CONSTITUTIONAL LAW—TAXATION—GRANTING OF PROPERTY TAX EXEMPTIONS TO RELIGIOUS ORGANIZATIONS UPHELD AS CONSTITUTIONAL—*Walz v. Tax Commission,* 397 U.S. 664 (1970).

Plaintiff, an owner of real estate, sought to enjoin the New York City Tax Commission from granting property tax exemptions to religious organizations for properties owned and used exclusively for religious worship. The exemption from state taxes was authorized by the New York State Constitution[1] and implemented by the state's Real Property Tax Law.[2] Defendant's motion for summary judgment was granted and the supreme court, appellate division[3] and the court of appeals,[4] affirmed. The Supreme Court of the United States also affirmed,[5] holding that the New York statute which exempted from taxation the real property owned by an association organized exclusively for religious purposes and used exclusively for carrying out such purposes is not unconstitutional as an attempt to establish, sponsor or support religion.

In reaching its decision, the Court resolved the issue of whether or not a tax exemption for property owned and used for religious purposes constituted a governmental subsidy to religion and thereby was violative of the establishment clause of the first amendment. Rejecting the attack on the tax exemption as such a subsidy, the majority maintained that the tax exemption provision of the statute was permissible as a minimal involvement between church and state.[6] Thus, the Court redefined the area of contact permitted between church and state within the confines of the establishment clause and permitted the long established practice of tax exemption to church owned and church used property to continue.

In defining the scope of the establishment clause, the Court noted that, to its authors, the term "establishment" meant "sponsorship, financial support, and active involvement of the sovereign in religious activity."[7] The Court's acceptance of this definition resolves the smoldering controversy as to whether the establishment clause commands "a wall of separation between church and state" or permits the state to assume a neutral position in relations with the

1 N.Y. CONST. art. 16, § 1.

2 N.Y. REAL PROP. TAX LAW § 420(1) (McKinney 1960).

3 Walz v. Tax Comm'n, 30 App. Div. 2d 778, 292 N.Y.S.2d 353 (1968).

4 Walz v. Tax Comm'n, 24 N.Y.2d 30, 246 N.E.2d 517, 298 N.Y.S.2d 711 (1969).

5 Walz v. Tax Comm'n, 397 U.S. 664 (1970).

6 *Id.* at 674.

7 *Id.* at 668.

church. Contributing to the heat of the controversy and enhancing the no-aid position were earlier declarations as to the perimeters of the establishment clause. For example, in *Everson v. Board of Education*,[8] the Court delimited the ambit of the establishment clause when it declared:

> 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. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. . . . 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 teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."[9]

Among the proscriptions enunciated in *Everson* are some which are now clouded by the *Walz* decision, and which probably prompted the *Walz* Court to account for the cloud in the following language:

> In attempting to articulate the scope of the two Religion Clauses, the Court's opinions reflect the limitations inherent in formulating general principles on a case-by-case basis. The considerable internal inconsistency in the opinions of the Court derives from what, in retrospect, may have been too sweeping utterances on aspects of these clauses that seemed clear in relation to the particular cases but have limited meaning as general principles.[10]

The "too sweeping utterances" appear to be those first stated in *Everson* and reiterated in subsequent establishment clause cases. In *Illinois ex rel. McCollum v. Board of Education*,[11] which followed *Everson* by one year, the Court quoted the no-aid pronouncement and emphasized that both the majority and minority opinions in *Everson* stated that the establishment clause required "a wall of separation between the church and State."[12] That wall, *McCollum* held, was breached by the use of public school facilities for the private instruc-

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8 330 U.S. 1 (1947).
9 *Id.* at 15-16 (emphasis added).
10 397 U.S. at 668.
11 333 U.S. 203 (1948).
12 *Id.* at 211.

tion of religion. Again in *Torcaso v. Watkins,*[13] the Court affirmed both *Everson* and *McCollum,* declining to renounce their utterances as dicta and not authoritative as an interpretation of the scope of the first amendment's establishment clause.[14] Fourteen years after *Everson,* the words were again used in *McGowan v. Maryland*[15] where the Court sustained a Sunday closing law but on the theory that its religious origin had been transcended by the primary secular purpose of providing a uniform day of rest.

The controversy as to the delineations of the establishment clause derives essentially from what the opposing views regard as the historic origin and purpose of the clause. Those arguing that tax exemptions are permissible view the establishment clause as a safeguard only against the entrenchment of a particular sect by virtue of some type of governmental favoritism.[16] Early state constitutions granting exemptions to churches are cited as indicative of the attitude of the founders and reflect an intended policy of benevolent neutrality.[17] That policy does not renounce a relationship between church and state as long as that relationship does not result in the establishment of a national religion.[18] Adherents of this permissible-if-impartial position approach the no-aid doctrine of *Everson* as a departure from the traditional pattern of church-state relations.[19] Supporting this view is a formidable list of state and lower federal

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13 367 U.S. 488 (1961) (belief in God as a prerequisite to public office is unconstitutional).

14 *Id.* at 493.

15 366 U.S. 420 (1961).

16 *See* III A. STOKES, CHURCH AND STATE IN THE UNITED STATES 561 *et seq.* (1950); Lasson, *Religious Freedom and the Church-State Relations in Maryland,* 14 CATHOLIC LAWYER 4 (1968); V. STORY, COMMENTARIES ON THE CONSTITUTION § 1871 (1833); C. ANTIEAU, A. DOWNEY & E. ROBERTS, FREEDOM FROM FEDERAL ESTABLISHMENT 160, 161 (1964); Editorial, 8 J. CHURCH & STATE 333 (1966); Brooks, *The Functions of the Constitution and the Establishment Clause,* 13 CATHOLIC LAWYER 325 (1967).

17 ANTIEAU, *supra* note 16, at 159; Lasson, *supra* note 16.

18 *See* Zorach v. Clauson, 343 U.S. 306 (1952), where the Court upheld released time for out of school religious training. Justice Douglas, dissenter in *Walz,* wrote the opinion in *Zorach* and said:

> We are a religious people whose institutions presuppose a Supreme Being. . . . We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. . . . To hold that it may not [encourage religious instruction] would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.

Id. at 313-14.

19 STOKES, *supra* note 16, at 564-65; ANTIEAU, *supra* note 16, at 160.

court decisions upholding the constitutionality of tax exemptions to church owned and used property.[20] The underlying hypothesis in many of these decisions is the benefit accruing to the community as a whole from the social and moral welfare activities of religious organizations.[21] The rationale here is twofold. First, religious societies, by performing social welfare services, relieve the state of some of the burdens it would otherwise have; conversely, taxation of exempt church property would not materially alter the tax burden as the funds so raised would be diverted to services formerly provided by churches. This rationale was rejected by the *Walz* decision because it offered too variable a basis by which to measure the exemption and would in turn, involve church and state in too protracted a relationship.[22] Thus, to determine what aid was going directly to religious purposes would not comport with the limited contacts permissible.

The second justification for tax exemptions in the past has been the promotion of morals and ethics which is beneficial to society as a whole and to the advancement of civilization.[23] This argument was advanced to sustain the constitutionality of school prayer, but in *School District of Abington Township v. Schempp*,[24] the Court rejected this contention, declaring that moral inspiration, when promoted by religiously oriented Bible reading, violated the establishment clause. However, the *Walz* Court took a different view, recognizing the "moral . . . improvement" afforded the community by "certain entities" without distinguishing between the social services and the purely religious practices of organized religion as the *Schempp* Court

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20 Swallow v. United States, 325 F.2d 97 (10th Cir.), *cert. denied*, 371 U.S. 950 (1963); Santa Clara v. Southern Pac. R.R., 18 F. 385, 400 (C.C. Cal. 1883), *aff'd*, 118 U.S. 394 (1886); Sovereign Camp, W.O.W. v. Casados, 21 F. Supp. 989 (D.N.M.), *aff'd*, 305 U.S. 558 (1938); State v. Alabama Educ. Found., 231 Ala. 11, 163 So. 527 (1935); 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); Fellowship of Humanity v. County of Alameda, 153 Cal. App. 2d 673, 315 P.2d 394 (Dist. Ct. App. 1957); San Francisco v. McGovern, 28 Cal. App. 491, 152 P. 980 (Dist. Ct. App. 1915); Garrett Biblical Inst. v. Elmhurst State Bank, 331 Ill. 308, 163 N.E. 1 (1928); Murray v. Comptroller of Treas., 241 Md. 383, 216 A.2d 897, *cert. denied*, 385 U.S. 816 (1966); General Finance Corp. v. Archetto, 93 R.I. 392, 176 A.2d 73 (1961), *appeal dismissed*, 369 U.S. 423 (1962).

21 Bradfield v. Roberts, 175 U.S. 291 (1899); Washington Ethical Soc. v. District of Columbia. 249 F.2d 127, 129 (D.C. Cir. 1957); City of Hanibal v. Draper, 15 Mo. 425, 428 (1852); Y.M.C.A. v. Douglas County, 60 Neb. 642, 646, 83 N.W. 924, 927 (1900).

22 397 U.S. at 674.

23 *E.g.*, Orr v. Baker, 4 Ind. 86, 88 (1853), where the court said:

> It is easier to admire the motives for such exemption than to justify it by any sound argument. . . . To say that such is the practice of civilized nations, is not sound. It is rather an apology for a departure from principle.

24 374 U.S. 203 (1963).

had distinguished the Bible as literature from the Bible as a religious instrumentality.[25]

It thus appears that neither of the major hypotheses supporting the exemption in its two centuries of existence is left wholly intact. The social welfare thesis is rejected by the Court itself; the moral betterment rationale is retrieved from a prior rejection. What now stands as the parameter of tax exemption is a policy of briefest of involvements; "[t]he exemption creates only a minimal and remote involvement between church and state and far less than taxation of churches."[26] On this point the Court, quoting Madison, had previously said:

> "[I]t is proper to take alarm at the first experiment on our liberties. . . . Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians . . . ."[27]

Opponents of the tax exemption contend that historically, the first amendment's establishment clause dictates a wall of separation between church and state which is breached by state action that aids religious organizations regardless of the scrupulous impartiality with which that aid is given.[28] In support of this position are a series of Supreme Court decisions which indicate that neutrality, defined as assistance without discrimination as to sect, would not redeem the constitutionality of state acts in aid of religion. In *Schempp*, the Court said of the permissible-if-impartial distinction being urged:

> [T]his Court has rejected unequivocally the contention that the Establishment Clause forbids only governmental preference of one religion over another. . . .
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> . . . Such contentions, in the light of the consistent interpretation in cases of this Court, seem entirely untenable and of value only as academic exercises.[29]

Madison, termed by the Court as the framer of the first amendment,[30] regarded tax exemptions to religious bodies for property so used to be an encroachment upon the constitutional mandate for

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25 *Compare* 374 U.S. at 224 *with* 397 U.S. at 671-72.

26 397 U.S. at 676.

27 Engel v. Vitale, 370 U.S. 421, 436 (1962).

28 L. PFEFFER, CHURCH, STATE AND FREEDOM 149, 154 (rev. ed. 1967).

29 374 U.S. at 216-17. *See also* Engel v. Vitale, 370 U.S. 421 (1962), where the Court held that the mere nondenominational aspect of school prayer would not save it from conflict with the first amendment.

30 Flast v. Cohen, 392 U.S. 83, 103 (1968); 397 U.S. at 705 (Douglas, J., dissenting).

separation between government and religion.[31] Inherent in Madison's perspective of the establishment clause is a recognition of the rights of nonbelievers and their protection under this clause. As quoted by Justice Douglas in his dissenting opinion in *Walz,* Madison wrote:

> "Whilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us."[32]

In other decisions the Court has recognized the distinction between believers and nonbelievers, and has not permitted preferential treatment of one group over another. In *United States v. Seeger,*[33] the Court accepted as equal, religious doctrines disavowing a belief in the existence of God. Although the *Seeger* opinion does not derogate a religious test altogether, its acceptance of disbelief in God as grounds for a draft deferment was a step toward equalizing the positions of believers and nonbelievers. The relevance of this to *Walz* is indicated by another case decided at the same time. In *Welsh v. United States,*[34] the Court accorded conscientious objector status to a claimant who denied that his views were religious. Justice Harlan, concurring, referred to his own concurring opinion in *Walz* and added:

> The constitutional question that must be faced in this case is whether a statute that defers to the individual's conscience only when his views emanate from adherence to theistic religious beliefs is within the power of Congress. . . . However, having chosen to exempt, it cannot draw the line between theistic or nontheistic religious beliefs on the one hand and secular beliefs on the other. Any such distinctions are not, in my view, compatible with the Establishment Clause of the First Amendment.[35]

In *Torcaso v. Watkins,* the Court struck down a religious test oath as violative of the free exercise clause because a state could not "aid all religions as against non-believers."[36] Yet this aspect is not considered by the majority in *Walz.* On the contrary, the Court averred a position which overlooked the distinctions wrought by *Seeger* and *Torcaso* and reaffirmed in *Welsh.* To Justice Douglas, however, the

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31 397 U.S. at 713; PFEFFER, *supra* note 28, at 215.

32 397 U.S. at 705.

33 380 U.S. 163 (1965).

34 398 U.S. 333 (1970).

35 *Id.* at 356.

36 367 U.S. 488, 495 (1961).

issue presented by *Walz* was the exemption afforded believers merely because they are believers. In his dissenting opinion, Douglas viewed the issue here as governed by the principles established in *Torcaso,* which enunciated a position of government neutrality between believers and nonbelievers.[37]

An analysis of what governmental actions have been held to be within the establishment clause indicates the test the Court has devised by which to gauge acceptable conduct. For example, in *Everson,* the Court stated that the wall of separation was not breached by transporting parochial school students at public expense, as this in no way fostered or inhibited religion.[38] The Court discarded the argument that once transported to school, pupils in parochial schools would be receiving religious instruction which would be an aid to religion. The Court instead focused on the primary public purpose of the state policy in providing public transportation of students. The public purpose—safe transportation of children to school—provided the overriding consideration and, aid to religion, if any, was merely incidental. It was children, not religion, who were being aided.[39] In *Board of Education v. Allen,*[40] supplying books to parochial school students was also regarded not as an aid to religion but rather as an aid to the education of children. Again, the primary purpose test negated what was urged to be state action in aid of religion. This primary purpose standard as determinative of permissible state action under the establishment clause was again enunciated in *Schempp*:

> The test may be stated as follows: what are the purpose and the 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.[41]

Thus, pre-*Walz* precedent distinguished between state action in aid of education and children, and religion. But in *Walz,* there were no dominant public purposes to distract from the aid-to-religion contention of the plaintiff; arguments of incidental benefit accruing to secular groups for primary public-purposed legislation were not applicable. Thus the *Walz* Court directly confronted the issue of

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37 397 U.S. at 700-01.

38 330 U.S. at 17.

39 *Id.* at 18.

40 392 U.S. 236 (1968).

41 374 U.S. at 222 (1963); *see* Sherbert v. Verner, 374 U.S. 398 (1963); Braunfeld v. Brown, 366 U.S. 599 (1961).

which government acts in aid of religion are permissible; consequently, *Walz*, more so than other first amendment cases, sets forth the criteria. Rejected is the wall of separation and in its place is a screened fence through which impartial aid may be funnelled, provided, however, that such aid is not directly given.[42] This distinction between a direct subsidy and indirect aid in the form of a tax exemption causes some inconsistency with prior "sweeping utterances." For example, in *Flast v. Cohen*,[43] the Court noted that it was "palpably unconstitutional conduct" for government to provide funds for the construction of churches. But in *Walz* it is not unconstitutional to exempt church property from taxation. However, if the primary purpose test of *Schempp* were applied, the distinction between direct and indirect aid would be dim. No factors of incidental secular benefits are present to sustain a tax exemption for church property when framed in a primary public purpose test. Despite this, the *Walz* Court was able to discern, in the purpose of the exemption, a legislative intent not to advance religion but rather to prevent the inhibition of "certain entities that exist in a harmonious relationship to the community at large" and which serve the public interest.[44] By this reasoning, the Court met the *Schempp* test.

An essential element of the *Walz* decision is the fact that exemptions minimize the relations between church and state and preclude the state from any interference with the churches. Illustrative of this principle is the Court's discussion of the hazards which would be presented by taxation of church property.[45] Taxation, by implication, carries the power to penalize for failure to pay the tax, thus conferring upon the states the power to confiscate church property. Exemptions, on the other hand, avert this hazard and thereby avoid a potential conflict with the free exercise clause of the first amendment.[46] Thus, while the Court ostensibly deals only with the issue of exempting church property, has the underlying reasoning palpably foreclosed legislative action to remove the exemption? The question is currently relevant as many legislatures, faced with mounting needs for funds and a diminished tax base, seek to expand the sources of tax

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42 397 U.S. at 675; *see also* 397 U.S. at 690 (Brennan, J., concurring).

43 392 U.S. 83, 98 n.17 (1968); *see also* Horace Mann League v. Board of Pub. Works, 242 Md. 645, 220 A.2d 51, *cert. denied*, 385 U.S. 97 (1966); Kauper, *Constitutionality of Tax Exemptions for Religious Activities*, in D. OAKS, THE WALL BETWEEN CHURCH AND STATE (1963).

44 397 U.S. at 672.

45 *Id.* at 674.

46 *Id.* at 676.

revenues.[47] Various studies are under way to consider the potential income which could be derived from taxing religious property.[48] If the reasoning of *Walz* were to apply, and the minimal contact test there devised were to govern, taxation of religious-owned and used property might be precluded. However, there is authority to the contrary which appears to have anticipated this question. In *Murdock v. Pennsylvania,*[49] the Court passed on the validity of a license tax on religious colporteurs and rejected it as a violation of the free exercise clause. As was there stated:

> *We do not mean to say that religious groups and the press are free from all financial burdens of government.* . . . We have here something quite different, for example, from a tax on the income of one who engages in religious activities or a tax on property used or employed in connection with those activities. *It is one thing to impose a tax on the income or property of a preacher. It is quite another thing to exact a tax from him for the privilege of delivering a sermon.* . . . Those who can tax the exercise of this religious practice can make its exercise so costly as to deprive it of the resources necessary for its maintenance. Those who can tax the privilege of engaging in this form of missionary evangelism can close its doors to all those who do not have a full purse.[50]

From this it is apparent that taxation of religious property is to be distinguished from taxation of religion itself; just as the transportation of children to religious schools is to be distinguished from aid to religion.

Another line of reasoning also supports taxation of religious property. Analogous to taxation of religious property is taxation of other first amendment instrumentalities. Justice Douglas' dissenting opinion takes note of this:

> Churches, like newspapers also enjoying First Amendment rights, have no constitutional immunity from all taxes. As we said in *Murdock*:
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> "We do not mean to say that religious groups and the press are free from all financial burdens of government."[51]

Thus, a valid distinction is made between the freedom from taxation of worship, press or speech and the state's power to tax en-

47 M. LARSON & C. LOWELL, THE CHURCHES, THEIR RICHES, REVENUES AND IMMUNITIES: AN ANALYSIS OF TAX EXEMPT PROPERTY 65-68 (1969).

48 *Id.*

49 319 U.S. 105 (1943).

50 *Id.* at 112 (emphasis added).

51 397 U.S. at 707. *See also* Grosjean v. American Press Co., 297 U.S. 233 (1936).

tities giving expression to these first amendment freedoms. This distinction overshadows the minimal contacts thesis evolved by *Walz*. There the Court sought to thwart the potential conflict that lurks somewhere in the penumbra between the religious clauses of the first amendment. To accommodate these two clauses, *Walz* proffered minimal contacts. It is apparent however, that this thesis will not survive as a test that could be consistently applied. The weakness of the test underscores the dilemma faced by the Court. The resolution of the issue presented by *Walz* appears ultimately to rest on a ground alternately disclaimed and embraced by the Court: The "two centuries of uninterrupted freedom from taxation."[52] In disclaiming this basis for permitting the exemption the Court states that ubiquity and long practice do not make for constitutionality.[53] However, the tenor of the majority opinion indicates that this consideration was ultimately more persuasive than other factors.

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[52] 397 U.S. at 678.

[53] *Id.*