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In June, 1967, Frederick Walz bought a small tract of land on Staten Island.1 Almost immediately he brought suit in the New York Supreme Court to enjoin the New York City Tax Commission from granting property tax exemptions to religious organizations for property used exclusively for religious worship.2 His main contention was that the exemption, authorized by state constitutional and statutory provisions, indirectly required him to make a contribution to religious bodies and thereby violated the Establishment Clause of the First Amendment to the United States Constitution.3 In concrete terms, the $5.24 annual real estate tax Walz had to pay on his lot was allegedly inflated illegally to compensate for the revenues lost to the state as a result of church tax exemptions.

Summary judgment was granted to the defendant Tax Commission and unanimously affirmed (5-0) by the Appellate Division of the New York Supreme Court, with no written opinion being given.4 The plaintiff's contentions were again rejected in another unanimous decision by the New York Court of Appeals, which stated in a *per curiam* opinion:

Firmly embedded in the law of the state, both by Constitution . . . and by statute [citations omitted], is the doctrine that real property owned by a religious corporation and used exclusively for religious purposes is exempt from taxation [citations omitted], and research discloses—and the 2½-page brief of the plaintiff-appellant herein cites no authority to the contrary—that courts throughout the country have long and consistently held that the exemption of such real property from taxation does not violate the Constitution of the United States. [Citations omitted.] We see no reason for departing from this conclusion in this case.5

1. N.Y. Times, June 20, 1969, § 1, at 1, col. 3.
Mr. Walz appealed to the United States Supreme Court, which noted probable jurisdiction, and affirmed by a seven-to-one margin the prior decision of the New York Court of Appeals.

**Theories Involved—Development of First Amendment Principles**

From a historical standpoint, the New York Court of Appeals was undoubtedly accurate in saying that the principle of property tax exemptions for churches was firmly embedded in American tradition. Over two-thirds of the state constitutions provide for exemptions of church property from taxation, about half of these making the exemption mandatory. Whether mandatory or not, all 50 states and the federal government now grant tax exemptions by legislative enactment to property used for religious worship. From pre-Revolutionary days the states have granted such exemptions to churches, but only on rare occasions have they been challenged in the courts. When challenged, the courts, both state and federal, have invariably upheld the validity of the exemption. In almost all of these cases the exemptions were questioned on grounds other than the First Amendment, but even in the two cases before 1947 which did use violation of the First Amendment as grounds for appeal, the state courts in each case rejected this contention.

Prior to 1947 there was virtually no support for the contention of the plaintiff that the granting of tax exemptions to churches violated the First Amendment to the United States Constitution. In that year, however, the United States Supreme Court handed down its decision in *Everson v. Board of Education*, which marked the starting point of

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11. Walz, supra note 7, at 685 (Brennan, J., concurring); A. VanAlstyne, supra note 8.
modern analysis and application of the religion clauses of the First Amendment. Since many legal commentators began to reassess the entrenched position of religious tax exemptions in light of the Everson decision, and since Walz based his attack squarely on the "new look" of the Establishment Clause to overturn 200 years of tradition, it is important to examine Everson and the line of cases following it in detail.

In Everson v. Board of Education the plaintiff challenged the right of a local New Jersey school board, under the authorization of a New Jersey statute, to reimburse the parents of parochial school children for bus fares to and from school. Among other things, the plaintiff claimed that the board's resolution and the New Jersey statute forced inhabitants to pay taxes to help support and maintain Catholic schools, thereby using state power to support church schools. This, it was argued, was contrary to the First Amendment's prohibition respecting the establishment of religion. By a five-to-four margin, the Supreme Court held that the statute and resolution in question were not in violation of the Establishment Clause.

In the Opinion of the Court, Mr. Justice Black differentiated between the Establishment Clause and the Free Exercise Clause, and attempted to lay down certain guidelines for applying the former. That he was not totally successful in clarifying the principle involved is borne out by the fact that both sides in the Walz appeal relied on Everson to support their argument.

The confusion centers around the question of whether one places heavier emphasis on the first part of the Everson Court's discussion of the Establishment Clause or the latter part. The opinion first attempts to establish certain general principles regarding government aid to religion:

15. Supra, note 13.
16. Id. at 5.
17. Id. at 8, 14 passim.

The First Amendment clause pertinent here reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. Const., Amend. I.
18. Brief for Appellant at 6-8; Reply Brief of Appellant at 2, 3; Brief for Appellee at 18; See also briefs of amici curiae, id.; Walz, supra, note 7.
The ‘establishment of religion’ clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. . . . No person can be punished for entertaining or professing religious beliefs or disbeliefs for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions. . . . In the words of Jefferson, the clause against establishment of religion by law was intended to erect ‘a wall of separation between church and State.”

Read by itself, this quote from the Opinion appears to be a dogmatic pronouncement forbidding state aid of any kind to any religion. However, in further clarifying and applying this “no-aid” principle, Justice Black stated:

On the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans . . . or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation.

Admitting that some aid is indirectly given to religion by providing free bus transportation to religious-affiliated schools, Everson compares such aid with police and fire protection and other public services provided for church-affiliated schools. All of these aid religion indirectly because without them, such institutions would find it harder, if not impossible, to operate. To literally follow the principle of separation of church and state to its logical extreme, the state would have to eliminate even these services to religious institutions.

But such is obviously not the purpose of the First Amendment. That Amendment requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them.

The Court appeared to hold that while the Establishment Clause prohibits aid to any religion for any purpose, this clause could not be used as an instrument of hostility towards religion by denying religious institutions general welfare benefits to which they would otherwise be entitled.

20. Id. at 16.
21. Id. at 18.
The dissents in *Everson* immediately saw the problems involved. Mr. Justice Jackson commented:

"[T]he undertones of the Opinion, advocating complete and uncompromising separation of Church from State, seem utterly discordant with its conclusion yielding support to their commingling in educational matters."

However, it was Mr. Justice Rutledge who sounded the haunting keynote to the problem that the *Everson* decision created:

"If it is part of the state's function to supply to religious schools or their patrons the smaller items of educational expense, because the legislature may say they perform a public function, it is hard to see why the larger ones may also not be paid. . . ."

The process of defining more clearly the broad boundaries set down in the *Everson* decision has continued to this day. Those favoring absolute separation of church and state put dogmatic emphasis on the first premise and general principle of *Everson*; those advocating a more benign relationship look to the second premise and actual decision in *Everson*. One year later, Mr. Justice Frankfurter described the situation in *Illinois ex rel McCollum v. Board of Education*. Speaking on behalf of the four original dissenters in *Everson*, his concurring opinion stated:

"[T]he mere formulation of a relevant Constitutional principle is the beginning of the solution of a problem, not its answer. This is so because the meaning of a spacious conception like that of the separation of Church from State is unfolded as appeal is made to the principle from case to case. We are all agreed that the First and the Fourteenth Amendments have a secular reach far more penetrating in the conduct of Government than merely to forbid an 'established church.' But agreement, in the abstract, that the First Amendment was designed to erect a 'wall of separation between Church and State,' does not preclude a clash of views as to what the wall separates."

In the *McCollum* case, those who had despaired of maintaining the wall as a result of *Everson* gained new hope. Four members of the *Everson* majority joined the four dissenters in rejecting as uncon-

22. *Id.* at 19.
23. *Id.* at 50 (Rutledge, J., dissenting).
27. *Id.* at 212-13.
28. Black, Vinson, Douglas and Murphy, JJ.
29. Rutledge, Jackson, Frankfurter, and Burton, JJ. Rutledge and Burton also joined in the majority opinion in *McCollum*. 

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stitutional a released-time plan whereby church representatives were allowed to come into the public schools once a week to give religious instructions to the pupils. Mr. Justice Black, again writing for the Court, repeated his "no-aid" principle\(^{30}\) from *Everson* and concluded:

> Here not only are the State's tax-supported public school buildings used for the dissemination of religious doctrines. The State also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the State's compulsory public school machinery. This is not separation of Church and State.\(^{31}\)

Mr. Justice Reed, the lone dissenter, objected:

> I find it difficult to extract from the opinion any conclusion as to what it is in the Champaign plan that is unconstitutional. . . . None of the reversing opinions say whether the purpose of the Champaign plan for religious instruction during school hours is unconstitutional or whether it is some ingredient used in or omitted from the formula that makes the plan unconstitutional.\(^{32}\)

Four years later the Court, taking a different approach, upheld (6-3) in *Zorach v. Clauson*\(^{33}\) a released-time plan similar to that in *McCollum*. The obvious difference, which saved the New York program in *Zorach*, was the fact that in the latter the religious instruction was not conducted on public school property.\(^{34}\) While pointing out that the Court still followed *McCollum*,\(^{35}\) the majority paid greater heed to the aspect of cooperation between church and state in protecting the students' right to the free exercise of their religion. The Court, in an opinion written by Mr. Justice Douglas, reasoned that a teacher in allowing a student to be dismissed for a holy day service "aids" religion to some extent, but not sufficiently to violate the Establishment Clause of the First Amendment. The released-time program in *Zorach* was viewed as merely a logical extension of such permission.\(^{36}\) "Accommodation" was injected as a new guide-word alongside "neutrality" for determining cases involving the religion clause.\(^{37}\)

> When the state . . . cooperates with religious authorities . . . , it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public

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31. *Id.* at 212.
32. *Id.* at 240.
34. *Id.* at 308, 315.
35. *Id.* at 315.
36. *Id.* at 313.
37. See, e.g., *id.* at 314-15.
service to their spiritual needs . . . . [W]e find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence.³⁸

Justice Black, now dissenting, argued with strong justification that the decision contradicted the stand taken four years earlier.

_McCollum_ . . . upheld that Illinois could not constitutionally manipulate the compelled classroom hours of its compulsory school machinery so as to channel children into sectarian classes. Yet that is exactly what the Court holds New York can do.³⁹

Whether or not _Zorach_ was in line with _McCollum_,⁴⁰ the fact remained that _Zorach_ certainly was not in line with what Black conceived to be the majority position in _McCollum_.

By emphasizing the Free Exercise Clause and the "hostility" aspect in _Zorach_, the Court tempered the pervasiveness of the Establishment Clause, but the most important statement in _Zorach_ may well have been Justice Douglas' simple justification: "The problem, like many problems in constitutional law, is one of degree."⁴¹

Prayers (_Engel v. Vitale_⁴²) and Bible reading (_Abington School District v. Schempp_⁴³) in public schools provided the Court with further opportunities to interpret the religion clauses.⁴⁴ Professor Kurland was reasonably justified in commenting, on the heels of the two decisions:

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38. _Id._ at 313-14.
39. _Id._ at 316. See also P. Kauper, _supra_, note 14, at 15; L. Pfeffer, _supra_ note 9, at 175; 18 DePaul L. Rev. 785, 794 (1969).
41. _Zorach v. Clauson_, _supra_, note 33, at 314. See also P. Kauper, _supra_ note 14, at 19.
42. 370 U.S. 421 (1962).
43. _Supra_ note 40, decided with _Murray v. Curlett_.
44. Prior to this the Supreme Court had considered five other cases relating to the Establishment Clause. In four related cases upholding the constitutionality of Sunday closing laws, _McGowan v. Maryland_, 366 U.S. 420 (1961); _Two Guys from Harrison-Allentown v. McGinley_, 366 U.S. 582 (1961); _Braunfeld v. Brown_, 366 U.S. 599 (1961); _Gallagher v. Crown Kosher Market_, 366 U.S. 617 (1961), the Court pointed out that the Establishment Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions. (McGowan, at 442). This idea is further developed in _Schempp_, _supra_, note 40. Cf. _McGowan_ at 441 and at 466 (Frankfurter, J., concurring in latter) with _Schempp_ at 222. In another case, _Torcaso v. Watkins_, 367 U.S. 488 (1961), the Court, in striking down a Maryland statute requiring belief in God as a requisite for holding public office, reiterated that neither the federal nor state governments can pass laws aiding believers in religion as opposed to non-believers (at 493). This point had previously been expressed in dicta in _Everson_, _supra_ note 13, at 15-16, _McCollum_, _supra_, note 25, at 210-11, and _Zorach_, _supra_ note 33, at 314.

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This, and only this, is certainly to be derived from the *Engel* and *Schempp* cases. The states may not prescribe the conduct of religious ceremonies in their public schools.46

By themselves, the decisions add only confusion to the interpretation of the religion clauses,46 but in conjunction with *Sherbert v. Verner*,47 decided the same day as *Schempp*, and *Board of Education v. Allen*,48 five years later, *Schempp* takes on greater meaning.

Examining the interrelationship between the Establishment Clause and Free Exercise Clause, Mr. Justice Clark emphasized in *Schempp* the need for a "wholesome neutrality" on the part of government in safeguarding both clauses.49 To determine whether legislative enactments violate this neutrality with regard to the Establishment Clause, Justice Clark proposed a test:

The test may be stated as follows: what are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.50

It has been noted51 that Justice Clark, in emphasizing the neutrality aspect, carefully avoided any reference to government accommodation to religion, although three of the concurring justices gave specific approval to the concept.52 Here consideration of *Sherbert v. Verner*53 is relevant. In that case the Court held that South Carolina could not withhold unemployment compensation payments to a Seventh Day Adventist who refused to work on Saturdays. The opinion said, in effect, that a state not only may, but *must* accommodate itself to the church in certain situations in order to safeguard the Free Exercise of Religion. Although the case revolves around the Free Exercise Clause, the interrelationship between the two religion clauses is evident.

49. *Supra*, note 40, at 222.
50. *Id.*
51. P. Kauper, supra note 46, at 18.
52. See *Schempp*, supra note 40, at 294 et seq. (Brennan, J., concurring); *id.* at 305-08 (Goldberg, J., concurring).
53. *Supra*, note 47.
This holding, [says Justice Brennan for the Court], but reaffirms a principle that we announced [in Everson] . . . that no State may exclude individual Catholics, . . . because of their faith, or lack of it, from receiving the benefits of public welfare legislation.\textsuperscript{54}

If Schempp emphasized neutrality in church-state relations, Zorach and Sherbert reiterated the view that the “wholesome” aspect of the neutrality criterion must not be overlooked, and that neutrality under the Establishment Clause has its limitations.

Strict separationists hailed the Engel and Schempp decisions as shoring up the wall of separation between church and state, but Board of Education v. Allen\textsuperscript{55} indicated that their victory might have been pyrrhic. Holding that loans of non-religious textbooks by public school authorities to sectarian schools does not violate the Establishment or Free Exercise Clause, Allen adopted Justice Clark’s test in Schempp. Recognizing that this test, standing alone, could be given either a strict or a liberal interpretation, Mr. Justice White, speaking for the Court, noted that the Schempp opinion relied on Everson, and concluded that a strict separationist interpretation of the test could not be reconciled with the result of that case.\textsuperscript{56} If the New Jersey bus statute in Everson was considered secular in purpose and primary effect, so must the New York book statute in Allen be considered. In reaching its conclusion, the Court adopted another factor in considering legislative acts of a religious nature:

We are unable to hold . . . that this statute results in unconstitutional involvement of the State with religious instruction.\textsuperscript{57}

[Emphasis added.]

Therefore, twenty-one years after Everson, the Supreme Court resolved the clash between the two premises\textsuperscript{58} primarily in favor of the latter. Government must be neutral in its dealings with religion, but not hostile. Avoiding hostility means that it may accommodate itself toward religion even if religious liberty and the Free Exercise Clause are not threatened, so long as neither the purpose nor the primary effect of a legislative act is the advancement or inhibition of religion. But this rule, in turn, requires its own yardstick for determining limitations. Allen provides that measure with the new criterion of “in-
volvement.” And not to be overlooked in this evolution of standards is the quotation by the Allen majority from Zorach: “The problem . . . is one of degree.”

THE DECISION IN Walz

On three previous occasions, one as recently as 1966, the U.S. Supreme Court had denied hearings for challenges to tax exemptions for churches. The New York Times, commenting on the U.S. Supreme Court’s agreement to hear the Walz appeal, declared that the case “could produce the most far-reaching church-state decision in the court’s history.” This fact would have been eminently true had the Supreme Court reversed the New York courts. As actually decided, the case merely preserved the status quo of a centuries-old tradition. Nevertheless, the result in Walz constitutes an approval of the allowance of governmental benefits to religion greater than had been expressly authorized by the Court since the era prior to Everson.

Mr. Chief Justice Burger’s Opinion of the Court is essentially a recapitulation and reassessment of what the Court has said on the matter of the Establishment and Free Exercise Clauses since Everson. Admitting that some of the Court’s opinions suffer from “considerable internal inconsistency” which results from “what, in retrospect, may have been too sweeping utterances on aspects of these clauses,” he attempts to extract the simple core of principles to be drawn from this series of decisions. In so doing, however, he takes a step forward by firmly establishing the direction of the present Court on church-state matters.

Subtly important in the opinion is the absence of any reference to Jefferson’s famous “wall of separation between church and state.” This controversial metaphor was resurrected by Justice Black, speaking for the Court, as part of the first premise in the Everson decision, repeated in McCollum, and used again by Justice Black as late as

61. N.Y. Times, June 17, 1969, § 1, at 1, col. 6.
62. Supra, note 7, at 668.
63. As one author commented, “Certainly there is something anomalous about a wall that will admit a school bus without the slightest breach, but is impermeable to a prayer.” D. Oaks ed., The Wall Between Church and State, at 2-3 (1963).
64. Supra, note 13, at 16.
65. Supra, note 25, at 211, 212.
1961, in *Torcaso v. Watkins*. Its was never used thereafter in any majority opinion, although Justice Black once again relied on it in his dissent in *Allen*. In the *Walz* opinion, the Court refers instead to the "not so narrow a channel" of neutrality described by Mr. Justice Harlan in his *Sherbert* dissent. Contained in this otherwise small change of metaphors is the basic shift in, or perhaps refinement of, the Supreme Court's position on the First Amendment religion clauses from *Everson* to *Walz*.

The first hint of the Court's position comes at the very beginning of the *Walz* opinion when the Chief Justice says that for the men who wrote the First Amendment, "establishment" of a religion connoted "sponsorship, financial support, and active involvement of the sovereign. . . ." (Emphasis added.) Chief Justice Burger develops the point further when he quotes from *Zorach* that the First Amendment "does not say that in every and all respects there shall be a separation of Church and State." He firmly establishes the position of the Court with the observation, "No perfect or absolute separation is really possible; the very existence of the Religion Clauses is an involvement of sorts—one which seeks to mark boundaries to avoid excessive entanglement."

The general principle deducible from the First Amendment and all that has been said by the Court, the opinion states, is "that we will not tolerate either governmental established religion or governmental interference with religion." These broad boundaries form the outside extremities of the "channel." Between the Scylla and Charybdis of the Establishment and Free Exercise Clauses, the Court must "chart a course" of neutrality which "cannot be an absolutely straight line." The path to follow must be broad enough so that there will be "room for play in the joints." Far from constructing a wall between church and state, the opinion calls for an overlapping area in which church and state need not be uncompromisingly separated at all. The purpose of such a flexible arrangement is to produce, "a benevo-
lent neutrality which will permit religious exercise to exist without sponsorship and without interference.\textsuperscript{77}

The rule enunciated by the \textit{Walz} Court for determining in each case whether a particular act goes beyond the area of permissible "benevolent neutrality" is the \textit{Schempp} test as interpreted in \textit{Allen}.\textsuperscript{78} Each case must turn on whether the particular acts in question are:

1. \textit{Intended} to
   a. establish or
   b. interfere with religious beliefs and practices or
2. Have the primary \textit{effect} of doing so.

Applying the \textit{Schempp} test to the facts in \textit{Walz}, the Supreme Court found that the legislative intention of tax exemptions is neither the advancement nor inhibition of religion. Quite the contrary, states have passed tax exemption laws so that churches and other non-profit organizations will \textit{not} be inhibited in their activities by property taxes or the hazard of loss of property for nonpayment of taxes.\textsuperscript{79} The New York statute does not \textit{establish} a religion, but \textit{spares the free exercise} of religion from the burden of taxation.\textsuperscript{80}

As for the effect, the second part of the test, the Court declares that the end result must not be an excessive governmental entanglement with religion.\textsuperscript{81} Once again the test is "inescapably one of degree."\textsuperscript{82} The Court notes that either course, taxation of churches or exemption, occasions some degree of involvement with religion, but concludes that the exemption of churches from taxation actually creates a lesser degree of involvement than would a program of taxation.\textsuperscript{83} Although tax exemptions granted by the state do admittedly result in an indirect economic benefit to churches,\textsuperscript{84} the benefit and the resulting involvement is minimal and, says the Court, "tends to complement and reinforce the desired separation insulating each from the other."\textsuperscript{85} By granting tax exemptions to churches, the Court observes, government simply abstains from demanding that the church support the state.\textsuperscript{86}

\textsuperscript{77} \textit{Id.} at 669. The term "benevolent neutrality" is not original with the \textit{Walz} decision. Professor Paul Kauper used the term in a 1963 essay discussing the \textit{Schempp} and \textit{Sherbert} decisions to describe the same position as that taken here by the \textit{Walz} court. P. Kauper, \textit{supra}, note 46, at 16 et seq.

\textsuperscript{78} \textit{Walz, id.} at 669, 672.

\textsuperscript{79} \textit{Id.} at 672.

\textsuperscript{80} \textit{Id.} at 673.

\textsuperscript{81} \textit{Id.} at 674.

\textsuperscript{82} \textit{Id.}

\textsuperscript{83} \textit{Id.}

\textsuperscript{84} \textit{Id.}

\textsuperscript{85} \textit{Id.} at 676.

\textsuperscript{86} \textit{Id.} at 675.
DOUGLAS' DISSENT IN Walz

Mr. Justice Douglas was a member of the Court that decided Everson\textsuperscript{87} in 1947, and originally found himself allied with the majority of the Court. However, in his concurring opinion in Engel v. Vitale\textsuperscript{88} he adopted a stand that even the slightest cooperation between church and state constitutes a violation of the Establishment Clause.

Concurring in Schempp, Justice Douglas said,

Through the mechanism of the State, all of the people are being required to finance a religious exercise that only some of the people want and that violates the sensibilities of others.\textsuperscript{89} In light of this statement, it should come as no surprise that Justice Douglas objected to the church tax exemptions in Walz.\textsuperscript{90} The very contention of the petitioner was that the state was forcing him to finance a religious exercise that violated his beliefs.

As Justice Douglas views the case, the question is whether believers organized in church groups can be made exempt from real estate taxes merely because they are believers, while nonbelievers, whether organized or not, must pay them.\textsuperscript{91}

The first premise in Douglas' analysis is the questionable one that the believers themselves are being exempted. As the Walz case is presented, at least, it is not the believers themselves but the religious organization as a separate entity that is being exempted. The believers per se reap no direct financial benefit from the tax exemption; quite the contrary, because of the exemption, their own property taxes rise in the same proportion as do those of the petitioner.

A second, and related, possible weakness in the Douglas argument is his tacit assumption that nonbelievers are unfairly treated because antitheological, atheistic, or agnostic groups would not receive the same tax exemption as churches.\textsuperscript{92} Although Justice Harlan in his concurring opinion assumes that such groups would be equally as exempt from property taxes,\textsuperscript{93} Justice Douglas is not so convinced. However, at least two prior cases on the federal and state appellate

\textsuperscript{87} Supra, note 13.
\textsuperscript{88} Supra, note 42, at 437.
\textsuperscript{89} Supra, note 40, at 229.
\textsuperscript{90} It goes without saying that Justice Douglas protested vigorously the lending of tax-purported textbooks to parochial school children. See Board of Education v. Allen, supra, note 48, at 235.
\textsuperscript{91} Walz, supra note 7, at 700.
\textsuperscript{92} Id.
\textsuperscript{93} Id. at 697.
levels have extended religious tax exemptions to cover similar groups.\textsuperscript{94} No United States Supreme Court case has specifically ruled in favor of a broad extension of such tax exemptions, but by the same token, no case has ruled against it. What case law there is, however, seems to favor an extension.\textsuperscript{95} In light of these facts, the assumption of Mr. Justice Douglas that nonbelieving groups would automatically be discriminated against is questionable. Emphasizing issues which have not been presented to the Court or even shown to exist, he attempts, in effect, to destroy the whole on the conjecture that a part is unresolved.

Much of the dissent relies heavily on the arguments of James Madison in advocating complete separation of church and state.\textsuperscript{96} Both Madison and Jefferson have been repeatedly cited to buttress "separation" arguments,\textsuperscript{97} but this reliance on their views appears overemphasized. Jefferson was out of the country during the entire period when the Constitution and Bill of Rights were being deliberated and passed.\textsuperscript{98} Although his previously expressed opinions carried much weight in the adoption of the religion clauses, he could hardly be considered the sole influence in their formulation.\textsuperscript{99} Madison has justifiably been called the leading architect of the religion clauses,\textsuperscript{100} but again it should not be assumed that every utterance he made in his lifetime concerning the religion clauses should be automatically accepted as irrefutable authority. As Justice Brennan points out in his concurring opinion in \textit{Walz}, there is strong indirect evidence that Madison, although vehemently opposed to other forms of state aid to religion, was not necessarily opposed to tax exemptions to churches.\textsuperscript{101} Madison was a member of the Virginia legislature when that body voted exemptions for churches, and no record can be found of any opposition by him. It is true that in his later years he did oppose such exemptions, but again, as Mr. Justice Brennan points out, this may well have been merely an extreme view which Madison reached late in

\textsuperscript{95} \textit{Id.}
\textsuperscript{96} \textit{Walz}, supra at 704 passim.
\textsuperscript{97} See, e.g., Everson, \textit{supra} note 13, at 11-12; also 28-29, 32-46, 63-74 (Rutledge, J., dissenting); McCollum, \textit{supra} note 25, at 214 (Frankfurter, J., concurring); Engel, \textit{supra} note 42, at 428; McGowan, \textit{supra} note 44, at 577-78 (Douglas, J., dissenting); Allen, \textit{supra} note 48, at 266 (Douglas, J., dissenting).
\textsuperscript{99} See, e.g., McCollum, \textit{supra} note 25, at 245-48 (Reed, J., dissenting); also J. Story, 2 Commentaries on the Constitution, 829-34 (5th ed. 1891).
\textsuperscript{100} Flast v. Cohen, 392 U.S. 83, 103 (1968).
\textsuperscript{101} \textit{Supra} note 7, at 684-85.
life. It certainly does not seem to have been a common view held by the other Founding Fathers. As further evidence that Madison cannot be cited unquestioningly on the religion clauses, one need only look to his action as President, when he vetoed a bill incorporating the Protestant Episcopal Church in Alexandria, Virginia, because he believed it to be a violation of the Establishment Clause. Today, with incorporation of religious organizations an accepted fact throughout the nation, it is doubtful that any court would follow Madison's precedent by declaring such an incorporating act a violation of the First Amendment.

Mr. Justice Douglas also classifies a tax exemption as tantamount to a state subsidy without any further qualification. That a tax exemption is aid of a sort to a religious body is not denied by the majority, but they and the concurring justices agree that there are important differences between an exemption and a direct subsidy. Tax exemptions by themselves add nothing to the churches' coffers; they become beneficial only when and if a church obtains something of value from another source. At best, they leave a religious organization free to originate and flourish or wither according to the support of its followers without being burdened by property taxes. Justice Douglas himself expressed something of this in Zorach when he said,

We sponsor an attitude on the part of government that . . . lets each flourish according to the zeal of its adherents and the appeal of its dogma.

As the majority points out, the government does not transfer any revenues to churches, but simply abstains from demanding that the church give revenues to the state.

In response to the appellee's argument based upon the long tradition of church tax exemptions, Justice Douglas gives a rather unconvincing recital of the Fourteenth Amendment and its only recent application to the First Amendment religion clauses. Even granting that the First Amendment has only in recent years been extended to cover the states, still no strong case is presented for overturning the long-established tradition of tax exemptions. As early as 1886 Gib-

102. See J. Story, supra note 99.
103. See generally 76 C.J.S. Religious Societies §§ 4-10; note also McGowan, supra, note 44, at 437-41.
104. Walz, supra note 7, at 701, 704 passim.
105. Id. at 675; 690 (Brennan, J., concurring); 698 (Harlan, J., concurring).
106. Zorach, supra note 33, at 313.
107. Walz, supra, note 7, at 675.
108. Id. at 701-03.
bons v. District of Columbia was decided in a federal jurisdiction where the First Amendment was directly applicable without the need of any Fourteenth Amendment "bridge." The case dealt specifically with tax exemptions to churches, yet far from voicing concern over violation of the Establishment Clause, the United States Supreme Court actually gave tacit approval to such exemption practices. Mr. Justice Douglas fears the granting of tax exemptions to churches as a long step down the Establishment path. To this, Chief Justice Burger answers:

If tax exemption can be seen as this first step toward 'establishment' of religion, as Mr. Justice Douglas fears, the second step has been long in coming.

In spite of the numerous arguments employed by Justice Douglas, one omission stands out prominently in his dissent. This is the complete absence of any rebuttal to what may be the strongest argument in the majority opinion—that the alternative result, taxation of churches, could embroil the state in greater involvement with religion than would the policy of exemption. Both sides agree in principle that the state must remain neutral in matters of religion. Mr. Justice Douglas's interpretation of neutrality would deny tax exemptions to churches even though such exemptions are extended to other nonprofit organizations. Such an interpretation immediately brings to the fore two other questions. First, by singling out churches from the general classification of nonprofit, charitable organizations, which are granted exemption, is not the state displaying an attitude of discrimination and hostility toward religion contrary to the Free Exercise Clause as interpreted in Everson and Douglas' own Zorach opinion. Secondly, if a church can be granted tax exemptions for its nonsectarian social welfare functions but not for its purely religious activities, will not the state become deeply involved in church affairs when attempting to determine the proper ratio between these functions? Will not the state preserve neutrality more effectively if, as the majority advocates, it simply leaves churches well enough alone and absolves them from the whole labyrinth of tax regulations? In closing, Mr. Justice Douglas declares:

110. Id. at 408.
111. Walz, supra note 7, at 716.
112. Id. at 678.
113. Id. at 707-08.
114. It might again be noted that the decision in Walz is not that states must grant tax exemptions to churches, only that they may if they so desire. All fifty states have so desired.
[A]s I have read the Constitution and its philosophy, I gathered that independence was the price of liberty.\textsuperscript{115}

Examination of the problem would seem to indicate that this comment might fit more logically within the majority opinion.

**THE IMPACT OF Walz**

Since dividing the Establishment Clause and the Free Exercise Clause into separate entities, the Supreme Court has struggled to find a balance between the two clauses. Speaking for the Court in *Everson*, Mr. Justice Black referred to neutrality as the proper relationship of a state toward religious groups and non-believers, but at the same time he made the Establishment Clause the focal point of the religion clauses with his “no aid” pronouncement.

The key to the most recent decisions of the Court in this area is the evolution of the “legislative purpose-primary effect” test. This test was first established in the *Schempp* case, where the Court said:

The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. 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.\textsuperscript{116}

It must be recalled that the application of the test in *Schempp* rendered unconstitutional under the Establishment Clause the reading of the Bible in public schools. The *Schempp* opinion emphasizes a philosophy of strict neutrality. The rule that the *Schempp* Court formulated could, by itself, be interpreted liberally, but read in light of the rest of the opinion, it is very conservative in nature. The Court, in fact, specifically approved Justice Rutledge’s dissenting opinion in *Everson* that the First Amendment’s purpose,\[W] as to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion.\textsuperscript{117}

*Board of Education v. Allen*\textsuperscript{118} may well have been, up to that time,

\textsuperscript{115.} *Walz*, *supra* note 7, at 716.
\textsuperscript{116.} *Schempp*, *supra* note 40, at 222.
\textsuperscript{117.} *Id.* at 217.
\textsuperscript{118.} *Supra* note 48.
the most significant milestone in the series of First Amendment cases since *Everson*, for in *Allen* the Supreme Court changed from a negative to a positive approach toward the church-state relations. The Court in *Allen* rested its conclusions on what it considered an application of the *Schempp* rule, and superficially the *Walz* case seems to do the same. Actually, neither is strictly based on *Schempp*, nor is *Walz* squarely in line with *Allen*.

What the Court was really faced with in *Allen* was the application of the *Schempp* rule to a situation where the alleged “aid” was financial rather than devotional. The Court was equal to the challenge and upheld the financial aid by creating a distinction between the religious and secular functions of a school and finding that the aid only went to the advancement of those secular functions.

In so doing the *Allen* Court quoted the *Schempp* rule but in actuality emphasized the latter aspect of the rule, which stressed the need for a secular legislative purpose and primary effect. The former aspect of the rule, which stressed the concept of neutrality, was only mentioned in passing in *Allen*.119

The *Walz* case involved the application of the *Schempp-Allen* rule to a situation where the Court could not divide the functions of the agency aided into religious and secular ones. By its nature the function of a house of worship is religious. Nevertheless the aid was upheld.

The *Walz* opinion seems to be merely a combination of ideas from both *Schempp* and *Allen*, but in reality it adopts a new approach not specifically utilized since *Everson*. The subtlety of *Walz* is in the application of the *Schempp-Allen* test. The important difference is that the *Schempp* test was originally meant to apply to the Establishment Clause; *Walz*, on the other hand, applies it to the religion clause in general. Much of the problem in interpreting the First Amendment religion clause has stemmed from the *Everson* Court’s division of the religion clause into two parts, and what may have been that Court’s overemphasis of the Establishment Clause. By casting new emphasis on the religion clause as a concept to be considered *in toto*, rather than as two conflicting parts, the Court in *Walz* may have come around full circle to the original intentions of the authors of the Amendment, and may have cleared away much of the confusion caused by the *Everson* decision.

119. *Id.* at 242.
While, as previously indicated, the Walz opinion could not stress a secular function which the "aid" related to, it bridged this hurdle by reverting back to the original neutrality emphasis in Schempp and making that once again the basis of the test. The purpose of the legislation does not necessarily have to be secular, it need only be neutral. But even in liberalizing the legislative purpose test, the effect of church tax exemptions is still an aid to religion. Here the Walz Court retains the Allen test of involvement in determining whether or not the particular enactment violates the religion clause.

In so doing the Court looked both to the legislative intent and primary effect of the legislation, but instead of emphasizing its secular nature, the Court emphasized whether it advanced or inhibited religion. Finding a tax exemption to be neutral they concluded that it did neither, at least past constitutional limits. In this connection both the historical precedent, and the negative form of a tax exemption were important in reaching the conclusion that the "aid" was indeed neutral. While it cannot be denied that a tax exemption constitutes a real benefit to a church, the Court concluded the taxation of a church would be a possibly greater violation of neutrality.

In revitalizing the emphasis on neutrality in Schempp, however, the Walz Court does not adopt the Rutledge version that the Schempp Court approved. Instead, it speaks of a "benevolent" neutrality and the idea of accommodation. If Allen interpreted Schempp to be in line with Everson, Walz adjusts Schempp to be more in line with Zorach. The net result is a new criterion more liberal than any since Everson, and one to be applied not just to the Establishment Clause, but to the religion clause as a whole.

In spite of the Walz Court's attempt to play down the differences between the two parts of the religion clause and to emphasize the complementary aspects of the two, there still remain some areas where the clauses may conflict. Whereas Everson and the cases immediately following it viewed the Free Exercise Clause as a limiting factor on the Establishment Clause, the Allen and Walz decisions now indicate that the converse seems to be true. The Free Exercise Clause has become the prevailing focal point with the Establishment Clause as its limitation.

In this respect it is noteworthy that Schempp and Allen were both appealed on the basis of the Establishment and Free Exercise Clauses, but were decided on Establishment grounds only. Walz, on the other
hand, was appealed exclusively on Establishment Clause grounds. The decision in *Walz*, as noted, is based on the broader aspect of the religion clause generally, but it is significant that much of the tenor of the opinion seems to rely upon Free Exercise principles.

We cannot read New York’s statute [says the Court] as attempting to establish religion; it is simply sparing the exercise of religion from the burden of property taxation levied on private profit institutions.\(^{120}\)

Finally, the liberalization of standards from a test centering upon the primary secular purpose to one of simple benevolent neutrality is complemented by the *Walz* Court’s shift in outlook from a “wall” or “line” concept of separation to a “channel” or “overlapping area” approach. Far from erecting a barrier, the Court outlines a wide area of tolerant permissiveness bounded only by the general principles that no religion be sponsored or favored, none commanded, and none inhibited.

No perfect or absolute separation is really possible; the very existence of the Religion Clauses is an involvement of sorts—one which seeks to mark boundaries to avoid excessive entanglement.\(^{121}\)

**CONCLUSION**

Any analysis of the *Walz* decision must attempt to answer the basic question of whether *Walz* is a potential landmark decision, or whether in future religion clause cases it will be limited to its particular factual setting. It is submitted that a number of factors indicate the extent of *Walz* goes far beyond the narrow boundaries of an isolated case, and the decision is more likely a precedent-making decision in the area of the First Amendment religion clause.

The first of these factors relates to the nature of the aid involved. *Everson* made clear that normal public welfare benefits may not be denied an organization merely because it is religiously oriented. A church is not precluded by the First Amendment from receiving police and fire protection, and this concept also applies to bus services provided other school children. *Allen* extended this trend to school books, which were also provided to all other school children similarly situated where a clear secular purpose could be shown. *Walz* on the other hand approves a tax exemption, a financial aid which is not of the public welfare nature, although one which is accorded generally to

\(^{120}\) *Walz*, supra note 7, at 673.

\(^{121}\) *Id.* at 670.
not-for-profit institutions, even where the secular nature of the aid can not be established.

This change is accomplished through the second factor which makes *Walz* significant, a modification of the *Schempp-Allen* test. This test had permitted aid to a religious organization only if the legislative purpose and the primary effect of the aid was secular. *Walz* substitutes for the word secular a concept of neutrality—the purpose and primary effect can neither advance nor inhibit religion. The application of this change permits aid of a passive nature even where the organization aided serves no "secular purpose." It must be recognized, however, that the test so enunciated in *Walz* encompasses a secular purpose as one which neither advances nor inhibits religion.

One newspaper commentary immediately following the *Walz* decision said the case "clearly indicated that any direct money subsidy for parochial schools would run afoul of the First Amendment." Such an interpretation of *Walz* may have been too conclusive. Although the Court does say that a direct money subsidy would create "a relationship pregnant with involvement," it is speaking within the framework of benefits to churches as such.

A third important factor is that the passive benefit permitted indicates a departure from some of the language used in *Everson*. The former "wall of separation" has been replaced by a "channel" which leaves "room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." In *Allen* the Court changed from a restrictive to a cautiously permissive approach to state aid to religion, laying stress on the secular purpose of such aid. *Walz* retains the permissiveness but no longer retains the necessity of the secular purpose test. The purpose need only be neutral and the extent of involvement must not amount to "excessive entanglement." The latitude seems broad, indeed.

*Walz*, like *Everson*, considers neutrality as the basic touchstone of church-state relations, but *Walz* has significantly modified the standard to be benevolent neutrality. "The test," says Chief Justice Burger, "is inescapably one of degree.

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124. *id.* at 669.
125. *id.* at 670, 674, 675.
126. *id.* at 674.
that degree to a point of permissiveness never reached before in religion clause decisions.

CHARLES J. WERLING