*, felt that the statute did not include such groups, resulting in aid to organized believers but denying it to non-believers, whether organized or not, in violation of governmental neutrality. 397 U.S. at 700. Welsh v. United States, 398 U.S. 333 (1970), and Seeger v. United States, 380 U.S. 163 (1965), may have revealed the Court's general approach to this issue. Those cases involved construction of the term "religious training and belief" in the statutory provision for exemption of conscientious objectors from combatant service in the Universal Military Training and Service Act § 6(j), 50 U.S.C. APP. 456(j) (1964).

[11] School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962). See p. *infra*. For an account of the public reaction to those decisions see Kurland, *The School Prayer Cases*, in THE WALL BETWEEN CHURCH AND STATE 142 (D. Oaks ed. 1963).

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

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, 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 . . . .[13]

Thus the Court settled the long-standing debate over whether the establishment clause was intended to proscribe only governmental preference of one religion over another, or governmental advancement of all religions as well, and couched its interpretation of the clause in absolute language. In keeping with the strict "no aid to religion" principle, the watchwords of early establishment cases were "separation of church and state."[14] In later cases the Court recognized, and in *Walz* it strongly reiterated, that this constitutional goal of separation cannot mean absence of all contact,[15] and the absolute "no aid" principle was abandoned—properly so, it would seem, since such an approach had proved unsuitable in other areas of constitutional law.[16]

Board of Education of Abington Township v. Schempp[17] marked a significant step in the evolution of establishment clause standards. In *Schempp* the Court held that a state may not require readings of Bible verses or recitation of the Lord's Prayer in public schools and restated the establishment clause test as follows:

> [W]hat [is] the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment

[13] *Id.* at 15-16.

[14] Zorach v. Clauson, 343 U.S. 306, 314 (1952); Everson v. Board of Educ., 330 U.S. 1 (1947).

[15] 397 U.S. at 676.

[16] *E.g.*, in Ogden v. Saunders, 25 U.S. (12 Wheat.) 213 (1827), all but one of the Justices agreed that the contract clause, "No State shall . . . pass any . . . Law impairing the Obligation of Contracts," U.S. CONST. art. I, § 10, imposed an absolute ban. See Hale, *The Supreme Court and the Contract Clause* (pt. 1), 57 HARV. L. REV. 512, 533 (1944). Thereafter, in some cases, the Court engaged in the dubious enterprise of creating state contract law and reading implied conditions into contracts in order to uphold some statutes and yet preserve this absolute principle. *Id.* (pt. 3), 852, 872-73. This awkward position was abandoned, and the modern view puts it "beyond question that the prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula." City of El Paso v. Simmons, 379 U.S. 497, 508 (1965).

[17] 374 U.S. 203 (1963).

> Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.[18]

Under the *Schempp* test, the validity of legislation turned on mere form—the manner in which aid to religion came about, rather than the magnitude of the aid. In *Walz*, the Court did not adopt the *Schempp* test,[19] and once again one may find striking parallels in other areas of constitutional law in which distinctions based on form were ultimately rejected.[20]

In some establishment cases the Court had relied on the secularization of religious institutions to sustain governmental advancement of them.[21] "Blue laws" requiring Sunday closing were upheld upon the Court's finding that although they were originally enacted to serve religion, the prevailing modern use of Sunday justified their continuance to advance the secular state goal of providing a day of recreation and respite from labor.[22] In *Walz* the Court specifically rejected a similar justification of the exemption based on performance of secular social services by churches.[23]

In *Everson*, while admitting that reimbursing parents for the transportation costs helped children get to sectarian schools, the majority of

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[18] *Id.* at 222.

[19] The *Schempp* test was adopted in substantially the same form and applied in the establishment cases decided by the Court after *Schempp* and before *Walz*. See Epperson v. Arkansas, 393 U.S. 97 (1968) (a state may not prohibit the teaching in the public schools of the theory that man evolved from lower orders of life, at least when it is clear that the purpose of the statute is to prevent contradiction of the traditional Biblical account of man's creation); Board of Educ. v. Allen, 392 U.S. 236 (1968) (a state may "lend" secular textbooks to children attending sectarian schools).

[20] *E.g.*, Congressional power under the commerce clause to regulate intrastate activities was once held not to extend to those activities having only an indirect effect on interstate commerce. The Court's view was that "[t]he distinction between a direct and an indirect effect turns, not upon the magnitude of either the cause or the effect, but entirely upon the manner in which the effect has been brought about," and that "[i]t is quite true that rules of law are sometimes qualified by considerations of degree . . . . [b]ut the matter of degree has no bearing upon the question here . . . ." Carter v. Carter Coal Co., 298 U.S. 238, 308 (1936). That view was later rejected; "questions of the power of Congress are not to be decided by reference to any formula which would give controlling force to nomenclature such as . . . 'indirect' and foreclose consideration of the actual effect of the activity . . . ." Wickard v. Filburn, 317 U.S. 111, 120 (1942). Now such an activity may be regulated "if it exerts a substantial economic effect on interstate commerce," regardless of whether that effect is direct or indirect or how local in nature the activity is. *Id.* at 125.

[21] *E.g.*, if sectarian school education had not become secularized, the reimbursement of transportation costs in *Everson* would have taken on the quality of providing transportation to church services.

[22] McGowan v. Maryland, 366 U.S. 420, 444-45 (1961).

[23] 397 U.S. at 674.

five was careful to characterize the aid as being to parents rather than to church schools.[24] In *Board of Education v. Allen*,[25] the Court applied the *Schempp* "purpose and effect" test to uphold the practice of lending textbooks to sectarian school children on "formal request" by the children. The books were chosen by the sectarian schools and approved by public school authorities. In *Allen*, the Court insisted that "[no] books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools."[26] *Walz* recharacterized *Everson* and *Allen* and cited their facts in support of its result; the *Everson* transportation costs and the *Allen* books were said surely to have constituted "aid" to the sponsoring churches, and, in the *Allen* case, relieved "those churches of an enormous aggregate cost for those books."[27] Building on this view, the Court failed to see how the "broader range of police and fire protection given equally to all churches, along with nonprofit hospitals, art galleries, and libraries . . . is different for purposes of the Religion Clauses."[28] Thus it is clear that the Court will not invalidate legislation for the sole reason that it results in very substantial aid to religion, and, accordingly, the Court no longer feels compelled to cover up the fact of that substantial aid by calling it something else.

The Court retained only the skeleton of the establishment clause test that existed prior to *Walz*. In initially defining the limits of governmental power, the Court stated that "[e]ach value judgment under the Religion Clauses must . . . 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."[29] This broad and general guideline does not, without more, add significantly to precise consideration of establishment issues, since in that regard it merely begs the question. However, it is noteworthy that the Court framed this test in terms of the "Religion *Clauses*." Discussion on the relationship of the establishment and free exercise clauses is scarce in earlier opinons, but the opinion in *Walz* is replete with references to that relationship[30] and at least indicates that the Court has begun to consider the clauses together.

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[24] 330 U.S. at 18.
[25] 392 U.S. 236 (1968).
[26] *Id.* at 243-44.
[27] 397 U.S. at 671-72.
[28] *Id.* at 671.
[29] *Id.* at 669.
[30] *E.g.*, "The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other." *Id.* at 668-69.

When the Court applied the "purpose" phase of the test, it found that the purpose of the exemption was neither advancement nor inhibition of religion. Instead, the purpose was said to be simply to spare a broad class of nonprofit organizations, including religious groups, that "foster the moral or mental improvement" of and are beneficial and stabilizing influences in the community from the burden of taxation levied upon private profit institutions.[31]

In applying the "effect" phase of the test, the Court stated it to be "inescapably one of degree." Past decisions have indicated that the establishment clause test is properly one of degree,[32] although that theme was not then developed. Adoption of a degree test seems entirely appropriate, especially when it has proved workable in other areas of constitutional law.[33] Yet after determining that an excessive degree of something is impermissible, the question remains, of what? In *Walz*, the Court answered, "excessive governmental entanglement with religion."[34] Indeed, "entanglement" and "involvement" appear to have become new watchwords.

The Court analyzed the exemption issue by comparing the exemption with the alternative of taxation. Exemption, although resulting in an indirect economic benefit, was said to occasion far less "involvement" by avoiding tax valuation of church property, tax liens, and so forth; furthermore, exemption was not viewed as sponsorship since the state does not transfer part of its funds to the church. Unfortunately, the Court's analysis on this point is obscure. The sort of involvement avoided by the exemption could hardly lead to an establishment of religion; even disregarding the financial burden, the inconvenience to the church caused by the taxation process is much more relevant to the *free exercise clause*. Of course, the free exercise clause can limit the operation of the establish-

[31] *Id.* at 672.

While specifically declining to justify the exemption because of the secular services performed by churches, the Court accepted the New York legislative determination that along with the other exemptees, religious organizations *qua* religious organizations contribute to the secular goals of fostering the "moral or mental improvement" and stabilization of the community. Thus it appears that for the first time in an establishment case the Court has given specific recognition to what Professor Giannella has called a "secularly relevant religious factor," and seems to accept the notion that the advancement of religion per se *always* advances *some* permissible secular goals to some extent. See Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development*, 81 HARV. L. REV. 513, 528 (1968).

[32] *E.g.*, Zorach v. Clauson, 343 U.S. 306, 314 (1952).

[33] See note 20 *supra*.

[34] 397 U.S. at 674.

ment clause, and has freequently been held to require government to create special exceptions in favor of religion.[35] It is possible and seems probable, that, although it did not specifically so state, the Court was enaging in a balancing of the interference with the "free exercise" of religion that would result from taxation against whatever "establishment" or advancement results from exemption.[36]

It is also possible that the Court has embraced quantitative minimization of church-state involvement[37] as an independent factor in the establishment clause or religion clauses test. It appears from the *Walz* opinion that a statute conditioning tax exemption on performance of secular services by the church would not find favor with the Court.[38] Of course, performance of such services would be a burden on the church, and the imposition of that burden could conceivably run afoul of the free exercise clause. However, the Court's position seems to be that even if the burden of performance was negligible, the application of such a statute to churches would nevertheless be unconstitutional solely because of the church-state involvement precipitated. It is true that such a statute would visit some slight burden on the church due to the inconvenience of documented conformity, but the Court leaves unclear whether it is this consideration or the mere fact of the involvement, the church-state con-

[35] *E.g.*, in Follett v. McCormick, 321 U.S. 573 (1944), the Court held that a town could not impose its license fee for the selling of books on a Jehovah's Witness minister for whom the selling of religious literature was a religious exercise and source of living income.

[36] In other parts of the opinion, the Court did talk in terms of the "Religion *Clauses*." *See* note 30 *supra*. The Court did say that the exemption tends to complement and reinforce the desired separation, but did not clarify whether it is the operation of the free exercise clause that makes the separation desirable in this instance. 397 U.S. at 676.

[37] The phrase "quantitative minimization of church-state involvement" is intended to denote diminution of church-state intercourse and entanglement of the state in activities of the church without regard to its quality, kind, effect, etc. An extreme and absurd example would be denial of police and fire protection to the church because of the "involvement" occasioned by affording the protection.

[38] The Court found it not only unnecessary but also undesirable to justify the exemption on the social welfare service performed by churches. In the Court's words,

> [t]o give emphasis to so variable an aspect of the work of religious bodies would introduce an element of governmental evaluation and standards as to the worth of particular social welfare programs, thus producing a kind of continuing day-to-day relationship which the policy of neutrality seeks to avoid. Hence, the use of a social welfare yardstick as a significant element to qualify for tax exemption could conceivably rise to confrontations that could escalate to constitutional dimensions.

397 U.S. at 674.

tact, that could require condemnation of the statute. Minimization of church-state involvement and entanglement is properly an independent consideration, since even neutral involvement, in which the church is treated neither favorably nor unfavorably because it is the church, may be so direct or intense as to draw the church into the political arena and invite strife and "political division on religious lines."[39] Hopefully, however, the Court is not unwittingly heading towards a reversion culminating with quantitative minimization of church-state involvement as *the* controlling factor. The Court has already rejected quantitative maximization of separation of church and state as the *only* constitutional goal,[40] and should similarly limit the role of this, its obverse.

The "purpose" element of the test seems open to question. A legislative purpose to advance religion is in some instances easily concealed, especially in the tax field. Professor Bittker has pointed out that taxation statutes can be drafted so as to avoid positive exemptions and therefore the use of such words as "religion" as a basis for classification.[41] Other potential problems with the examination of legislative purpose are illustrated by *Zorach v. Clauson*,[42] in which the Court sustained the practice of releasing children from public schools on parental request to attend religious instruction classes without the school grounds. School attendance was otherwise compulsory; those children not leaving the school for religious instruction were required to remain at the school. The Court declared this program to be a permissible state accommodation of its public school schedule to religious activities.[43] If faced with the *Zorach* facts again, although the "effect" of the program is clearly the advancement of religion, the Court could simply hold that it is not such to an unconstitutional degree. But who could deny that the "purpose" of the program is the establishment of religion, or at least the advancement of religion? If the *Zorach* result were to be reached again, it would appear that the Court would either have to strike the purpose inquiry from the test or fashion some sort of degree scale for determining permissible legislative purpose.

[39] "[P]olitical division on religious lines is one of the principal evils that the first amendment sought to forestall." Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1692 (1969). In his concurring opinion in *Walz*, Justice Harlan adopted and applied the factor of minimization of church-state involvement as the third element in a tripartite test also imposing "voluntarism" and "neutrality" requirements. 397 U.S. at 695.

[40] See p. 345 *supra*.

[41] Bittker, *Churches, Taxes, and the Constitution*, 78 YALE L.J. 1285, 1293 (1969).

[42] 343 U.S. 306 (1952).

[43] *Id.* at 315.

Perhaps the best means of obviation of these difficulties is also the simplest—elimination of the purpose inquiry. After all, one wonders why even the most fastidious atheist would object to a statute, the admitted purpose of which is the establishment of an official religion, but which is wholly ineffectual to accomplish that result.

Since the Court did not summarily dispose of the exemption issue as it apparently could have,[44] it would seem that it considered *Walz* to be an appropriate vehicle for definitive exposition of its views on the establishment clause. *Walz* does indicate that the Court will use the free exercise clause and a degree test to limit the operation of the establishment clause, especially when the "aid," albeit substantial, is afforded equally to all religions. Adoption of a degree test was an appropriate step towards more refined consideration of establishment issues, but the unfortunate use of church-state "involvement" per se, without clarification, as the measure of the validity of the exemption has not contributed to that goal, and it still remains for the Court to do what it has already said the first amendment does with respect to church-state relations—"studiously [define] the manner, the specific ways, in which there shall be no concert or union or dependency one on the other."[45]

R. B. TUCKER, JR.

Criminal Procedure—Application of the Doctrine of Collateral Estoppel to State Criminal Prosecutions

In *Ashe v. Swenson*[1] the Supreme Court has constitutionally required a variation of the civil law doctrine of collateral estoppel for state criminal trials.[2] The Court defined collateral estoppel as the principle that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot be litigated between the same parties in any

[44] See p. — & note 9 *supra*.
[45] Zorach v. Clauson, 343 U.S. 306, 312 (1952).

[1] 397 U.S. 436 (1970).
[2] Collateral estoppel, as required in criminal cases is distinguishable in two ways from that traditionally applied in the civil law. First, the requirement of mutuality—that a party cannot benefit from the doctrine unless he would be bound by it if the opposite result had been reached—is not carried over into the criminal law. Second, the general verdict of a criminal trial requires some speculation as to its basis that the special verdict of the civil trial often does not. For a good discussion of the problems of mutuality and the general verdict *see* Note, *Collateral Estoppel in Criminal Cases*, 28 U. CHI. L. REV. 142 (1960).