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Constitutional Law - The Establishment Clause and Property Tax Exemptions for Religious Organizations. *Walz v. Tax Commission*, 397 U.S. 644 (1970)

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courts may not be as quick to label the plans as illegal per se without first attempting the significant economic analysis that is required by the "rule of reason" approach.

NICHOLAS JOHN DEROMA

Constitutional Law—THE ESTABLISHMENT CLAUSE AND PROPERTY TAX EXEMPTIONS FOR RELIGIOUS ORGANIZATIONS. *Walz v. Tax Commission*, 397 U.S. 664 (1970).

In *Walz v. Tax Commission*¹ the appellate taxpayer sought to have provisions of New York State's Constitution² and Code³ allowing church property exemption from real and personal property taxes declared in violation of the establishment clause⁴ of the United States Constitution. The taxpayer argued that exemption of church property indirectly required him to "make a contribution to religious bodies. . . ." ⁵ The state courts upheld the tax exemptions,⁶ and their rulings were affirmed upon appeal to the Supreme Court of the United States.

Chief Justice Burger's majority opinion declared that a literal interpretation and strict application of the establishment clause was impossible because it conflicts with the free exercise clause.⁷ Strict and complete application of both would "defeat the basic purpose of . . . [the] provisions, which . . . [was] to insure that no religion be sponsored or favored, none commanded, and none inhibited."⁸ The Court determined that the establishment clause did not require complete neutrality on the part of the government; for the authors of the establishment clause sought only to prevent "sponsorship, financial support, and active involvement of the sovereign in religious activity."⁹ Finally, while admitting that tax exemption benefited churches, the Court found the

SE.2d at 446. Although the Justice Department is not bound by the views stated in the letter, the court in *Blue Cross* refused to give the letter any weight. *Id.*; ANTI-TRUST & TRADE REG. REP., *supra* note 18.

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

2. N.Y. CONST. art. 16, § 1.

3. N.Y. REAL PROPERTY TAX LAW § 420 (McKinney Supp. 1970-71).

4. U.S. CONST. amend. I: "Congress shall make no law respecting an establishment of religion . . ."

5. 397 U.S. at 667.

6. *Walz v. Tax Commission*, 30 App. Div. 2d 778, 292 N.Y.S.2d 353 (1st Dept., Sup. Ct. 1968), *aff'd*, 24 N.Y.2d 30, 246 N.E.2d 517, 298 N.Y.S.2d 711 (1969).

7. 397 U.S. at 668-69. U.S. CONST. amend. I: "Congress shall make no law . . . prohibiting the free exercise [of religion] . . ."

8. 397 U.S. at 669.

9. *Id.* at 668.

exemption did not amount to government sponsorship. "There is no genuine nexus between tax exemption and establishment of religion. . . . The exemption creates only a minimal and remote involvement between church and state. . . ." ¹⁰ In arriving at these interpretations of the establishment clause, the Court relied upon the long history of the church property tax exemption in America¹¹ and its universality among the fifty states.¹²

Walz is the first Supreme Court decision which deals specifically with the establishment clause and property tax exemptions for churches. In the past, the Court has declined to consider several exemption cases,¹³ although decisions have been rendered in several important establishment clause cases involving non-tax aid.¹⁴ The first, *Everson v. Board of Education*,¹⁵ found that a state statute reimbursing parents for transportation expenses incurred in sending their children to private schools did not violate either the fourteenth amendment¹⁶ or the establishment clause.¹⁷ The establishment clause was held to insure only state neutrality "in its relations with groups of religious believers and non-believers . . . [and not to] require the state to be their adversary."¹⁸ State payment of school transportation costs was deemed analogous to state payment of police and fire protection expenses.

Everson was shortly followed by *McColum v. Board of Education*¹⁹ which held that state provisions for instruction of religious subjects in public school buildings were unconstitutional even though the teachers were not compensated from public funds. "Pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend . . . religious classes. This is beyond all question a utilization of the tax established and tax sup-

10. *Id.* at 675-76.

11. *Id.* at 676-77.

12. *Id.* at 676.

13. *Murray v. Comptroller of the Treasury*, 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); *Lundber v. County of Alameda*, 46 Cal. 2d 644, 298 P.2d 1, *appeal dismissed*, 352 U.S. 921 (1956).

14. For a detailed discussion of the establishment cases before *Walz*, see Note, *The Establishment Dilemma: Exemption of Religiously Used Property*, 4 SUFFOLK U. L. REV. 433 (1970).

15. 330 U.S. 1 (1947).

16. *Id.* at 5-8.

17. *Id.* at 8-18.

18. *Id.* at 18.

19. 333 U.S. 203 (1948).

ported public school system to aid religious groups to spread their faith.”²⁰

Four years later, in *Zorach v. Clauson*,²¹ the Court approved the state action allowing public school students to leave school during the day to receive religious instruction in non-public buildings. Justice Douglas, writing for the majority, stated that the first amendment requires “complete and unequivocal” separation of church and state, but nevertheless found that separation in “all respects” is not necessary.²² A common sense interpretation of the establishment clause was deemed necessary to prevent governmental hostility toward religion. The clause was interpreted as not requiring governmental neutrality; it only barred direct financial assistance, governmental “religious instruction,” or any blending of “secular and sectarian education [or] use of secular institutions to force one or some religion on any person.”²³ The establishment decision immediately preceding *Walz* was *Engel v. Vitale*,²⁴ the school prayer case. Required reading of an interdenominational prayer in public schools was declared to be a governmentally fostered religious activity “wholly inconsistent with the Establishment Clause.”²⁵

There appear to be two basic, and somewhat extreme, views as to the requirements of the establishment clause.²⁶ It might be interpreted as barring only the establishment of an official state church or discrimination in favor of one or some religions over others. Or it might be interpreted as barring aid to religious organizations entirely. The Supreme Court has indicated an unwillingness to bar all governmental aid, but it has prohibited aid provided in too direct a manner. Not unexpectedly, therefore, exactly which aid is permissible is still uncertain in areas in which there are no cases directly in point.

Although past cases have failed to establish workable guidelines,²⁷ *Walz* now serves to clarify the area of property tax exemption.²⁸

20. *Id.* at 209-10.

21. 343 U.S. 306 (1952).

22. *Id.* at 312.

23. *Id.* at 314.

24. 370 U.S. 421 (1962).

25. *Id.* at 424.

26. C. PRITCHETT, *THE AMERICAN CONSTITUTION* 567-68 (2d ed. 1968).

27. An injunction was issued recently by a federal district court which halted state payments to private schools, all of which happened to be religious, for salaries of teachers of non-religious subjects. *DiCenso v. Robinson*, 316 F. Supp. 112 (D.R.I. 1970). This case may also find its way to the Supreme Court.

28. One federal district court has already decided a property tax case on the basis of *Walz*. *Diffenderfer v. Central Baptist Church*, 316 F. Supp. 1116 (S.D. Fla. 1970).

Churches receive other tax exemptions, however, about which there are no definitive Supreme Court cases. These include exemptions from death and gift taxes at the state level,²⁹ exemption from income taxation at both the state³⁰ and federal³¹ levels, and exemption from sales and other excise taxes.³² On the basis of *Walz*, it appears that these areas of exemption would be upheld if they are ever considered by the Court.

JAMES W. CORBITT, JR.

Constitutional Law—DEATH PENALTY AS CRUEL AND UNUSUAL PUNISHMENT FOR RAPE. *Ralph v. Warden*, No. 13,757 (4th Cir., Dec. 11, 1970).

On January 18, 1961, the petitioner was convicted of rape, and sentenced to death in the Circuit Court for Montgomery County, Maryland.¹ In appealing the dismissal of a habeas corpus petition, he contended that the death penalty, under the circumstances, constituted cruel and unusual punishment as proscribed by the Constitution.² Reversing the conviction, the United States Court of Appeals for the Fourth Circuit held that the eighth amendment's prohibition against cruel and unusual punishment forbids Ralph's execution for rape, since his victim's life was neither taken, nor endangered.³

29. Note, *Constitutionality of Tax Benefits Accorded Religion*, 49 COLUM. L. REV. 968, 974 (1949).

30. *Id.* at 979.

31. INT. REV. CODE OF 1954, § 501(c)(3).

32. Note, *supra* note 29, at 981.

1. This unreported case was noted in *Ralph v. State*, 226 Md. 480, 481, 174 A.2d 163, 164 (1961), *cert. denied*, 369 U.S. 813 (1962). The state of Maryland authorizes capital punishment for a person convicted of the crime of rape. MD. ANN. CODE art. 27, § 461 (Repl. Vol. 1971) provides:

Every person convicted of a crime of rape or as being accessory thereto before the fact shall, at the discretion of the court, suffer death, or be sentenced to confinement in the penitentiary for the period of his natural life, or undergo a confinement in the penitentiary for not less than eighteen months nor more than twenty-one years; and penetration shall be evidence of rape, without proof of emission.

2. *Ralph v. Warden*, No. 13,757 (4th Cir., Dec. 11, 1970), *rehearing denied*, (4th Cir., Mar. 1, 1971). The issue of whether the imposition of the death penalty on a convicted rapist constitutes cruel and unusual punishment was raised by the same petitioner in this court in 1964. *Ralph v. Peppersack*, 335 F.2d 128, 141 (4th Cir. 1964). In that case the court found no Supreme Court decision to support such a contention, and refused to act favorably upon it.

3. *Ralph v. Warden*, No. 13,757 at 2 (4th Cir., Dec. 11, 1970).