

A Look Back at Walz v. Commissioner:

Why Aren't Real Property Tax Exemptions  
for Religious Organizations Unconstitutional?

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## INTRODUCTION

In two recent cases, Texas Monthly, Inc. v. Bob Bullock, \_\_\_ U.S. \_\_\_, 109 S. Ct. 890 (1989), and Jimmy Swaggart Ministries v. Board of Equalization of California, \_\_\_ U.S. \_\_\_, 110 S. Ct. 688 (1990), the Supreme Court ruled that (i) exemption from state sales tax for religious periodicals violates the Establishment Clause of the First Amendment<sup>1</sup> (Texas Monthly) and (ii) the imposition of sales and use tax on the distribution of religious materials by religious organizations does not violate the Establishment Clause (Swaggart).

Texas Monthly, decided in February 1989, was a 6-3 decision and Swaggart, decided one year later, was unanimous.

These two cases appear to conflict with Walz v. Tax Commission of New York City, 397 U.S. 664, 90 S. Ct. 1409 (1970), the 1970 decision in which the Court ruled that the New York property tax exemption granted to religious organizations with respect to property used for religious purposes was not unconstitutional.

This paper (actually, "nugget") will explore Walz in the context of subsequent cases and suggest that either Walz was wrongly decided, or that better arguments were and are available to reach the holding in Walz.

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<sup>1</sup> The relevant part of the First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." (Collectively known as the "Religion Clauses".)

### The Walz Decision

At issue in Walz was a challenge brought by a New York real property owner to the provision in New York's Constitution, as applied by the New York City Tax Commission, exempting real property owned by religious organizations and used "exclusively" for religious purposes. This exemption was part of the broad exemption authorized for property owned by educational or charitable organizations and used for such purposes. Appellant property owner argued that exempting church property from taxation violated the Establishment Clause by indirectly requiring taxpayers to make a contribution to churches.

The Walz Court relied heavily upon the rationale in Everson v. Board of Education, 330 U.S. 1, 67 S. Ct. 504 (1947). By a 5-4 vote, the Court in Everson sustained the constitutionality of a local New Jersey township's authorization, pursuant to state law, to reimburse parents for their children's school transportation (including transportation to non-public schools) where travel was on regular busses operated by the public transportation system.<sup>2</sup>

The Court in Everson, per Justice Black, reached its conclusion through the following analysis. First, it is

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<sup>2</sup> Interestingly, the township limited reimbursement to parents of children attending public or Catholic schools, but the Catholic school limitation was only noted in a footnote.

constitutional for parents to send their children to religious rather than to public schools so long as state-imposed secular educational requirements are met (citing Pierce v. Society of Sisters, 268 U.S. 510, 45 S. Ct. 571 (1925)). Second, the parochial schools in Everson appear to meet New Jersey's secular educational requirements. Third, New Jersey provides no financial or other support to parochial schools. Fourth, the New Jersey legislation, as applied, provides "no more than" a general program to help parents transport their children to accredited schools, safely and securely. In sum, the court held that there is no conflict whatsoever with the Establishment Clause.

Justice Black's closing paragraph is bell-ringing clear:

The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach. New Jersey has not breached it here.

Everson, 330 U.S. at 18, 67 S. Ct. at 513.

It is instructive to track the different interpretations and shades of interpretation of the Religion Clauses, in general, and the Establishment Clause, in particular, within and across opinions. Early in Everson, Black states that the

"establishment of religion" clause . . . means at least this: Neither a state nor the Federal Government . . . can pass laws which aid one religion, aid all religions, or prefer one religion over another.

Id. at 15, 67 S. Ct. at 541. Black also comments that "no tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." Id. at 16, 67 S. Ct. at 511-12. Black also sets forth the neutrality concept, i.e., the First Amendment requires that State power neither handicap nor favor religions.

Black's position on the Religion Clauses vis-a-vis the facts in Everson is straightforward: transporting children to parochial school is no different than providing general government services, such as ordinary police and fire protection. Yet, the underlying rationales do not necessarily mesh; neutrality, for example, is not the sole logical derivative of the impregnable wall of separation.

Enter Walz. Chief Justice Burger (writing for an 8-1 majority, Justice Douglas dissenting)<sup>3</sup> relies heavily on the detailed history of the First Amendment as set forth in

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<sup>3</sup> Douglas comments in his dissent that although Everson is distinguishable (and he was part of the Everson majority), he since had "grave doubts about it, because [he has] become convinced that grants to institutions teaching a sectarian creed violate the Establishment Clause." Walz, 397 U.S. at 703, 90 S. Ct. at 1429.

Everson,<sup>4</sup> but analytically, tends to mark a somewhat different path. This may be because Walz seems to be a result-oriented decision. The political prospect and practical implications of invalidating the property tax exemption is certainly complicated; although the decision was 8-1, Brennan and Harlan did write separate concurrences. It is a practical decision, one which notes that "rigidity could well defeat the basic purpose of [the Religion Clauses], which is to insure that no religion be sponsored or favored, none commanded, and none inhibited." 397 U.S. 669, 90 S. Ct. at 1411. Burger treats rather lightly Jackson's dissent in Everson which explains in great detail that the "undertones" of the majority opinion in Everson "seem utterly discordant with its conclusion." Burger says

Perhaps so. One can sympathize with . . . Jackson's logical analysis but agree with the Court's eminently sensible and realistic application of the language of the Establishment Clause.

Id. at 671, 90 S. Ct. at 1412.

Burger's opinion reveals two major themes which are important (even essential) to his analysis: the significance of the legislative purpose (i.e., whether the intention is to advance or inhibit religion); and the requirement to avoid excessive government entanglement with religion. (The

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<sup>4</sup> See also Rutledge's dissent to Everson, which includes as an Appendix The Virginia Assessment Bill (December 24, 1784) and Madison's Memorial and Remonstrance Against Religious Assessments, reproduced again in the Douglas dissent to Walz. (See attached.)

neutrality notion is thus given some shape.) Noting that both the taxation and the tax exemption of churches result in some degree of involvement with religion, the test becomes one of degree. Burger believes that taxing church property entails greater entanglement than exemption. Ultimately, Burger rests his conclusion on history; i.e., all the states provide property tax exemptions for churches, and most states have done so for a long, long time.<sup>5</sup> Not only has the practice not led to an established church, it has "operated affirmatively to help guarantee the free exercise of all forms of religious belief." Id. at 678, 90 S. Ct. at 1416. Burger's closing paragraph provides an interesting counterpoint to Black's in Everson (see page 3, supra), to wit:

It appears that at least up to 1885 this Court, reflecting more than a century of our history and uninterrupted practice, accepted without discussion the proposition that federal or state grants of tax exemption to churches were not a violation of the Religion Clauses of the First Amendment. As to the New York statute, we now confirm that view.

Id. at 680, 90 S. Ct. at 1417.

Barely one year later, in Lemon v. Kurtzman, 403 U.S. 602, 91 S. Ct. 2105 (1971), Chief Justice Burger, again writing for the Court,<sup>6</sup> invalidated on First Amendment grounds (i) a Rhode Island statute providing for a 15% salary

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<sup>5</sup> The vulnerability of an "historical practice" argument is surely demonstrated by Brown v. Board of Education, among others.

<sup>6</sup> Douglas wrote a concurring opinion, in which Black and Marshall joined; Brennan wrote a separate concurrence; and White concurred in part and dissented in part.

supplement to be paid to teachers in non-public schools at which the average per student expenditure was less than the public school average, and (ii) a Pennsylvania statute authorizing the State to directly reimburse non-public schools solely for their actual expenditures for the secular portion of teachers' salaries, textbooks, and instructional materials. (The funds for the Pennsylvania program originally were paid from a tax on horse racing and subsequently by a portion of the state cigarette tax.)

The Lemon Court, in effect, refined the rationale for either exempting religious organizations from various forms of taxation or for including religious organizations in various subsidy programs. First, it consolidated into three criteria the tests developed over the years by the Court in analyzing the Establishment Clause: (i) the statute must have a secular legislative purpose; (ii) the statute's principal or primary effect must be one that neither advances nor inhibits religion; and (iii) the statute must not foster an excessive government entanglement with religion. Id. at 612-13, 91 S. Ct. at 2111. Second, the Lemon Court attempted to provide a better justification for the Walz decision than that articulated by the Walz Court. The Lemon Court stated that Walz "tended to confine rather than enlarge the area of permissible state involvement with religious institutions by calling for close scrutiny of the degree of entanglement involved in the relationship." Id. at 614, 91 S. Ct. at 2112.



Interestingly, in Lemon, Burger undermines the Everson rationale (although Everson and Lemon reach opposite results) by noting that "prior holdings" do not call for total separation between church and state.<sup>7</sup> Further, although the Court in Walz rejected the "slippery slope" argument made by Douglas in his dissent<sup>8</sup> (Burger noted that 200 years of property tax exemption has not led to state churches or religions), the Lemon Court buys into the argument fully. Thus, because there is no 200-year history of state aid to church-related schools, and government programs tend to gather momentum, which can result in "a 'downhill thrust' [sic] easily set in motion but difficult to retard or stop," therefore, the Rhode Island and Pennsylvania statutes are unconstitutional on First Amendment grounds. Id. at 624, 91 S. Ct. 217.

#### Texas Monthly and Swaggart

In Texas Monthly, the Court struck down Texas' sales tax exemption for periodicals devoted wholly to religious writings and published or distributed by religious organizations. The Court, per Justice Brennan, reviewed prior

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<sup>7</sup> Everson simply noted that the wall of separation was "impregnable" and not even the "slightest breach" could be tolerated.

<sup>8</sup> In his dissent, Douglas regrets having voted with the majority in Everson, and also expresses concern that by sustaining New York's tax exemption, the "church qua church might someday be on the public payroll." Id. at 711, 90 S. Ct. at 1433.

decisions on the tax exemption issue and particularly Walz ("the case most nearly on point").<sup>9</sup>

Brennan's majority holding was a plurality opinion: Brennan wrote for himself, Justices Marshall and Stevens; Justice Blackman wrote a concurring opinion in which Justice O'Connor joined; and Justice White only concurred in the judgment.

The decision rested largely on two related arguments: (i) the Texas sales tax exemption, unlike the New York property tax exemption in Walz, lacked "sufficient breadth to pass scrutiny under the Establishment Clause;" and (ii) an incidental benefit to religious groups is permitted so long as nonsectarian groups are the primary beneficiaries.<sup>10</sup> \_\_\_ U.S. at \_\_\_, 109 S. Ct. at 899.

In all of these [prior] cases, however, we emphasized that the benefits derived by religious organizations flowed to a large number of nonreligious groups as well. Indeed, were those benefits confined to religious organizations, they could not

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<sup>9</sup> Brennan wrote a concurring opinion in Walz which supported the constitutionality of the real property tax exemptions because the exemptions "do not 'serve the essentially religious activities of religious institutions.' Their principal effect is to carry out secular purposes -- the encouragements of public service activities and of a pluralistic society." 397 U.S. at 692, 91 S. Ct. at 1423.

<sup>10</sup> As an aside, Brennan notes that "[e]very tax exemption constitutes a subsidy." \_\_\_ U.S. at \_\_\_, 109 S. Ct. at 899. Brennan also commented on the subsidy issue in his Walz concurrence.

have appeared other than as state sponsorship of religion.<sup>11</sup>

Id. at \_\_\_, 109 S. Ct. at 897. Overall, Brennan seems to struggle with the analysis, probably because he relies heavily on Walz, and because hairbreadth distinctions are required to reach a holding opposite from Walz in what is really a comparable fact pattern.

The issue in Swaggart, decided in 1990, was the converse of Texas Monthly; whether the Religion Clauses prohibit states from imposing generally applicable sales and use taxes on the distribution of materials by religious organizations. In a brief and unanimous opinion, the Court ruled that such taxes do not run afoul of the First Amendment. In sustaining the California tax, Swaggart puts to rest any lingering doubts about whether earlier decisions foreclosed any taxation of religious materials distributed by religious organizations.<sup>12</sup>

<sup>11</sup> However, Burger's majority opinion in Walz states that it is "unnecessary to justify the tax exemption on the social welfare services that some churches perform," 397 U.S. at 674, 90 S. Ct. at 1414, and the New York statute's reference to religious organizations limited the exemption only to property used for religious purposes. The Texas Monthly Court reconciles this seeming difference by noting that the breadth of New York's property tax exemption was "essential" to the holding because it had a legitimate secular purpose and effect. \_\_\_ U.S. at \_\_\_, 109 S. Ct. at 898. Ironically, as noted before, this "secular purpose and effect" argument, which was the basis of Brennan's concurrence in Walz, was expressly dismissed by the Walz majority.

<sup>12</sup> More specifically, see Murdock v. Commonwealth of Pennsylvania, 319 U.S. 105, 63 S. Ct. 870 (1943). Murdock is (Footnote continued on following page)

The Establishment Clause issue in Swaggart is posed as the third prong of the three Lemon criteria; *i.e.*, does the imposition of these sales and use taxes result in an excessive or impermissible degree of entanglement between the State and the religious organization. The Court reviewed the evidence presented in the lower courts and found, simply, that "even assuming that the tax imposes substantial administrative burdens . . . , such administrative and recordkeeping burdens do not rise to a constitutionally significant level." \_\_\_ U.S. at \_\_\_, 110 S. Ct. at 698.

Justice Scalia's dissent (joined by Justices Rehnquist and Kennedy) in Texas Monthly was sufficiently soothing that his participation in a unanimous decision in Swaggart is at best puzzling.<sup>13</sup>

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(Footnote continued from preceding page)  
a fascinating case, which deserves exploration in any expanded version of this nugget.

<sup>13</sup> For example, Scalia labels the Texas Monthly decision an "impressive judicial demolition project." \_\_\_ U.S. at \_\_\_, 109 S. Ct. at 907. He dissents because "[he] find[s] no basis in the text of the Constitution, the decisions of this Court or the traditions of our people for disapproving this longstanding and widespread practice." \_\_\_ U.S. at \_\_\_, 109 S. Ct. at 909. With language like that, I would hope that the Justice would feel compelled on grounds of intellectual integrity and loyalty to the Constitution to maintain his position, at least for a year or two.

## Closing Thoughts and Preliminary Conclusions

What if the Court in Walz had struck down New York's real property tax exemption?<sup>14</sup> A strict application of the Everson "impregnable wall" certainly provided the opportunity. Is there a distinction, constitutionally, between reimbursing parents for transporting their children to parochial school, as in Everson, and exempting church property from taxation, as in Walz? Whether there is or is not, the Everson analysis is both more straightforward and intelligible than Walz.

However, even if one believes that the Walz majority opinion does not justify the holding, the holding might still withstand scrutiny on other grounds.

1. No Violation Separation of Church and State. In Everson, Black articulated a strong wall of separation argument, but believed that the New Jersey statute did not breach the Establishment Clause. It is possible, though more difficult, to use the same analysis for real property tax exemptions. In fact, had Douglas not voted with the majority in Everson (as he later stated his regret in voting as he had), the holding would have been different, although the

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<sup>14</sup> As noted above on page 5, supra, the real issue may simply be a practical one of such magnitude that it takes on constitutional dimensions. That is, to now revoke these exemptions would work such an overwhelming financial hardship on religious organizations that the Religion Clauses, especially the Free Exercise Clause, would then be breached. If this is the case, then, in fact, Walz as precedent should be confined to its facts and not be further applied.

very same analysis could have been utilized. Sustaining real property tax exemptions might then have been more difficult to justify.

2. Primary Benefit to Community at Large. In Walz, Burger clearly states that the validity of the real property tax exemption does not rest upon the fact that religious organizations can be viewed as part of a very broad class of beneficiaries which benefit the community. Yet, community benefit is significant to Brennan's concurrence in Walz and his opinion in Taxes Monthly.

The weakness of a "social welfare" analysis is that it only covers property owned and used by religious organizations for primarily or exclusively social welfare programs; e.g., soup kitchens, social services, etc. To include the actual house of worship in the charitable category would seem to require an extremely broad reading of "charitable" and a correspondingly narrow definition of the Establishment Clause.

The Texas Monthly Court, in revisiting Walz, saw the social welfare argument similarly.

Had the State defined the class of subsidized activities more narrowly -- to encompass only "charitable" works, for example -- more searching scrutiny would have been necessary, notwithstanding the greater intermingling of government and religion that would likely result.

\_\_\_ U.S. \_\_\_ n.2, 109 S. Ct. at 898 n.2.

3. Exemption as Subsidy. Perhaps the "best" (as in intellectually preferable) approach to real property tax

exemptions is to take the position that exemption is not a tax subsidy.<sup>15</sup> The Supreme Court certainly is confused on the issue (and with good reason, as many of us know). For example, in his concurrence in Walz, Brennan distinguishes tax exemptions and general subsidies. To wit, although they both provide economic assistance, a subsidy involves a direct transfer of public funds and an exemption does not. Subsidies are direct and active; exemptions are indirect and passive. 397 U.S. at 690, 90 S. Ct. at 1422. On the other hand, Justice Marshall says that "[o]ur opinions have long recognized -- in First Amendment contexts as elsewhere -- the reality that tax exemptions, credits, and deductions are a form of subsidy . . . ." Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 198, 236, 107 S. Ct. 1722, 1731 (1987), citing Regan v. Taxation with Representation of Washington, 461 U.S. 540, 103 S. Ct. 1997 (1983).

In summary, striking down real property tax exemptions (back in 1970, or even through a revisitation of the issue) is fraught with political, social, and economic problems of possibly overwhelming dimension. Yet, intellectual stimulation aside, there is a real-life need for a coherent and consistent analysis and interpretation of the Religion Clauses as they apply to taxation issues. Defining the relationship between church and state has been an important and continuing saga for the United States, which pre-dates

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<sup>15</sup> See Peter Swords, et al.

this country's independence. At the very least, the Court should confine Walz to its facts and not rely on the majority's reasoning.



day it is one of principle, to keep separate the separate spheres as the First Amendment drew them; to prevent the first experiment upon our liberties; and to keep the question from becoming entangled in corrosive precedents. We should not be less strict to keep strong and untarnished the one side of the shield of religious freedom than we have been of the other.

The judgment should be reversed.

APPENDIX.

MEMORIAL AND REMONSTRANCE  
 AGAINST RELIGIOUS AS-  
 SESSMENTS.

TO THE HONORABLE THE GENERAL ASSEMBLY

OF

THE COMMONWEALTH OF VIRGINIA.

A MEMORIAL AND REMONSTRANCE.

We, the subscribers, citizens of the said Commonwealth, having taken into serious consideration, a Bill printed by order of the last Session of General Assembly, entitled "A

<sup>04</sup> Bill establishing a provision for teachers of the Christian Religion," and conceiving that the same, if finally armed with the sanctions of a law, will be a dangerous abuse of power, are bound as faithful members of a free State, to remonstrate against it, and to declare the reasons by which we are determined. We remonstrate against the said Bill,

1. Because we hold it for a fundamental and undeniable truth, "that religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence."<sup>1</sup> The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It is unalienable; because the opinions of men, depending only on the evidence contemplated by their own minds, cannot follow the dictates of other men:

It is unalienable also; because what is here a right towards men, is a duty towards the Creator. It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. This duty is precedent both in order of time and degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the general authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign. We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance.

<sup>05</sup> True it is, that no other rule exists, by which any question which may divide a Society, can be ultimately determined, but the will of the majority; but it is also true, that the majority may trespass on the rights of the minority.

2. Because if religion be exempt from the authority of the Society at large, still less can it be subject to that of the Legislative Body. The latter are but the creatures and vicegerents of the former. Their jurisdiction is both derivative and limited: it is limited with regard to the co-ordinate departments, more necessarily is it limited with regard to the constituents. The preservation of a free government requires not merely, that the metes and bounds which separate each department of power may be invariably maintained; but more especially, that neither of them be suffered to overleap the great Barrier which defends the rights of the people. The Rulers who are guilty of such an encroachment, exceed the commission from which they derive their authority, and are Tyrants. The People who submit to it are governed by laws made neither by themselves, nor by an authority derived from them, and are slaves.

<sup>1</sup> Decl. Rights, Art. 18. [Note in the original.]

3. Because, it is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of citizens, and one of [the] noblest characteristics of the late Revolution. The freemen of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle. We revere this lesson too much, soon to forget it. Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? That the same authority which can force a citizen to contribute three pence

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only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?

4. Because, the bill violates that equality which ought to be the basis of every law, and which is more indispensable, in proportion as the validity or expediency of any law is more liable to be impeached. If "all men are by nature equally free and independent,"<sup>1</sup> all men are to be considered as entering into Society on equal conditions; as relinquishing no more, and therefore retaining no less, one than another, of their natural rights. Above all are they to be considered as retaining an "equal title to the free exercise of Religion according to the dictates of conscience."<sup>2</sup> Whilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us. If this freedom be abused, it is an offence against God, not against man: To God, therefore, not to men, must an account of it be rendered. As the Bill violates equality by subjecting some to peculiar burdens; so it violates the same principle, by granting to others peculiar exemptions. Are the Quakers and Menonists the only sects who think

a compulsive support of their religions unnecessary and unwarrantable? Can their piety alone be intrusted with the care of public worship? Ought their Religions to be endowed above all others, with extraordinary privileges, by which proselytes may be enticed from all others? We think too favorably of the justice and good sense of these denominations, to believe that they either covet pre-eminencies over their fellow citizens, or that they will be seduced by them, from the common opposition to the measure.

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5. Because the bill implies either that the Civil Magistrate is a competent Judge of Religious truth; or that he may employ Religion as an engine of Civil policy. The first is an arrogant pretension falsified by the contradictory opinions of Rulers in all ages, and throughout the world: The second an unhallowed perversion of the means of salvation.

6. Because the establishment proposed by the Bill is not requisite for the support of the Christian Religion. To say that it is, is a contradiction to the Christian Religion itself; for every page of it disavows a dependence on the powers of this world; it is a contradiction to fact; for it is known that this Religion both existed and flourished, not only without the support of human laws, but in spite of every opposition from them; and not only during the period of miraculous aid, but long after it had been left to its own evidence, and the ordinary care of Providence: Nay, it is a contradiction in terms; for a Religion not invented by human policy, must have pre-existed and been supported, before it was established by human policy. It is moreover to weaken in those who profess this Religion a pious confidence in its innate excellence, and the patronage of its Author; and to foster in those who still reject it, a suspicion that its friends are too conscious of its fallacies, to trust it to its own merits.

7. Because experience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Reli-

<sup>1</sup> Decl. Rights, Art. 1. [Note in the original.]

<sup>2</sup> Art. 16. [Note in the original.]

gion, have had a contrary operation. During almost fifteen centuries, has the legal establishment of Christianity been on trial. What have been its fruits? More or less in all places, pride and indolence in the Clergy; ignorance and servility in the laity; in both, superstition, bigotry and persecution. Enquire of the Teachers of Christianity for the ages in which it appeared in its greatest lustre; those of every sect, point to the ages prior

to its incorporation with Civil policy. Propose a restoration of this primitive state in which its Teachers depended on the voluntary rewards of their flocks; many of them predict its downfall. On which side ought their testimony to have greatest weight, when for or when against their interest?

8. Because the establishment in question is not necessary for the support of Civil Government. If it be urged as necessary for the support of Civil Government only as it is a means of supporting Religion, and it be not necessary for the latter purpose, it cannot be necessary for the former. If Religion be not within [the] cognizance of Civil Government, how can its legal establishment be said to be necessary to Civil Government? What influence in fact have ecclesiastical establishments had on Civil Society? In some instances they have been seen to erect a spiritual tyranny on the ruins of Civil authority; in many instances they have been seen upholding the thrones of political tyranny; in no instance have they been seen the guardians of the liberties of the people. Rulers who wished to subvert the public liberties, may have found an established clergy convenient auxiliaries. A just government, instituted to secure & perpetuate it, needs them not. Such a government will be best supported by protecting every citizen in the enjoyment of his Religion with the same equal hand which protects his person and his property; by neither invading the equal rights by any Sect, nor suffering any Sect to invade those of another.

9. Because the proposed establishment is a departure from that generous policy, which, offering an asylum to the persecuted

and oppressed of every Nation and Religion, promised a lustre to our country, and an accession to the number of its citizens. What a melancholy mark is the Bill of sudden degeneracy? Instead of holding forth an asylum to the persecuted, it is itself a signal

of persecution. It degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority. Distant as it may be, in its present form, from the Inquisition it differs from it only in degree. The one is the first step, the other the last in the career of intolerance. The magnanimous sufferer under this cruel scourge in foreign Regions, must view the Bill as a Beacon on our Coast, warning him to seek some other haven, where liberty and philanthropy in their due extent may offer a more certain repose from his troubles.

10. Because, it will have a like tendency to banish our Citizens. The allurements presented by other situations are every day thinning their number. To superadd a fresh motive to emigration, by revoking the liberty which they now enjoy, would be the same species of folly which has dishonoured and depopulated flourishing kingdoms.

11. Because, it will destroy that moderation and harmony which the forbearance of our laws to intermeddle with Religion, has produced amongst its several sects. Torrents of blood have been spilt in the old world, by vain attempts of the secular arm to extinguish Religious discord, by proscribing all difference in Religious opinions. Time has at length revealed the true remedy. Every relaxation of narrow and rigorous policy, wherever it has been tried, has been found to assuage the disease. The American Theatre has exhibited proofs, that equal and complete liberty, if it does not wholly eradicate it, sufficiently destroys its malignant influence on the health and prosperity of the State. If with the salutary effects of this system under our own eyes, we begin to contract the bonds of Religious freedom, we know no name that will too severely reproach our folly. At least let warning be taken at the first fruit of the threatened innovation. The very ap-

pearance of the Bill has transformed that "Christian

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forbearance,<sup>4</sup> [love and charity," which of late mutually prevailed, into animosities and jealousies, which may not soon be appeased. What mischiefs may not be dreaded should this enemy to the public quiet be armed with the force of a law?

12. Because, the policy of the bill is adverse to the diffusion of the light of Christianity. The first wish of those who enjoy this precious gift, ought to be that it may be imparted to the whole race of mankind. Compare the number of those who have as yet received it with the number still remaining under the dominion of false Religions; and how small is the former! Does the policy of the Bill tend to lessen the disproportion? No; it at once discourages those who are strangers to the light of [revelation] from coming into the Region of it; and countenances, by example the nations who continue in darkness, in shutting out those who might convey it to them. Instead of levelling as far as possible, every obstacle to the victorious progress of truth, the Bill with an ignoble and unchristian timidity would circumscribe it, with a wall of defence, against the encroachments of error.

13. Because attempts to enforce by legal sanctions, acts obnoxious to so great a proportion of Citizens, tend to enervate the laws in general, and to slacken the bands of Society. If it be difficult to execute any law which is not generally deemed necessary or salutary, what must be the case where it is deemed invalid and dangerous? and what may be the effect of so striking an example of impotency in the Government, on its general authority?

14. Because a measure of such singular magnitude and delicacy ought not to be imposed, without the clearest evidence that it is called for by a majority of citizens: and no satisfactory method is yet proposed by which the voice of the majority in this case may be determined, or its influence secured. "The people of the respective counties

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are indeed requested to signify

<sup>4</sup> Art. 10. [Note in the original.]

their opinion respecting the adoption of the Bill to the next Session of Assembly." But the representation must be made equal, before the voice either of the Representatives or of the Counties, will be that of the people. Our hope is that neither of the former will, after due consideration, espouse the dangerous principle of the Bill. Should the event disappoint us, it will still leave us in full confidence, that a fair appeal to the latter will reverse the sentence against our liberties.

15. Because, finally, "the equal right of every citizen to the free exercise of his Religion according to the dictates of conscience" is held by the same tenure with all our other rights. If we recur to its origin, it is equally the gift of nature; if we weigh its importance, it cannot be less dear to us; if we consult the Declaration of those rights which pertain to the good people of Virginia, as the "basis and foundation of Government,"<sup>5</sup> it is enumerated with equal solemnity, or rather studied emphasis. Either then, we must say, that the will of the Legislature is the only measure of their authority; and that in the plentitude of this authority, they may sweep away all our fundamental rights; or, that they are bound to leave this particular right untouched and sacred: Either we must say, that they may controul the freedom of the press, may abolish the trial by jury, may swallow up the Executive and Judiciary Powers of the State; nay that they may despoil us of our very right of suffrage, and erect themselves into an independent and hereditary assembly: or we must say, that they have no authority to enact into law the Bill under consideration. We the subscribers say, that the General Assembly of this Commonwealth have no such authority: And that no effort may be omitted on our part against so dangerous an usurpation, we oppose to it, this remonstrance; earnestly praying, as we are in duty

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bound, that the Supreme Lawgiver of the Universe, by illuminating those to whom it is addressed, may on the one hand, turn their councils from every act which

<sup>5</sup> Decl. Rights-titl. [Note in the original.]

would affront his holy prerogative, or violate the trust committed to them: and on the other, guide them into every measure which may be worthy of his [blessing, may re]dound to their own praise, and may establish more firmly the liberties, the prosperity, and the Happiness of the Commonwealth. II Madison, 183-191.

SUPPLEMENTAL APPENDIX.

A Bill Establishing A Provision for Teachers of the Christian Religion.

Whereas the general diffusion of Christian knowledge hath a natural tendency to correct the morals of men, restrain their vices, and preserve the peace of society; which cannot be effected without a competent provision for learned teachers, who may be thereby enabled to devote their time and attention to the duty of instructing such citizens, as from their circumstances and want of education, cannot otherwise attain such knowledge; and it is judged that such provision may be made by the Legislature, without counteracting the liberal principle heretofore adopted and intended to be preserved by abolishing all distinctions of pre-eminence amongst the different societies or communities of Christians;

*Be it therefore enacted by the General Assembly,* That for the support of Christian teachers, — per centum on the amount, or — in the pound on the sum payable for tax on the property within this Commonwealth, is hereby assessed, and shall be paid by every person chargeable with the said tax at the time the same shall become due; and the Sheriffs of the several Counties shall have power to levy and collect the same in the same manner and under

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the like restrictions and limitations, as are or may be prescribed by the laws for raising the Revenues of this State.

*And be it enacted,* That for every sum so paid, the Sheriff or Collector shall give a receipt, expressing therein to what society of Christians the person from whom he may receive the same shall direct the money to be paid, keeping a distinct account

thereof in his books. The Sheriff of every County, shall, on or before the — day of — in every year, return to the Court, upon oath, two alphabetical lists of the payments to him made, distinguishing in columns opposite to the names of the persons who shall have paid the same, the society to which the money so paid was by them appropriated; and one column for the names where no appropriation shall be made. One of which lists, after being recorded in a book to be kept for that purpose, shall be filed by the Clerk in his office; the other shall by the Sheriff be fixed up in the Court-house, there to remain for the inspection of all concerned. And the Sheriff, after deducting five per centum for the collection, shall forthwith pay to such person or persons as shall be appointed to receive the same by the Vestry, Elders, or Directors, however denominated of each such society, the sum so stated to be due to that society; or in default thereof, upon the motion of such person or persons to the next or any succeeding Court, execution shall be awarded for the same against the Sheriff and his security, his and their executors or administrators; provided that ten days previous notice be given of such motion. And upon every such execution, the Officer serving the same shall proceed to immediate sale of the estate taken, and shall not accept of security for payment at the end of three months, nor to have the goods forthcoming at the day of sale; for his better direction wherein, the Clerk shall endorse upon every such execution that no security of any kind shall be taken.

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*And be it further enacted,* That the money to be raised by virtue of this Act, shall be by the Vestries, Elders, or Directors of each religious society, appropriated to a provision for a Minister or Teacher of the Gospel of their denomination, or the providing places of divine worship, and to none other use whatsoever; except in the denominations of Quakers and Menonists, who may receive what is collected from their members, and place it in their general fund, to be disposed of in a manner which they shall think best calculated to promote their particular mode of worship.

*And be it enacted*, That all sums which at the time of payment to the Sheriff or Collector may not be appropriated by the person paying the same, shall be accounted for with the Court in manner as by this Act is directed; and after deducting for his collection, the Sheriff shall pay the amount thereof (upon account certified by the Court to the Auditors of Public Accounts, and by them to the Treasurer) into the public Treasury, to be disposed of under the direction of the General Assembly, for the encouragement of seminaries of learning within the Counties whence such sums shall arise, and to no other use or purpose whatsoever.

THIS Act shall commence, and be in force, from and after the — day of — in the year —.

*A Copy from the Engrossed Bill.*

John Beckley, C. H. D.  
*Washington Mss. (Papers of George Washington, Vol. 231); Library of Congress.\**



329 U.S. 501  
KRUG, Secretary of the Interior, et al. v.  
SANTA FE PAC. R. CO. (two cases).

Nos. 97 and 98.

Argued Jan. 6, 7, 1947.

Decided Feb. 3, 1947.

**Public lands** — 85

A release executed under transportation act of 1940, providing that railroad should be entitled to rate concessions given therein only on releasing its claim to land granted in aid of construction of railroad, extinguished railroad's claims against gov-

\* This copy of the Assessment Bill is from one of the hand-bills which on December 24, 1784, when the third reading of the bill was postponed, were ordered distributed to the Virginia counties by the House of Delegates. See Journal

ernment for "lieu lands" due railroad under prior act reciting that, if government could not give possession to some of lands granted by it to a railroad, it could select other public lands in lieu of them as an indemnity. Transportation Act of 1940, § 321, 49 U.S.C.A. § 65; 43 U.S.C.A. §§ 888, 890, 893, 894, 900, 904; Act Cong. July 27, 1865, 14 Stat. 292, 297; Act Cong. June 22, 1874, 18 Stat. 19; Act Cong. April 28, 1904, 33 Stat. 556.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia.

Actions by the Santa Fe Pacific Railroad Company against Harold L. Ickes, Secretary of the Interior, and others for relief by way of injunction and mandamus to compel the Secretary of the Interior to determine the railroad's right to certain lands. The complaints were dismissed, 57 F.Supp. 984, and the plaintiff appealed to the Circuit Court of Appeals. To review a judgment of the Circuit Court of Appeals, 153 F.2d 305, reversing the district court's judgment, Julius A. Krug, Secretary of the Interior, and others bring certiorari.

Reversed.

Mr. Frederick Bernays Wiener, of Providence, R. I., for petitioners.

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Mr. Lawrence Cake, of Washington, D. C., for respondent.

Mr. Justice BLACK delivered the opinion of the Court.

In the first half of the Nineteenth Century the United States acquired a vast new area of sparsely populated lands in the South and West. Settlement and absorption of this territory into the older part of the country became a national problem which demanded for its solution a more rapid and extensive means of transportation

of the Virginia House of Delegates, December 24, 1784; Eckenrode, 102-103. The bill is therefore in its final form, for it never again reached the floor of the House. Eckenrode, 113.

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