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THE WALZ DECISION: MORE ON THE RELIGION CLAUSES OF THE FIRST AMENDMENT

Paul G. Kauper*

IN *Walz v. Tax Commissioner of the City of New York*¹ the Supreme Court, by a seven-to-one vote,² upheld the constitutionality of the property tax exemption granted under New York law for property used exclusively for religious purposes.³ The *Walz* decision is noteworthy not only because it settles a constitutional question that has been the subject of much controversy in recent years, but also because it sheds further light on the interpretation of the twin religion clauses of the first amendment.⁴ The majority opinion is particularly significant since it was written by the new Chief Justice and therefore indicates the direction of his thinking in the difficult area of church-state relations. Justice Harlan's concurring opinion is also of major importance since he took this occasion to voice for the first time his commitment to a theory of constitutional interpretation which, if adopted by the Court, would have far-ranging consequences in this area of constitutional law.

The principal thrust of this Article is to determine the contribution made by the *Walz* decision to the body of ideas that has been developed by the Court in its application of the interdependent free exercise and establishment limitations of the first amendment, to point up any distinctively new emphases, and to suggest the implications of these new ideas and emphases for important cases coming before the Court at its 1970-1971 term.

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

2. The case was decided prior to the appointment of Justice Blackmun to the vacancy on the Court that resulted from the resignation of Justice Fortas.

3. In *Walz* a taxpayer was challenging the validity of the property tax exemption as applied to a house of worship. This exemption has its source in the following provision of the New York Constitution:

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 Exemptions may be altered or repealed except those exempting real or personal property used exclusively for religious, educational, or charitable purposes as defined by law and owned by any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.

N.Y. CONST. art. 16, § 1. As authorized by the constitution, an implementing statute, N.Y. REAL PROP. TAX LAW § 420 para. 1 (McKinney 1965), defines in some detail the purposes included in the three categories for which exemptions are required.

4. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" U.S. CONST. amend. I.

During the past term, but subsequent to its decision in *Walz*, the Supreme Court announced its decision in *Welsh v. United States*,⁵ a case involving a claim to exemption from military service on the ground of conscientious objection to war. Although the division of the Court in *Welsh* precluded a majority opinion, and although four Justices rested their votes on a construction of the statute that avoided constitutional issues, the separate opinions by Justice Harlan and by Justice White⁶ deal with the substantial constitutional issues that were raised in the case and are therefore highly significant in further illuminating the ideas advanced in *Walz*. Account will be taken of these opinions in the appraisal of *Walz* here undertaken.

I. PRIOR DOCTRINAL DEVELOPMENT

A brief statement of earlier developments in the area of church-state relations in American constitutional law will serve as a frame of reference for appraising the significance of the recent opinions.⁷

The cases have made clear that, whatever else is included in the proscription of the establishment clause of the first amendment, government may not become an active participant in religious affairs—either by programs aimed distinctively at the propagation of religious belief or the cultivation of religious practices, or by intrusion of governmental organs into the affairs of religious organizations. Thus, the Court has held invalid a system of released time for religious instruction conducted on public-school premises as part of the public-school program,⁸ a program of prayers and Bible-reading in the public schools,⁹ use of the public-school instruction programs to favor a religious view of life,¹⁰ and attempts by civil courts to determine doctrinal matters in cases arising out of disputes within religious organizations.¹¹ The thrust and import of these cases cannot be understood, however, unless they are placed in the perspective supplied by other decisions and the doctrinal development stemming therefrom.

5. 398 U.S. 333 (1970).

6. Justice Harlan concurred in the reversal of conviction (398 U.S. at 344), while Justice White, joined by Chief Justice Burger and Justice Stewart, dissented. 398 U.S. at 367.

7. For a more extended review of these developments, see Kauper, *The Warren Court: Religious Liberty and Church-State Relations*, 67 MICH. L. REV. 269 (1968).

8. *McCullum v. Board of Educ.*, 333 U.S. 203 (1948).

9. *School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962). See also *Murray v. Curlett*, 374 U.S. 203 (1963) (companion case to *Schempp*).

10. *Epperson v. Arkansas*, 393 U.S. 97 (1968).

11. *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969).

While the Court's celebrated opinion in *Everson v. Board of Education*¹² employed the sweeping no-aid-to-religion language in its interpretation of the establishment limitation, the *Everson* case itself and subsequent decisions made clear that governmental programs and laws aimed at secular objectives are not rendered invalid merely because they result in incidental aid to religion. Thus, the use of public funds to reimburse parents for the cost of transporting their children to parochial schools,¹³ the use of public funds to provide textbooks for children in these schools,¹⁴ and the use of the police power to enact Sunday closing laws¹⁵ were all sustained on the secular-purpose theory. In *School District of Abington Township v. Schempp*,¹⁶ the Court refined its secular-purpose doctrine by stating the test as follows: "That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."¹⁷ This test was closely identified in *Schempp* with the concept of neutrality as a central canon in the interpretation of the establishment clause—an idea already voiced in earlier opinions.¹⁸ Yet it did not appear that the Court in *Schempp* was adopting the strict-neutrality test implicit in Professor Kurland's thesis that government may not use religion as a basis for classification in order either to advance or inhibit religion.¹⁹ There was no indication that the Court was prepared to overrule *Zorach v. Clauson*,²⁰ in which it had upheld a state system of released time for public-school children allowing them the opportunity for religious instruction conducted off the school premises. Justice Douglas, writing the majority opinion in *Zorach*, had declared that it was appropriate for government to accommodate its public-school program to serve the religious interests of the people. Accommodation for the purpose of advancing religious interests is not, however, compatible with a policy of strict neutrality. Moreover, in *Sherbert v. Verner*²¹ the Court held that a state was under a

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

13. *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

14. *Board of Educ. v. Allen*, 392 U.S. 236 (1968).

15. *McGowan v. Maryland*, 366 U.S. 420 (1961).

16. 374 U.S. 203 (1963).

17. 374 U.S. at 222.

18. See Justice Black's opinion in *Everson*, 330 U.S. at 17-18, in which he said that if the state elected to be neutral in providing bus transportation to children attending public and parochial schools, the Court could not say this was unconstitutional. See also Justice Douglas' opinion in *Zorach v. Clauson*, 343 U.S. 306, 314 (1952), stating that government must be neutral on the issue of competition between sects.

19. P. KURLAND, *RELIGION AND THE LAW* 18, 112 (1962).

20. 343 U.S. 306 (1952).

21. 374 U.S. 398 (1963). The Court here found that South Carolina had violated

constitutional duty to grant an exemption on religious grounds from a law of general application in order not to interfere with the free exercise of religion. Here was a constitutionally *required* accommodation!²²

Thus, by the time of the *Walz* decision, secular purpose, neutrality, and accommodation had emerged as central concepts in the construction of the establishment clause. The government could not actively identify itself with religious beliefs or practices. Incidental aid to religion and religious bodies was valid if pursuant to a secular purpose or if consistent with a policy of neutrality. But, action favoring religious interests was permissible if viewed as an appropriate accommodation to religion, provided the government did not thereby become excessively involved in religious matters. Indeed, such accommodation was required in some cases to prevent an interference with the free exercise of religion.

The development of these doctrinal principles and standards raised serious questions for later resolution by the Court. Were there any limitations implicit in the establishment limitation on the secular-purpose doctrine or on the neutrality principle? What was the meaning and understanding of neutrality in view of the accommodation doctrine? If neutrality meant that government could not do anything to advance or inhibit religion, the accommodation idea would have to be scrapped. But if neutrality suggested a judicial process whereby the Court attempted to reconcile competing demands of the free exercise and establishment limitations and to steer a course which accommodated the establishment clause to underlying values and interests symbolized by the free exercise guarantee, the two standards could be reconciled. With these considerations and questions in mind, the issues raised by the property tax exemption for churches and the opinions in the *Walz* case may be examined.

II. THE PROPERTY TAX EXEMPTION FOR CHURCHES— BACKGROUND AND ISSUES

The property tax exemption for property used for religious purposes has had a long unbroken history in this country.²³ This exemp-

the free exercise clause in the administration of its unemployment compensation law by cutting off unemployment compensation payments to a Seventh Day Adventist who had refused a job requiring Saturday work.

22. See Kauper, *Schempp and Sherbert, Studies in Neutrality and Accommodation*, 1963 RELIGION AND THE PUBLIC ORDER 3, 10-23. See also Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: The Nonestablishment Principle* (pt. 2), 81 HARV. L. REV. 513 (1968).

23. The range of the exemptions varies considerably among the states. For the

tion is recognized by either constitutional or statutory provision in the laws of all fifty states and the District of Columbia. These state provisions were not open to serious constitutional challenge on federal grounds until 1947, when the Supreme Court, in the *Everson* decision,²⁴ made the establishment clause applicable to the states by way of the fourteenth amendment and formulated the broad no-aid doctrine. Even after *Everson*, however, state courts continued to uphold the validity of the property tax exemption in the face of the establishment clause argument.²⁵ The Supreme Court declined review of these decisions²⁶ until it finally decided to face the question in *Walz*.²⁷

In view of the variety of ideas advanced and expressions used in the Supreme Court's opinions, it was not difficult to advance substantial arguments pro and con on the question whether a tax exemption for property used for religious purposes violated the establishment clause.²⁸

Relying on the sweeping statement in *Everson* to the effect that government can do nothing which in any way aids any or all religions,²⁹ opponents of the exemption argued that a tax exemption for churches was necessarily invalid since a tax exemption affords churches some kind of economic aid: for purposes of the *Everson* dictum, it is immaterial whether the economic benefit is in the

practice in the states, see C. ANTIEAU, P. CARROLL & T. BURKE, *RELIGION UNDER THE STATE CONSTITUTIONS* 123-69 (1965). See also Van Alstyne, *Tax Exemption of Church Property*, 20 OHIO ST. L.J. 461 (1959).

24. *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

25. *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); *General Fin. Corp. v. Archetto*, 93 R.I. 392, 176 A.2d 73 (1961), *appeal dismissed*, 369 U.S. 423 (1962); *Murray v. Comptroller of Treasury*, 241 Md. 383, 216 A.2d 897, *cert. denied*, *Murray v. Goldstein*, 385 U.S. 816 (1966).

26. See the subsequent history of cases cited in note 25 *supra*.

27. The New York Court of Appeals had sustained the constitutionality of the exemption. *Walz v. Tax Commn. of the City of New York*, 24 N.Y.2d 30, 246 N.E.2d 517, 298 N.Y.S.2d 711 (1969).

28. For treatment of the subject, see—in addition to the opinions in the state court cases cited in note 25 *supra*—the following: L. PFEFFER, *CHURCH, STATE, AND FREEDOM* 210-19 (rev. ed. 1967); D. ROBERTSON, *SHOULD CHURCHES BE TAXED?* (1968); W. TORPEY, *JUDICIAL DOCTRINES OF RELIGIOUS RIGHTS IN AMERICA* 171-97 (1948); Guild of St. Ives, *A Report on Churches and Taxation*, in *THE RELIGIOUS SITUATION* 931 (D. Cutler ed. 1968); 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); Giannella, *supra* note 22 at 544-54; Korbel, *Do the Federal Income Tax Laws Involve an "Establishment of Religion"?*, 53 A.B.A.J. 1018 (1967); Paulsen, *Preferment of Religious Institutions in Tax and Labor Legislation*, 14 LAW & CONTEMP. PROB. 144 (1949); Comment, *Constitutionality of Tax Exemptions Accorded American Church Property*, 30 ALBANY L. REV. 58 (1966).

29. 330 U.S. at 15.

form of a direct grant or of an indirect subsidy. Furthermore, according to the literal interpretation of the Court's language in *Everson*, it should make no difference whether or not the exemption is part of a broader pattern of exemptions extended to a whole category of nonprofit organizations serving purposes that benefit the community. Moreover, the usual consideration in favor of tax exemptions—that the recipient is rendering a public service that frees the government from an obligation of support—would not apply to churches since the government cannot engage in religious activities. Thus, those persons who objected to the exemption argued that it served no valid secular purpose and must be viewed as a governmental action which in its purpose and effect aids religion. Further, they argued that the exemption could not be claimed in the name of religious liberty since the property tax does not discriminate against churches, and is not a tax on the privilege of engaging in religious activities, but rather is a quid pro quo exacted for the benefits extended by the government to property within its jurisdiction. Finally, those attacking the exemption viewed the historical argument in support of the exemption as irrelevant since the relevant constitutional principles were not developed prior to 1947.

In support of the constitutionality of the property tax exemption, the arguments were advanced that, as *Everson* itself and subsequent cases³⁰ demonstrated, the no-aid statement in *Everson* could not be taken literally; that an exemption differed in a substantial way from a subsidy;³¹ that there was no definable correlation between a property tax exemption and the benefits of governmental services extended to all persons;³² that the exemption served a secular purpose since churches engage in some public-welfare activities that come within the range of public support; that the exemption met the test of neutrality since it was usually included in a series of exemptions granted to various nonprofit organizations which served the public good; that the exemptions were a recognition of the importance and usefulness of voluntary organizations in our pluralistic society;³³ and, by no means least in significance, that the tax exemption either was constitutionally required in order to avoid economic burdens and governmental involvement in religion proscribed by the free exercise clause or, if not required, was at least constitutionally permis-

30. *Board of Educ. v. Allen*, 392 U.S. 236 (1968); *McGowan v. Maryland*, 366 U.S. 420 (1961); *Zorach v. Clauson*, 343 U.S. 306 (1952).

31. See Giannella, *supra* note 22, at 553.

32. For a penetrating analysis of the economic aspects of the exemption, see Bittler, *supra* note 28.

33. This point is stressed in D. ROBERTSON, *supra* note 28, at 220-34.

sible as an accommodation by the government to values and interests served by that clause.³⁴ In addition to these theoretical arguments, an unbroken history of property tax exemptions for churches—going back to the early days of the nation and authorized by the constitutions or statutes of all fifty states and the District of Columbia—furnished the basis for a persuasive practical interpretation of the establishment clause, founded on a common understanding of proper church-state relations in this country.

The several opinions in *Walz* may now be examined in the context of these arguments and considerations.

III. THE OPINIONS IN WALZ

The *Walz* judgment was handed down by an eight-man Court. A majority of seven found the exemption constitutional. Chief Justice Burger delivered the opinion for the Court, Justices Brennan and Harlan wrote separate concurring opinions, and Justice Douglas wrote a dissenting opinion.

Noting at the outset of his compact opinion that it would serve no useful purpose to review in detail the background of the establishment and free exercise clauses of the first amendment or to restate what the Court's opinions have reflected over the years, the Chief Justice said that "[i]t is sufficient to note that for the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity."³⁵

After observing that the religion clauses of the first amendment are not the most precisely drafted clauses in the Constitution and that the Court's opinions, in attempting to articulate the scope of the two clauses, have reflected the limitations inherent in formulating general principles on a case-by-case basis, the Chief Justice said that 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."³⁶

The Chief Justice noted further that since both the establishment and the free exercise clauses are cast in absolute terms, "[t]he Court has struggled to find a neutral course between the two Religion

34. On the latter point, see Kauper, *supra* note 28, at 102-04, 111-16.

35. 397 U.S. 664, 668 (1970).

36. 397 U.S. at 668.

Clauses . . . either of which, if expanded to a logical extreme, would tend to clash with the other.”³⁷

“The course of constitutional neutrality,” the Chief Justice continued, “cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to ensure that no religion be sponsored or favored, none commanded, and none inhibited.”³⁸ Chief Justice Burger then stated what he thought to be the general principle deductible from the first amendment and from all that has been said by the Court: “that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.”³⁹ Having set out this general principle, the Chief Justice then proceeded to expand upon it:

Each value judgment under the Religion Clauses must therefore 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. Adherence to the policy of neutrality that derives from an accommodation of the Establishment and Free Exercise Clauses has prevented the kind of involvement that would tip the balance toward government control of churches or governmental restraint on religious practice.⁴⁰

Chief Justice Burger then emphasized the hazard of placing too much weight on a few words or phrases of the Court: he chose the majority opinion in *Everson*⁴¹ to illustrate his point. Despite the fact that Justice Black’s opinion in that case contained sweeping language to the effect that neither the state nor the federal government could aid one or all religions, the actual result in *Everson* was the upholding of a form of assistance to the churches that sponsored parochial schools—as was true also of the later decision in *Board of Education v. Allen*⁴² upholding the supplying of textbooks to children in parochial schools through public funds. With respect to Justice Jackson’s difficulty in reconciling the *Everson* result with the language of the opinion in that case, Burger said that one could sympathize with Justice Jackson’s logical analysis but agree with the Court’s “emi-

37. 397 U.S. at 668-69.

38. 397 U.S. at 669.

39. 397 U.S. at 669.

40. 397 U.S. at 669-70.

41. *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

42. 392 U.S. 236 (1968).

nently sensible and realistic application of the language of the Establishment Clause."⁴³ Significantly, in referring to the *Allen* holding, the Chief Justice said that the Court there heeded both its own prior holding in *Everson* and this country's religious tradition. In this same connection, after referring to Justice Douglas' statement in *Zorach v. Clauson*⁴⁴ that "[w]e are a religious people whose institutions presuppose a Supreme Being,"⁴⁵ the Chief Justice underlined the following further passage from the *Zorach* opinion: "*When the state encourages religious instruction . . . it follows the best of our traditions.*"⁴⁶

Concluding his discussion of the school cases, Chief Justice Burger said that "[w]ith all the risks inherent in programs that bring about administrative relationships between public education bodies and church-sponsored schools, we have been able to chart a course that preserved the autonomy and freedom of religious bodies while avoiding any semblance of established religion. This is a 'tight rope' and one we have successfully traversed."⁴⁷

Having stated these general observations, the Chief Justice then turned to the particular problem of the property tax exemption:

The legislative purpose of the property tax exemption is neither the advancement nor the inhibition of religion; it is neither sponsorship nor hostility. New York, in common with the other States, has determined that certain entities that exist in harmonious relationship to the community at large, and that foster its "moral or mental improvement," should not be inhibited in their activities by property taxation or the hazard of loss of those properties for nonpayment of taxes.⁴⁸

Noting that the property tax exemption for houses of worship was included in a broad class of exemptions for property owned by non-profit quasi-public corporations, Chief Justice Burger continued: "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."⁴⁹ Then the Chief Justice developed the important point that governments

43. 397 U.S. at 671. Justice Jackson, dissenting in *Everson*, stated that "the undertones of the opinion [of the majority in *Everson*], advocating complete and uncompromising separation . . . seem utterly discordant with its conclusion" 330 U.S. at 19.

44. 343 U.S. 306 (1952).

45. 343 U.S. at 313.

46. 343 U.S. at 313-14, quoted at 397 U.S. at 672.

47. 397 U.S. at 672.

48. 397 U.S. at 672.

49. 397 U.S. at 673.

have not always been tolerant of religious activity, that hostility toward religion has taken many shapes and forms, and that grants of exemptions historically reflect the concern of authors of constitutions and statutes about the latent dangers inherent in the imposition of property taxes; he concluded that the "exemption constitutes a reasonable and balanced attempt to guard against those dangers."⁵⁰ Following up on this idea, yet carefully avoiding any statement that the taxation of church property would violate the free exercise clause, Chief Justice Burger made the significant point that "[t]he limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause. To equate the two would be to deny a national heritage with roots in the Revolution itself."⁵¹

The Court said that it was unnecessary to justify the tax exemption for churches on the basis of the social-welfare services or "good works" that some churches perform for parishioners and others—an argument that is often advanced in support of such an exemption. The Chief Justice observed in this regard that churches vary substantially in the scope of such services and that the extent of services may vary depending on whether the church serves an urban or rural, a rich or poor constituency. To give emphasis to so variable an aspect of the work of religious bodies would introduce an element of governmental evaluation of the worth of particular social-welfare programs, thus producing a kind of continuing day-to-day relationship between church and state which the policy of neutrality seeks to minimize.

But even if the grant of a tax exemption was not aimed at establishing, sponsoring, or supporting religion, the Chief Justice said, the Court had to make the further inquiry whether the end result—the effect of the exemption—was "an excessive governmental entanglement with religion."⁵² The test employed in such an inquiry, he noted, inescapably must be one of degree. He noted too that the question of governmental entanglement was involved if an exemption was granted or if the state simply taxed the churches. Thus, the Chief Justice stated, "[e]limination 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."⁵³ On the other hand, tax exemptions to

50. 397 U.S. at 673.

51. 397 U.S. at 673.

52. 397 U.S. at 674.

53. 397 U.S. at 674.

churches would give rise to some, although a lesser, involvement than would taxing them directly. In analyzing either alternative,

the questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement. Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards, but that is not this case. The hazards of churches supporting government are hardly less in their potential than the hazards of governments supporting churches; each relationship carries some involvement rather than the desired insulation and separation.⁵⁴

Emphasizing again that the grant of a tax exemption did not amount to sponsorship since the government did not transfer part of its revenue to churches but simply abstained from demanding that the church support the state, the Chief Justice said that "[n]o one has ever suggested that tax exemption has converted libraries, art galleries, or hospitals into arms of the state or put employees 'on the public payroll.' . . . [The exemption] restricts the fiscal relationship between church and state, and tends to complement and reinforce the desired separation insulating each from the other."⁵⁵

Noting that separation of church and state cannot mean absence of all contact between the two institutions, Chief Justice Burger said the complexities of modern life inevitably produce some contact, that the fire and police protection received by houses of religious worship are no more than incidental benefits accorded all persons or institutions within a state's boundaries—including many other exempt organizations—and that the appellant in *Walz* had not established even an arguable quantitative correlation between the payment of an ad valorem property tax and the receipt of these municipal benefits.

Finally, the Chief Justice discussed the historical argument, noting that "[f]ew concepts are more deeply embedded in the fabric of our national life, beginning with pre-Revolutionary colonial times, than for the government to exercise at the very least this kind of benevolent neutrality toward churches and religious exercise generally so long as none was favored over others and none suffered interference."⁵⁶ In connection with his historical review, the Chief Justice, while observing that no one acquires a vested or protected right in

54. 397 U.S. at 675.

55. 397 U.S. at 675-76.

56. 397 U.S. at 676-77.

violation of the Constitution by long use, said: "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."⁵⁷ He bolstered this argument by quoting Justice Holmes' well-known statement, "If a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it . . .",⁵⁸ and also by quoting, at an earlier point, Justice Holmes' succinct observation that "a page of history is worth a volume of logic."⁵⁹ Moreover, Chief Justice Burger observed that nothing in this national attitude toward religious tolerance and two centuries of uninterrupted freedom from taxation has given "the remotest sign of leading to an established church or religion and on the contrary it has operated affirmatively to help guarantee the free exercise of all forms of religious beliefs."⁶⁰

While the Chief Justice closed his opinion with the historical argument, Justice Brennan gave it even greater prominence by developing it at the beginning of his concurring opinion. He prefaced his examination of the historical practice as follows:

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. But such practice is a fact of considerable import in the interpretation of abstract constitutional language. On its face, the Establishment Clause is reasonably susceptible of different interpretations regarding the exemption. This Court's interpretation of the clause, accordingly, is appropriately influenced by the reading it has received in the practices of the Nation. . . . 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 exemption 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.⁶¹

Following an extended review of the relevant history, in which he placed emphasis on the practices in effect when the Bill of Rights was under consideration, and, in which he, like the Chief Justice, quoted Justice Holmes' statement that "a strong case" is necessary for the fourteenth amendment to affect a practice that has been

57. 397 U.S. at 678.

58. *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922).

59. *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

60. 397 U.S. at 678.

61. 397 U.S. at 681.

followed for two hundred years by common consent, Justice Brennan said that an examination both of the governmental purposes for granting the exemption and of the type of church-state relationship that has resulted from their existence makes clear that no such "strong case" exists. In his review of the historical materials, Justice Brennan pointed out that at the time of the adoption of the first amendment neither Jefferson nor Madison expressed opinions that tax exemptions for churches were invalid as an establishment of religion—although Madison, in an essay written much later, did make this argument in conjunction with other arguments which, according to Justice Brennan, represent "an extreme view of church-state relations."⁶²

In the substantive part of his opinion, Justice Brennan concurred in the decision of the Court on the basis of the test he had formulated in his concurring opinion in the *Schempp* case, in which he said that what the establishment clause forbids are those involvements of religious with secular institutions which (1) serve the essentially religious activities of religious institutions; or (2) employ the organs of government for essentially religious purposes; or (3) use essentially religious means to serve governmental ends, when secular means would suffice.⁶³ Justice Brennan's test turns on the distinction between the religious and the secular. In his view, government has two basic secular purposes for granting real-property tax exemptions to religious organizations. First, these organizations, like other private, nonprofit organizations, contribute to the well-being of the community in a variety of nonreligious ways, and thereby perform tasks that would otherwise have to be paid for by general taxation or else left undone. Second, government grants exemptions to religious organizations "because they uniquely contribute to the pluralism of American society by their religious activities. Government may properly include religious institutions among the variety of private, non-profit groups which receive tax exemptions, for each group contributes to a vigorous, pluralistic society."⁶⁴

Justice Brennan then turned to the question whether a granting of the exemption results in extensive state involvement in religion. While emphasizing that general subsidies of religious activities would "of course" constitute state involvement with religion, he found tax exemptions and general subsidies to be qualitatively different. A subsidy involves a direct transfer of public moneys through the subsi-

62. 397 U.S. at 684-85 n.5.

63. *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 294-95 (1963) (Justice Brennan, concurring), quoted at 397 U.S. at 680-81.

64. 397 U.S. at 689.

dized enterprise and uses resources exacted from taxpayers as a whole, whereas an exemption assists the exempted enterprise only passively by relieving a privately funded venture of the burden of paying taxes.⁶⁵ Tax exemptions, accordingly, constitute mere passive state involvement with religion and not the active involvement characteristic of outright governmental subsidy. Indeed, as pointed out in the majority opinion, the termination of the exemption would itself lead to involvement and would have a significant fiscal impact on religious organizations. At this point in his argument Justice Brennan dropped a footnote containing the interesting observation that the state involvement with religion that would be occasioned by any cessation of exemptions might conflict with the demands of the free exercise clause.⁶⁶ However, he stated that it was unnecessary to reach any question of free exercise in the present case, concluding that "while I believe that 'hostility, not neutrality, would characterize the refusal to provide [the exemptions] . . . , I do not say the government *must* provide [them] or that the Court should intercede if it fails to do so.' "⁶⁷

Having established these premises, Justice Brennan had no trouble fitting the exemptions into the three-pronged test set forth in his *Schempp* opinion—the exemptions do not serve the essentially religious activities of religious institutions, or employ the organs of government for essentially religious purposes, or use essentially religious means to serve governmental ends when secular means would suffice. His observations on the third point are particularly interesting:

The means churches use to carry on their public services activities are not 'essentially religious' in nature. They are the same means used by any purely secular organization—money, human time and skills, physical facilities. It is true that each church contributes to the pluralism of our society through its purely religious activities, but the state encourages these activities not because it champions religion *per se* but because it values religion among a variety of private, nonprofit enterprises that contribute to the diversity of the

65. Respecting this distinction, Justice Brennan quoted Professor Giannella's statement that "[i]n the case of direct subsidy, the state forcibly diverts the income of both believers and non-believers to churches," while "[i]n the case of an exemption, the state merely refrains from diverting to its own uses income independently generated by the churches through voluntary contributions." See Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: The Nonestablishment Principle* (pt. 2), 81 HARV. L. REV. 513, 553 (1968). Also on this point see Guild of St. Ives, *A Report on Churches and Taxation*, in THE RELIGIOUS SITUATION 931 (D. Cutler ed. 1968).

66. 397 U.S. at 692 n.12.

67. 397 U.S. at 692 n.12. The quotation is from Justice Brennan's concurring opinion in *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 299 (1963).

Nation. Viewed in this light, there is no nonreligious substitute for religion as an element of our societal mosaic, just as there is no non-literary substitute for literary groups.⁶⁸

In a separate opinion, Justice Harlan said that, while he entirely subscribed to the result reached by the majority and found himself in basic agreement with what the Chief Justice had written, he thought it appropriate—in view of the radiations of the issues involved—to state those considerations that for him were controlling in the case. He said that “[w]hat is at stake as a matter of policy is preventing that kind and degree of government involvement in religious life that, as history teaches us, is apt to lead to strife and frequently strain a political system to the breaking point.”⁶⁹ Noting that two requirements frequently articulated and applied in the cases for achieving this goal are “neutrality” and “voluntarism,” Justice Harlan said that these two related and mutually reinforcing concepts “are short-form for saying that the Government must neither legislate to accord benefits that favor religion over nonreligion, nor sponsor a particular sect, nor try to encourage participation in or abnegation of religion. . . . Neutrality and voluntarism stand as barriers against the most egregious and hence divisive kinds of state involvement in religious matters.”⁷⁰ Justice Harlan stated further, however, that an adherence to these concepts—although they are at the core of the religious clauses—may not suffice by itself to achieve in all cases the purpose of the first amendment—to prevent undue government involvement in religious life. Justice Harlan noted that, in addition, there still is the question whether

governmental involvement, while neutral, may be so direct or in such degree as to engender a risk of politicizing religion. . . . [H]istory cautions that political fragmentation on sectarian lines must be guarded against. Although the very fact of neutrality may limit the intensity of involvement, government participation in certain programs, whose very nature is apt to entangle the state in details of administration and planning, may escalate to the point of inviting undue fragmentation.⁷¹

Turning then to the tax exemption itself, Justice Harlan stated that this legislation neither encouraged nor discouraged participation in religious life and thus satisfied the voluntarism requirement of the

68. 397 U.S. at 693.

69. 397 U.S. at 694.

70. 397 U.S. at 694-95.

71. 397 U.S. at 695. In making this argument, Justice Harlan referred to a recent article by Professor Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680 (1969).

first amendment. In his opinion, the statute also satisfied the requirement of neutrality, the application of which, he felt, requires an equal protection mode of analysis. It was the Court's obligation "to survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders."⁷² In Harlan's view, the critical question in any particular case was "whether the circumference of legislation encircles a class so broad that it can be fairly concluded that religious institutions could be thought to fall within the natural perimeter."⁷³ The New York exemption for religious organizations fell within a class of exemptions for organizations whose common denominator is their nonprofit pursuit of activities devoted to culture and moral improvement and the doing of "good works" by performing certain social services in the community that might otherwise have to be assumed by government. Justice Harlan said that, to the extent that religious institutions sponsor secular activities that the legislation was designed to promote, it was consistent with a theory of neutrality to grant these institutions an exemption, just as government grants such an exemption to other organizations devoting resources to these secular projects. Furthermore, under Justice Harlan's theory, churches may properly receive an exemption even though they do not sponsor the secular-type activities but exist merely for the convenience of their interested members: "As long as the breadth of exemption includes groups that pursue cultural, moral, or spiritual improvement in multifarious secular ways, including, I would suppose, groups whose avowed tenets may be antitheological, atheistic, or agnostic, I can see no lack of neutrality in extending the benefit of the exemption to organized religious groups."⁷⁴

Justice Harlan then discussed the distinctions between subsidies and exemptions. Although exemptions do not differ from subsidies as an economic matter, there are, he noted, significant differences between the two. Subsidies, unlike exemptions, must be passed on periodically; they thus invite more political controversy than do exemptions and, as a general rule, are granted on the basis of more complicated, specifically enumerated qualifications. As a consequence, subsidies frequently involve state administration to a greater degree than do exemptions. Justice Harlan then noted that whether subsidies or direct aid entail that degree of involvement that is prohibited by the Constitution is a question that must be reserved for a

72. 397 U.S. at 696.

73. 397 U.S. at 696.

74. 397 U.S. at 697.

later case upon a record that fully develops all the pertinent considerations—such as the significance and character of subsidies in our political system and the role of the government administration in relation to the particular program aided.⁷⁵ Justice Harlan concluded with the interesting point that the states, while bound to observe strict neutrality, should be freer to experiment with involvement in religious affairs than should the federal government; this point is in accordance with his frequently expressed rejection of the idea that the effect of the fourteenth amendment is to make the first amendment applicable to the states.⁷⁶

The central point of Justice Douglas' dissenting opinion is that there is no difference between exemptions and subsidies in terms of what he regards as the support of religion which is forbidden by the establishment clause. Even prior to *Walz*, Justice Douglas had indicated a retraction of his support for the *Everson* decision.⁷⁷ In any event, Justice Douglas did not feel that *Everson* was controlling since there the public funds were used to support a secular purpose, whereas through the tax exemption here the state was supporting a house of worship. Moreover, in Justice Douglas' view the exemption challenged in *Walz* favored believers over nonbelievers—a result forbidden by the first amendment. While recognizing that an exemption for nonsectarian welfare activities conducted by churches would be permissible, he would require a clear separation of this function from the churches' other activities in order to warrant an exemption for the agency engaged in such activities.

Justice Douglas stated that the reliance on the historical argument by the majority was misplaced since the constitutional questions were not acutely raised until 1947 when the Court first made the first amendment's establishment clause applicable to the states in *Everson*. He did not, however, attempt to refute the argument made by both the Chief Justice and by Justice Brennan that a long unbroken history sheds some persuasive light on the common understanding respecting church-state relations, nor did he take account of the long history of tax exemptions for church property in the District of Columbia which is under the jurisdiction of Congress

75. Justice Harlan added a footnote that "[t]he dimension of the problem would also require consideration of what kind of pluralistic society is compatible with the political concepts and traditions embodied in our Constitution." 397 U.S. at 699 n.2.

76. Justice Harlan has advanced this point consistently in distinguishing between the limitations imposed by the first amendment on Congress and by the due process clause of the fourteenth amendment with respect to the enactment of obscenity legislation. See his separate opinion in *Roth v. United States*, 354 U.S. 376, 496 (1957).

77. See Justice Douglas' separate opinion in *Engel v. Vitale*, 370 U.S. 421, 443-44 (1962).

and directly controlled by the first amendment. In the final analysis, Justice Douglas' position appears to be that the historical practices, common understanding, and precedent antedating the *Everson* decision should play no significant part in the judicial interpretation of the establishment clause.

IV. THE SIGNIFICANCE OF WALZ

The *Walz* decision seems clearly to settle the question whether government may grant an exemption from property taxes for property distinctively used for religious purposes. The property involved in *Walz* was used for a house of worship. The case has no direct bearing on the validity of tax exemptions granted to religious organizations for property used for income-producing purposes. It should be noted that in Justice Harlan's view the exemption for property used for religious purpose is valid only if it is a part of a general scheme of exemption of property of all nonprofit organizations which in some way serve the interests of their members or promote the common good. It seems clear, however, that the basic rationale of the majority opinion supports a tax exemption for churches apart from whether that exemption is included in a broader characterization. The majority's rationale turns on the concept of "benevolent neutrality," which is discussed more fully below.⁷⁸

On the larger question of what *Walz* contributes to the interpretation of the religion clauses of the first amendment, attention can be concentrated on the opinion for the Court by Chief Justice Burger, with collateral references to the other opinions at appropriate points.

First, the historical argument, based on the theory that a long established practice has persuasive practical value as an aid to construction of the establishment clause, receives strong support from the majority opinion. In light of the fact that Madison is often thought of as the architect of the first amendment and that, consequently, his views are frequently relied on, Justice Brennan's footnote observation that some of the opinions expressed by Madison in later life represent "extreme views" on the establishment clause is particularly significant.⁷⁹

Second, the court eschews absolute and rhetorical extremes but speaks instead of "realistic and sensible solutions" to the questions posed in the interpretation of the religion clauses of the first amend-

78. See notes 83-95 *infra* and accompanying text.

79. See note 62 *supra* and accompanying text.

ment: complete separation is not possible. The Chief Justice's opinion as well as the opinions by Justices Harlan and Brennan deal further blows to the broad no-aid limitation which is so frequently extracted from *Everson* as a controlling principle. Moreover, as the Chief Justice says, the whole problem of interpretation cannot be approached in terms of absolutes—both because absolute separation is not possible and because of the necessity of reconciling and accommodating two competing clauses that are cast in absolute terms.

Third, the Chief Justice says that for those who wrote the religion clauses of the first amendment the "establishment" of a religion connoted "sponsorship, financial support, and active involvement of the sovereign in religious activity."⁸⁰ Viewed as a definition, this language states a more restrictive view of establishment than appears in some of the Court's earlier utterances and is more in accord with the historical meaning of the term.⁸¹ Of equal importance with this succinct statement of the meaning of establishment is the emphasis by the Chief Justice on the general purpose of the twin religion clauses of the first amendment—to promote and protect religious liberty.⁸² The impact on religion of governmental acts and programs assumes a central place in his opinion. The Chief Justice sees the problem of interpretation as one of reconciling the establishment and free exercise clauses and of accommodating the one to the other. From this view of the problem follows the important point that, between the governmental acts that amount to an establishment and those that interfere with free exercise, there may be laws or programs that fall within the category of what he describes as "benevolent neutrality"—an area in which the government may act in order both to recognize the interests served by the free exercise clause and to avoid hostility to religion.

Fourth, the *Walz* opinions contribute substantially to the development of the concept of neutrality. Neutrality plays a large part in the Chief Justice's opinion; but his is the neutrality of accommodation and a neutrality which, by according a central place to religious liberty, permits a preferential treatment for religion. Hence, it is a "benevolent neutrality." Again it should be emphasized that the majority opinion does not rest its case on the ground that the

80. 397 U.S. at 668.

81. Significantly, the Chief Justice supports this statement by reference to "establishment" in England, the colonies, and European countries. 397 U.S. at 668.

82. For development of the idea that religious freedom is the central concern of the first amendment and that the principle of church-state separation is defensible only as long as it promotes religious freedom, see Katz, *The Case for Religious Liberty*, in *RELIGION IN AMERICA* 95 (J. Cogley ed. 1958).

churches could claim the exemption in the name of religious liberty as a matter of constitutional right. But, short of that, the legislature may act in order to avoid hostility and to protect against potential burdens on churches which could retard the free exercise of religion. The point made by the Chief Justice—that the power of government to accommodate religion by relieving religious activities of burdens otherwise imposed by law is not commensurate with the demands of the free exercise clause—is central to his position since it defines what he means by benevolent neutrality. According to Burger, benevolent neutrality is a neutrality which, far from requiring that religion be a neutral factor in governmental programs, permits a deliberate favoring of religion in order to free religion from possible intrusions by and entanglements with governmental authority. Thus, in the middle ground between what is prohibited by the establishment clause and what is required in the name of free exercise are the governmental acts that are permitted in order to favor the policy of free exercise.

This position of benevolent neutrality, resting on a theory of reconciling the opposing demands of the free exercise and the establishment limitations, and permitting a legislative choice that favors free exercise, stands in contrast to the position of strict neutrality that Justice Harlan stresses in his opinion. Because of this difference, Harlan grounds his concurrence on the idea that the churches are simply given the same exemption extended to other types of nonprofit organizations. Strict neutrality does not require the state to discriminate against churches. It is evident that, with this case, Justice Harlan has now adopted Professor Kurland's thesis that religion may not be used as a basis for classification in order to favor or inhibit religion.⁸³ It cannot be emphasized too strongly that Justice Harlan's concept of neutrality is conspicuously different from the Chief Justice's concept of benevolent neutrality. The latter does not rest upon a classification interpretation of the first amendment in any sense, but uses the term "neutrality" to describe the judicial function in seeking a balance between the free exercise and establishment limitations.⁸⁴ Justice Harlan's neutrality rests on the basis that the first amendment already has struck a balance by eliminating religion as a classification factor.

83. See note 19 *supra* and accompanying text.

84. This concept of neutrality was stressed by Professor Katz in his article, *Freedom of Religion and State Neutrality*, 20 U. CHI. L. REV. 426 (1953). The thrust of his position was that the establishment limitation, like the free exercise clause, was aimed at religious liberty, and that government was not neutral if the establishment limitation was interpreted to require a discrimination on religious grounds in the disbursement of public benefits or otherwise to impede the free exercise of religion.

The importance of the difference between benevolent neutrality and strict neutrality is brought out more fully in the separate opinions by Justice White and Justice Harlan in *Welsh v. United States*.⁸⁵ Justice White, in his dissenting opinion joined by Chief Justice Burger and Justice Stewart, agrees with Justice Harlan that Congress intended to exempt from military service only persons who object on distinctively religious grounds, and then goes on to find that Congress, in exercising its power to enact military service laws, could appropriately limit the exemptions in this way. In his opinion, Justice White says that such action is not prohibited by the establishment clause since Congress, even if the exemption is not constitutionally required by the free exercise clause, could appropriately choose to steer clear of free exercise problems by granting this exemption. In his words, "It is very likely that [the statute's exemption] is a recognition by Congress of free exercise values and its view of desirable or required policy in implementing the Free Exercise Clause."⁸⁶ That judgment, according to Justice White, is entitled to respect by the Court. Thus, Justice White's opinion gives further expression to the point made in Chief Justice Burger's opinion in *Walz* that the limit of accommodation is not defined by the requirements of free exercise. On the other hand, Justice Harlan in his concurring opinion, more fully explicates in *Welsh* the position he adopted in *Walz* and is now firmly committed to the view that any classification that gives religion a preferred position is in itself a violation of the establishment clause. Professor Kurland has won at least one convert on the Court.

As pointed out at the beginning of this Article,⁸⁷ the accommodation theory propounded by the Chief Justice in *Walz* is not new. It has its foundation in the *Zorach* opinion,⁸⁸ from which the Chief Justice quotes in an approving way. Moreover, *Sherbert* was an extraordinary instance of constitutionally required preference on religious grounds.⁸⁹ *Walz* is important because it affirms the accommodation theory in a striking way, notwithstanding what has been said in intervening opinions about neutrality and secular purpose. What emerges as distinctively new in *Walz* is the clear-cut adoption

85. 398 U.S. 333, 344, 367 (1970) (Justice Harlan, concurring; Justice White, dissenting). For the purpose of this Article, discussion of *Welsh* will be confined to the opinions dealing with the question whether Congress may give a preferred position in the selective service laws to those persons who entertain objection on distinctively religious grounds.

86. 398 U.S. at 371.

87. See text accompanying notes 20-22 *supra*.

88. See note 20 *supra* and accompanying text.

89. See note 21 *supra*.

by Justice Harlan of the strict neutrality approach proposed by Professor Kurland.⁹⁰ Adoption of this view requires, as Justice Harlan acknowledges in his *Welsh* opinion, a rejection of both *Zorach* and *Sherbert*⁹¹ and a modification of his own views as expressed in his *Sherbert* dissent.⁹² In addition, by adopting the strict-neutrality approach Justice Harlan leaves himself in a position where he can find a tax exemption for religious purposes valid only if it is included in a broader classification which has the effect of neutralizing religion as a discrete ground for favored classification.⁹³

A result of both *Walz* and *Welsh* is to sharpen the controversy over the question whether or not government is required to follow a strictly neutral policy respecting religious matters. According to the Burger-White thesis, the Congress or state legislatures—in enacting statutes within their areas of legislative concern—may exercise their normal power to classify by exempting religious activities in order to avoid possible burdens on the free exercise of religion. Justice Harlan attacks this theory on the ground that it is for the Court, not the Congress, to determine the meaning of the free exercise clause. If Justice Harlan has his way, no free exercise violation can be demonstrated unless the effect of a law is to discriminate on religious grounds. Conversely, in Justice Harlan's view legislation that does not grant preferential treatment on religious grounds is not invalid on establishment grounds simply because it benefits religious activities. In attacking the Burger-White benevolent-neutrality concept and advocating the Kurland strict-neutrality thesis, Justice Harlan faces formidable obstacles.⁹⁴ *Zorach* and *Sherbert*, as previously observed, are solid precedents to support the Burger-White thesis. History generally is on the side of Justices Burger and White—various federal and state statutes authorize exemptions on religious grounds and thereby give preferential treatment. As noted by Justice White in his *Welsh* opinion, perhaps the most compelling consideration is that the first amendment itself classifies on religious grounds.⁹⁵

Fifth, it is clear that the majority opinion in *Walz* does not turn on the secular-purpose test as it was stated in the *Schempp*

90. See note 19 *supra* and accompanying text.

91. 398 U.S. at 360-61.

92. 398 U.S. at 358 n.9.

93. On the question how broad the classification must be to satisfy Justice Harlan's requirement of a religiously neutral classification, see 397 U.S. at 697 n.1.

94. For a discussion of Professor Kurland's thesis, see Kauper, Book Review, 41 TEXAS L. REV. 467 (1963); Konvitz, *The Constitution or Neutral Principles*, in 1963 RELIGION AND THE PUBLIC ORDER 99.

95. 398 U.S. at 372.

case.⁹⁶ Indeed, *Schempp* and the test stated there are not expressly mentioned in the majority opinion. Moreover, the Chief Justice emphasizes that the Court does not rest its opinion on the theory that churches perform some secular functions that the government may appropriately recognize. This is understandable, for, depending on its interpretation and application, the *Schempp* test can be equated with a concept of neutrality that is incompatible with the concepts of accommodation and benevolent neutrality emphasized in the Court's opinion. But it is important to remember that a majority of the Court in *Walz* was content to deal with the case as one raising the question of a preferred position for religion; on that basis, a discussion of secular purpose was not required. This does not mean that the majority of the Court has abandoned the secular-purpose test or its use in the case where legislation is designed to put religious institutions on an equal footing rather than to give them a preferential position. Indeed, the Court's reference with obvious approval to the *Everson* and *Allen* decisions indicates that the secular-purpose test will continue to have vitality in cases involving nonpreferential governmental support of programs carried on by church-related agencies.

Finally, the new doctrinal element found in *Walz* is the emphasis on what the Court's opinion describes as "entanglements" between church and state and the corresponding necessity of closely examining governmental programs to see if the government thereby becomes excessively entangled in the affairs of the churches. But while the entanglements terminology is new, the substance of the idea as an important consideration in the interpretation of the establishment clause is not. Underlying the twin religion clauses of the first amendment is the idea that the state and the churches have separate functions to perform and that the state may neither intrude into the affairs of the churches nor actively intervene in religious matters.⁹⁷ The Chief Justice described the specific problem in *Walz* in terms of "entanglements." Neither Justice Brennan nor Justice Harlan used the "entanglements" terminology. Although addressing themselves to the same question as the Chief Justice, they spoke in terms of "involvement"—whether the state by granting a tax exemption to churches thereby unduly involves itself in the affairs of the churches. Applying these standards to the facts in *Walz*, the

96. See text accompanying notes 16-17 *supra*.

97. This idea found its most recent expression in *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969), in which the Court held that a state court, in determining an issue respecting use of church property, could not inquire into doctrinal matters as a basis for decision.

Chief Justice found that the tax exemption produced a minimum of entanglements between church and state, while Justices Brennan and Harlan reached the same conclusion in terms of involvement. They agreed too that a policy of taxing church property would create greater risks of entanglement or involvement.

The difference between the "entanglements" terminology of the Chief Justice and the "involvement" language of Justices Brennan and Harlan is probably nothing more than a difference in choice of words to handle the specific problem before the Court. For the Chief Justice, entanglements are one aspect of involvement and have special reference to day-to-day administrative relations between church and state which result in governmental encroachment upon the autonomy of the churches. Moreover, he used the term involvement in a broader sense in his definition of establishment as "sponsorship, financial support, and active involvement of the sovereign in religious activity."⁹⁸ Such involvement is invalid even without any resulting entanglements between church and state. On the other hand, Justices Brennan and Harlan used the term "involvement" both to refer to what, in a comprehensive sense, the Chief Justice characterized as "entanglements" and to describe state action that gives support to religious beliefs or practices. "Involvement" in this latter sense played a large part in the opinions in the *Schempp* case.⁹⁹

The *Walz* opinions now suggest a two-step approach to the questions that bring the establishment clause into play. The first or threshold question is whether the challenged governmental action must be characterized as a forbidden establishment of religion in the sense that the government is actively supporting religion or is deeply involved in it; or whether, conversely, the action can be justified on the grounds that it achieves a secular purpose, or is consistent with strict neutrality, or is either required or permitted as an accommodation to religious liberty.

But even if the governmental action can be upheld on the basis of one or more of the tests employed in answering the threshold question, the second step requires the Court to examine whether the action results in extensive entanglements or involvement by the state in the affairs of the churches. In short, a concept of church-state relations, usually described in the language of the separation principle, serves as a further limitation on governmental action in dealing with religious organizations.

It is this second step that may raise the most critical questions

98. 397 U.S. at 668.

99. See Kauper, *Schempp and Sherbert, Studies in Neutrality and Accommodation*, 1963 RELIGION AND THE PUBLIC ORDER 3.

in further cases coming before the Court, particularly when affirmative payments by way of grants, subsidies, or purchases of service are involved. The opinions in *Walz* all suggest important differences on the entanglements or involvement issue between the passive aid afforded by tax exemption and the positive aid furnished by payments of various kinds. Cases involving the validity of governmental financial assistance to church-related institutions will come before the Court during its 1970-1971 term. The implications for these cases of the doctrinal development to date, including the ideas expressed in the several opinions in *Walz*, may be briefly noted.

V. GOVERNMENTAL ASSISTANCE TO CHURCH-RELATED EDUCATIONAL INSTITUTIONS

The Supreme Court has noted probable jurisdiction in two cases dealing with the validity of financial assistance to church-related educational institutions. *Tilton v. Finch*¹⁰⁰ raises the issue whether the federal government, pursuant to a general program for assistance in the financing of capital facilities at both public and private colleges and universities,¹⁰¹ may make capital grants to church-related colleges for specified academic facilities. In *Lemon v. Kurtzman*,¹⁰² the central question is whether a state program for purchasing secular teaching services at parochial schools as part of a general program for assistance to private schools at the elementary and secondary level is consistent with the establishment limitation.

A look at the disposition of these cases at the lower court level is instructive on the standards used in dealing with the question of government aid to church-related institutions. Three-judge federal district courts were convened in both cases. In both the *Tilton*¹⁰³ and *Lemon*¹⁰⁴ cases, the courts sustained the validity of the programs involved by use of the *Schempp* test. Respecting both the capital grants to church-related colleges and the purchase of secular services in parochial schools, the courts found a secular legislative purpose and a primary effect that neither advances nor inhibits religion. These cases were decided and the opinions written before the Court handed down its judgment and opinion in *Walz*. Subsequent to *Walz*, a three-judge federal district court in *DiCenso v. Robinson*¹⁰⁵

100. 312 F. Supp. 1191 (D. Conn.), *prob. juris. noted*, 399 U.S. 904 (1970) (No. 1555, 1969 Term; renumbered No. 153, 1970 Term).

101. Title I of the Higher Education Facilities Act, 20 U.S.C. §§ 701-21 (1964).

102. 310 F. Supp. 35 (E.D. Pa. 1969) *prob. juris. noted*, 397 U.S. 1034 (1970) (No. 1189, 1969 Term; renumbered No. 89, 1970 Term).

103. 312 F. Supp. 1191 (D. Conn. 1970). The court's decision was unanimous.

104. 310 F. Supp. 35 (E.D. Pa. 1969). Judge Hastie dissented. 310 F. Supp. at 49.

105. 316 F. Supp. 112 (D.R.I.) *prob. juris. noted*, 39 U.S.L.W. 3199 (U.S. Nov. 9,

held that the Rhode Island statute that authorized the purchase of secular teaching services¹⁰⁸—and which was basically similar to the Pennsylvania statute held valid in the *Lemon* case¹⁰⁷—was unconstitutional in its application to parochial schools, on the grounds: (1) that, because of the nature and purpose of parochial schools, any payment for secular services amounts to support of a religious enterprise, and (2) that the administration of the program created relationships resulting in the excessive entanglements of which the Chief Justice spoke in *Walz*.¹⁰⁸ The court in *DiGenso* found the *Schempp* test unworkable, and, in any event, felt that it had been abandoned or substantially modified by the new doctrinal emphasis in *Walz*. The *DiGenso* decision is chiefly important, however, for its reliance on the entanglements limitation derived from *Walz*.¹⁰⁹

The Supreme Court in its review of *Tilton* and *Lemon* will have to come to grips in a critical way with the several standards developed in the church-state cases decided up to this point. The use of the *Schempp* test to validate spending in aid of secular purposes at church-related educational institutions is well supported by the *Everson* and *Allen* decisions, both of which were cited with approval in *Walz*.¹¹⁰ Admittedly, the "primary effect" part of the *Schempp* test is, as pointed out by the majority in *DiGenso*, ambiguous;¹¹¹ but nothing in *Walz* suggests that *Schempp* is no longer

1970) (No. 570). Shortly before this Article went to press the Supreme Court agreed to review this decision and has set the case for argument immediately following the argument in *Lemon* and *Tilton*. 39 U.S.L.W. 3199 (U.S. Nov. 9, 1970).

106. Salary Supplement to Nonpublic Schoolteachers Act, R.I. GEN. LAWS §§ 16-51-1 to -9 (Supp. 1969).

107. Nonpublic Elementary & Secondary Education Act, PA. STAT. ANN. tit. 24, §§ 5601-09 (Supp. 1969).

108. Judge Pettine of the three-judge court dissented from the first ground of the court's holding but joined in the holding on the second ground. 316 F. Supp. at 123-24.

109. Still more recently a federal three-judge court has held invalid the Connecticut statute authorizing the use of public funds to purchase the teaching of secular subjects at private schools. *Johnson v. Sanders*, 39 U.S.L.W. 2225 (D. C. Conn. Oct. 15, 1970).

The Michigan supreme court, on the other hand, in a post-*Walz* advisory opinion, with two justices dissenting, has sustained the validity of comparable Michigan legislation under both the Federal and the Michigan Constitutions. *In re Legislature's Request for Opinion on Constitutionality of Chapter 2 of Amendatory Act No. 100 of the Public Acts of 1970*, 39 U.S.L.W. 2224 (Mich. Sup. Ct. Oct. 5, 1970).

110. For an extended development of the secular-purpose argument to support public assistance to parochial schools, see Choper, *The Establishment Clause and Aid to Parochial Schools*, 56 CALIF. L. REV. 260 (1968).

111. 316 F. Supp. at 119. According to the *Schempp* test, "there must be a secular legislative purpose and a *primary effect* that neither advances nor inhibits religion." 374 U.S. 203, 222 (1963) (emphasis added). The phrase "a primary effect" is open to several interpretations when more than one primary effect may be attributed to a program. Is it enough to sustain a program that it has one primary effect that neither advances nor inhibits religion? Or, contrariwise, is a program unconstitutional if one

relevant or that it cannot be extended, as was done by the lower courts, to validate the programs involved in *Tilton* and *Lemon*.

If strict neutrality, as urged by Justice Harlan, is the key to interpretation of the twin religion clauses of the first amendment, a strong case may be made to support the results reached by the lower courts in *Tilton* and *Lemon*. The federal government, in providing capital grants to meet educational needs at all institutions of higher learning, including church-related colleges, is pursuing a policy which neutralizes the religious factor. Similarly, a state follows a religiously neutral policy when it supports all elementary and secondary schools, including parochial schools. Indeed, if neutrality is the criterion, a discrimination against parochial schools is constitutionally impermissible.

Although neither *Tilton* nor *Lemon* involves the problem of preferential treatment, the accommodation concept is not irrelevant to the issues they raise. Recalling the theme emphasized by Justice Brennan in his concurring opinion in *Walz*,¹¹² some degree of support of private educational institutions may be viewed as a recognition both of the importance of voluntaristic institutions in our pluralistic society and of the social loss that would result if these institutions decline in quality or cease to exist because of financial burdens. A further consideration enters into the picture with respect to the parochial-school problem. Parents are compelled by law to send their children to school, but the Constitution assures that parents will have freedom to choose to send their children to private schools.¹¹³ Nothing in the Supreme Court's decisions dealing with private schools suggests that the parental freedom to send children to a private school implies a constitutional duty on the part of the state to give financial support to these schools.¹¹⁴ Certainly a limita-

primary effect advances or inhibits religion? Or in a case of mixed effects, must a court choose which is the dominant one?

112. See text accompanying note 64 *supra*.

113. See *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925).

114. In *Sherbert v. Verner*, 374 U.S. 398 (1963), the Court held that a state could not deny unemployment compensation benefits to a Seventh Day Adventist who refused a job that required her to work on Saturday contrary to her religious convictions. The Court made the argument that the petitioner in *Sherbert* should not be required to sacrifice her religious belief in order to receive the unemployment compensation benefit. On the basis of this case it has been argued that parents may not constitutionally be denied the benefit of public tax funds to educate their children because they have elected to exercise their constitutional right to send them to parochial schools. This argument was rejected, and *Sherbert* distinguished, in *DiCenso v. Robinson*, 316 F. Supp. 112, 123 (D.R.I.) *prob. juris. noted*, 39 U.S.L.W. 3199 (U.S. Nov. 9, 1970) (No. 570). See also Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1686-87 (1969).

On this question it is interesting to observe that the West German Constitution (Basic Law of the Federal Republic of Germany), which guarantees the right to

tion on the use of public funds to support only public schools is a permissible classification. Nor does the state's support of all private schools except parochial schools amount to unlawful discrimination if the discrimination is required by the Constitution. But this is precisely the question at issue. Under the strict-neutrality theory such discrimination is forbidden. According to the secular-purpose approach such discrimination is not required. Similarly, the accommodation doctrine of *Walz* is relevant in suggesting that, so far as the first amendment is concerned, the government may—although it is not required to do so—extend the benefit of its spending in aid of education to private institutions, including church-related institutions, as an accommodation both to freedom of choice and to the pluralistic character of our society.

In respect to what has been described as the first step in the handling of the establishment problem,¹¹⁵ arguments and standards developed in the cases to date may be marshalled to support the constitutionality of capital grants to church-related colleges for secular purposes and of the purchase of secular teaching services at parochial schools. This is not to suggest either that these arguments will be conclusive or that distinctions may not be made between aid to church colleges and aid to parochial schools.¹¹⁶ All that is suggested is that decisions by the Supreme Court give support to the results reached by the lower courts in the *Tilton* and *Lemon* cases.

Since *Tilton* and *Lemon* were decided prior to the Supreme Court's decision in *Walz*, the three-judge courts in those cases did not proceed with the second step in the analysis of an establishment clause problem and discuss the entanglements issue. But in view of

establish private schools (GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND art. 7(4), § 1), has been interpreted to create a duty on the part of the state to provide financial support for these schools in proportion to the public service they render. See Kauper & Halberstadt, *Religion and Education in West Germany: A Survey and an American Perspective*, 4 VALPARAISO U. L. REV. 1, 24-28 (1969).

115. See text following note 99 *supra*.

116. For a statement of considerations advanced in support of the constitutionality of financial aid to church colleges, as distinguished from aid to parochial schools, see P. KAUPER, *RELIGION AND THE CONSTITUTION* 114-16 (1964); GENERAL COUNSEL OF DEPT. OF HEW, *CONSTITUTIONALITY OF FEDERAL AID TO EDUCATION IN VARIOUS ASPECTS*, S. Doc. No. 29, 89th Cong., 1st Sess. 23 n.18 (1968). Note also the following language taken from footnote 15 of the *DiCenso* opinion:

While we conclude that Rhode Island's statute is unconstitutional, we do not wish to be read as condemning aid in any form to institutions affiliated with religion. We do not, for example, disagree with the result in *Tilton v. Finch*, *supra*, which upheld a federal enactment subsidizing secular facilities at private colleges, including church-related colleges. The degree of institutional involvement required by the federal program was episodic and relatively slight. Moreover, denominational colleges do not have the same close financial, legal, and pedagogical relationship to the Church as do parochial schools.

316 F. Supp. at 122 n.15.

the prominence of this issue in *DiCenso*, it may be expected to play an important part in the Court's review of *Tilton* and *Lemon*. In reaching the conclusion that the Rhode Island statute authorizing the purchase of secular teaching services in parochial schools would result in excessive entanglements between the secular- and parochial-school authorities, the court in *DiCenso* said that the annual renewal and possible enlargement of these subsidies would excite bitter controversy, and that substantial state subsidies would produce significant state limitations on the freedom of denominational schools, since such a direct subsidy requires greater administrative involvement between church and state than the payments involved in *Everson* or *Allen*. Thus, the Rhode Island Commission of Education would have been required to audit parochial-school expenditures and in close cases determine which spending is "religious" and which is "secular." Moreover, according to the district court, the kind of involvement permitted by the statute might significantly limit the internal freedom of parochial schools since it would influence the action of teachers in choosing the courses they would teach and the content thereof.¹¹⁷ Also, heavy state subsidy of parochial schools, according to the *DiCenso* court, may be viewed as state action subject to the restrictions of the fourteenth amendment.¹¹⁸

The arguments advanced on the entanglements issue in *DiCenso* are mentioned here not to indicate that they are dispositive of the matter but because they suggest some of the considerations relevant in dealing with the entanglements problem. Chief Justice Burger in *Walz* said that entanglements are a matter of degree, and that the Court's concern is with excessive entanglements. The problem must therefore be viewed in the perspective of the total picture presented when the state and church-related institutions cooperate in enterprises that serve the common good. Education, health, and welfare are enterprises shared by the state and private institutions—including church-related institutions. Admittedly, the state has a broad authority to prescribe standards and conditions that apply to public and private institutions alike. Substantial entanglement exists whether or not the government subsidizes the private institutions. Private schools, including parochial schools, are already subject to extensive legislative and administrative control. The public interest in adequate education for all its children—an interest reflected in the compulsory-education laws—warrants the imposition of standards and controls on the private schools that parents may choose to elect for the education of their children. The state may appropri-

117. 316 F. Supp. at 120-21.

118. 316 F. Supp. at 121.

ately compel adherence to requirements respecting such matters as qualification of teachers, basic courses to be taught, attendance, and health and safety requirements. Some entanglements, therefore, inhere in the situation.¹¹⁹

The question then is whether the statutory conditions, contractual requirements, or administrative supervision that accompany a particular program for extending public financial assistance to private institutions create such further involvement that it becomes excessive. Distinctions may be made that turn on the way in which the institution is benefited. Assistance that goes directly to students or parents, such as tuition grants, raises no substantial entanglement problem. The same is true of a program of financial assistance that is administered by the state authorities for the benefit of students and that results in aid to the institutions. In *Everson* the state reimbursed parents for the cost of transporting their children to parochial schools, and in *Allen* the state educational authorities made the final choice of which textbooks were to be loaned free of charge to parochial school children. Fewer entanglements are found in these arrangements than in arrangements that call for direct payments to parochial-school authorities, and that may require some degree of public supervision of the services rendered as the quid pro quo of the payment. This distinction between direct and indirect assistance, however, may be formal rather than substantive. The courts in the *Tilton* and *Lemon* cases rejected the argument that financial assistance to church-related educational institutions was invalid simply because payments were made directly to the institution. Nevertheless, the Court's views on the entanglements question may prove to be a major factor in the legislative choice of ways and means of assisting private education.

It would, indeed, be surprising if an affirmative grant of public funds to a church-related institution, in order to help support what the state recognizes as the secular aspect of the institution's program, were viewed as resulting in excessive entanglements simply because the institution was church-related and because the acceptance and administration of the grants required the receiving institutions to

119. Private schools may also be subjected to restrictions that are designed to prevent or discourage racial discrimination. Recently the Treasury Department has announced a policy of disallowing deductions for contributions made by donors to private schools which practice racial discrimination. IRS News Release, July 10, 1970, 7 CCH 1970 STAND. FED. TAX REP. ¶ 6790. See N.Y. Times, July 11, 1970, at 1, col. 8. See generally Note, *The Validity of Tax Benefits to Private Segregated Schools*, 68 MICH. L. REV. 1410, 1412 n.16 (1970). The Supreme Court's decision in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), suggests that Congress, in the exercise of its power to enforce the thirteenth amendment, could prohibit racial discrimination in all schools, whether public or private.

comply with certain conditions and controls designed to insure the achievement of the intended public purpose. Such a view would require the invalidation of substantial portions of many federal and state programs that extend assistance to a wide variety of nonpublic agencies, including church-related agencies, which operate hospital and social-welfare programs of various kinds. The vital question is not whether the state is dealing with and asserting some control over church-related institutions, but the extent to which it is thereby entangling itself in religious affairs.¹²⁰

Distinctions may also be made that depend on the nature of the assistance rendered to the private institution. Differences may be observed between nonrecurring capital grants to church-related colleges, as in *Tilton*, and annually renewable payments to reimburse parochial schools for operating costs incurred in teaching secular subjects.¹²¹ The former practice may result in only a modest entanglement in terms of the conditions prescribed for the grant, whereas the latter—whether characterized as a subsidy or as a purchase of services—may invite the administrative controls and checks that constitute the kind of “official and continuing surveillance” to which the Chief Justice referred in *Walz*.¹²² Also, the prospect of annual renewal would open up the possibility for controversies that promote sectarian divisiveness.

Just as entanglements are a matter of degree, so also the question of what may be a permissible degree of entanglement cannot be divorced from the substance of the whole problem before the Court. The existence of entanglements is one factor to be weighed and balanced along with other considerations. How strong or even dominant is the secular purpose served by the public assistance? How readily should the Court find a forbidden entanglement when church-related institutions are involved, thereby forcing government to discriminate on religious grounds? And may the Court tolerate greater entanglements in state-administered programs than in federal programs, as suggested by Justice Harlan?¹²³

The striking of a balance ultimately reaches into the considerations underlying the “entanglements” and “involvement” formu-

120. See the early case of *Bradfield v. Roberts*, 175 U.S. 291 (1899), in which the Court, in upholding a congressional appropriation to a District of Columbia hospital that was under a contract with the Commissioners of the District to provide care for indigent patients, said it was immaterial that the affairs of the corporation that owned the hospital were managed by a sisterhood of the Roman Catholic Church.

121. This distinction was made by the federal court in *DiCenso* in the footnote passage in which the court said it did not disagree with the *Tilton* holding. See note 116 *supra*.

122. See text accompanying note 54 *supra*.

123. See note 76 *supra* and accompanying text.

lations. Government should keep its hands out of the affairs of the churches in order to avoid encroachments and embroilments that impinge on the constitutional autonomy of the churches and that invite the risk of the politicization of the churches and of sectarian fragmentation of the public order. It is vital to the freedom of the churches that they rely only on voluntaristic support of their spiritual functions. But the institutions—such as schools and hospitals—that churches operate in areas of public concern are an important part of the total private sector that distinguishes American pluralism. The maintenance of these institutions and the freedom of choice they represent is also a matter of public concern.¹²⁴ The degree of this concern will help measure the tolerance of the entanglements resulting from public assistance to these institutions.

The issue of entanglements brings up crucial questions that go to the heart of church-state relations. These questions point up the great dilemmas in this area of American public law. Must the state, in order to avert encroachments upon the freedom of the churches and to avoid the risk of sectarian fragmentation of the public order, deny public assistance essential to the continued functioning of church-related institutions which admittedly serve a public purpose and which constitute a significant element of our pluralistic society? Or, in turn, if the state may grant assistance to these institutions, can they accept this assistance and the controls reasonably appropriate thereto without sacrificing their essential identity?¹²⁵

The concrete problem decided in *Walz* was a relatively simple one. The cases now coming before the Court raise critical and ultimate issues respecting the structure of our political and social order. The Constitution yields no compelling answers. To the Court falls the unenviable task of resolving these issues by making choices between competing interests and values of a higher order. Resort to constitutional litigation as a means of dealing with these questions imposes an extraordinary strain on the judicial process. The occasion calls for the wisdom of a Solomon.

124. Justice Brennan in *Walz* stated that "[g]overnment may properly include religious institutions among the variety of private, nonprofit groups that receive tax exemptions, for each group contributes to the diversity of associations, viewpoint, and enterprise essential to a vigorous, pluralistic society." 397 U.S. 664, 689 (1970) (Justice Brennan, concurring).

125. See, in this connection, the interesting and suggestive footnote by Justice Harlan in his concurring opinion in *Walz*, 397 U.S. 699 n.2, quoted in note 75 *supra*.