

# Supreme Court of the United States

October  
 TERM, 1969

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Supreme Court, U. S.  
NOV 28 1969

In the Matter of:

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FREDERICK WALZ,	:
	:
Appellant,	:
	:
vs.	:
	:
TAX COMMISSION OF THE CITY OF	:
NEW YORK,	:
	:
Appellee,	:
-----X	:

Docket No. 135

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Place      Washington, D. C.  
Date      November 19, 1969

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ORAL ARGUMENT OF:

P A G E

Edward J. Ennis, Esq.  
on behalf of Appellant . . . . . 2

J. Lee Rankin, Esq.  
on behalf of Appellee . . . . . 16

REBUTTAL ARGUMENT OF:

Edward J. Ennis, Esq.  
on behalf of Appellant . . . . . 29

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IN THE SUPREME COURT OF THE UNITED STATES

October

Term

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FREDERICK WALZ,

Appellant,

vs.

TAX COMMISSION OF THE CITY OF  
NEW YORK,

Appellee,

----- X

NO. 135

Washington, D. C.  
November 19, 1969

The above-entitled matter came on for argument at  
11:10 a.m.

BEFORE:

- WARREN E. BURGER, Chief Justice
- HUGO L. BLACK, Associate Justice
- WILLIAM O. DOUGLAS, Associate Justice
- JOHN M. HARLAN, Associate Justice
- WILLIAM J. BRENNAN, JR., Associate Justice
- POTTER STEWART, Associate Justice
- BYRON R. WHITE, Associate Justice
- THURGOOD MARSHALL, Associate Justice

APPEARANCES:

- EDWARD J. ENNIS, Esq.  
Civil Liberties Union  
165 Broadway  
New York, New York  
Counsel for Appellant
  
- J. LEE RANKIN, Esq.  
Corporation Counsel  
Municipal Building  
New Yor, New York 10007  
Counsel for Appellee



1 brief, because the principle I assert is very simple. I would  
2 like to address one word to the corporation counsel's suggestion  
3 in the first part of his brief that the Court should either dis-  
4 miss or affirm this appeal on the ground that the record is inade-  
5 quate.

6 We submit to the Court that all of the facts required  
7 for a decision of this issue, no matter how momentous it may be,  
8 are present either in the pleadings or in the facts which are  
9 for judicial notice.

10 It was the defendant who moved for summary judgment  
11 and the facts were quite sufficient to obtain a judgment of the  
12 Court of Appeals in favor of the defendant, and the defendant is  
13 not in a good position here to assert that the facts are not  
14 sufficient for review by this Court. All of the facts required  
15 for decision are present.

16 Q Before you continue your argument, I am a little  
17 curious about the whereabouts of the plaintiff in this case.  
18 I refer particularly to VI of the appendix of the amicus brief  
19 which is Madalyn Murray O'Hair, in which it was indicated the  
20 post office could not find Mr. Walz. Does somebody else sign  
21 for this ---

22 A Well, let me tell what I know.

23 Q --- for this letter? I wonder if ---

24 A Mr. Walz is a member of the New York Bar and he  
25 has taken the case to this stage and intended to argue the case.

1 He requested me to argue it on his behalf because he happens to  
2 be suffering from a very high blood pressure, and, frankly, he  
3 stated that he did not think that he emotionally could undertake  
4 the responsibility to present the oral argument to this Court.

5 But I know Mr. Walz. He has been in my office several  
6 times and I can communicate with him any time I wish to.

7 Q That satisfies my question. I just wondered.  
8 Thank you.

9 A Surely.

10 Now going to the merits of the argument, I do not  
11 intend to quote to this Court much of what it has said in the  
12 over 500 pages that the Court has written between Gobitis and  
13 Flast on the question of the meaning of the First Amendment.  
14 I think it appropriate, however, that we approach our argument  
15 with the statement made by Mr. Justice Jackson speaking for the  
16 Court in the Barnett case, which established that the flag salute  
17 violated the First Amendment.

18 Mr. Justice Jackson for the Court stated, "The task of  
19 translating majestic generalities of the Bill of Rights, conceived  
20 as a part of the pattern of liberal government in the 18th Cen-  
21 tury, places concrete restraints on officials dealing with prob-  
22 lems of the 20th Century, is one to disturb self-confidence."

23 These changed conditions from the laissez-faire situa-  
24 tion in the 18th Century to the Government control of our century  
25 often deprives precedence of liability and casts out more than

1 we would chew on our own judgment. But we act to meet matters  
2 not by authority of our competence, but by force of our commis-  
3 sion. We cannot because of modest estimates of our competence  
4 in such specialties as public education withhold the judgment  
5 that history authenticates that is the function of this Court  
6 when liberty is infringed.

7           Approaching this question, it is the appellant's sub-  
8 mission that the plain words, the first ten words of the First  
9 Amendment of the Bill of Rights that Congress, which now included  
10 the state, shall pass no law respecting the establishment of  
11 religion, bars all aid to religion including the massive tax  
12 exemption from real estate taxes presented in this case.

13           I will not pause to lead the Court again, as it has  
14 gone through its opinions through the course in the First Con-  
15 gress, which produced these general words respecting the estab-  
16 lishment of religion. It suffices to say that out of these  
17 narrower words introduced into the House, no law establishing  
18 religion, and out of the still narrower words introduced into  
19 the Senate, no law establishing articles of faith.

20           In the conference between the two Houses in which Mr.  
21 Madison was a member of the conference, we extracted the words  
22 "No law respecting the establishment of religion" which the  
23 Congress adopted and the states adopted.

24           Now this Court has said in Everson and in every case  
25 considered since Everson that the generalities of these words

1 not only prohibit the establishment of a church, but they prohibit  
2 any aid to religion.

3           Only two sentences from the Court's opinion in Everson  
4 which has been quoted by the Court in every opinion since: "The  
5 establishment clause of the First Amendment means that at least  
6 this. Neither the state or the Federal Government can set up a  
7 church, neither can pass laws which aid one religion, aid all  
8 religions or prefer one religion over another."

9           The appellant's position very simply is that just as  
10 this Court has repeatedly stated, and indeed in the last case,  
11 in the Flast case, that of course the First Amendment forbids  
12 aid to religion under any tax funds, that any taxes be exacted  
13 or spent on religion. It is the appellant's submission that  
14 this exemption from real estate taxes is precisely the same as  
15 if the State of New York had passed a law stating that all reli-  
16 gious property shall be valued, so at least we might know its  
17 evaluation -- increasing evaluation, and shall be taxed like all  
18 other properties, but that upon application by the taxpayer dis-  
19 closing that it is a religious organization and the property is  
20 used solely for religious purposes, these taxes should be refunded

21           We submit to the Court that the exemption before us is  
22 no different, and if this Court would strike down the hypothetical  
23 statute I suggested, it should strike down the exemption statutes  
24 of the State of New York.

25           Q     Mr. Ennis, do these statutes limit the exemption

1 to religious corporations?

2 A No, Your Honor, the ---

3 Q It is part of a broader statute?

4 A Of course. The religious corporation in the  
5 General Provisions, which exempt educational institutions, hos-  
6 pitals and the like -- that includes religious corporations.

7 We, of course, submit, Your Honor -- I have a word to  
8 say about the suggestion that religion can be subsummed under  
9 "charitable activities." But it is so far as the statutes are  
10 concerned included with the other classifications.

11 Q Does your argument go so far as to reach hospitals  
12 run by religious organization?

13 A No, of course not. The hospitals, the asylums,  
14 the orphanages, the educational institutions, schools, all of  
15 these institutions which are run by religious organizations,  
16 are exempt from real estate taxes by virtue of their function.  
17 Our argument only reaches to property used exclusively for reli-  
18 gious purposes.

19 Q Does that not assume that religious-oriented  
20 schools are not interchanged with religions?

21 A No, no, it does not at all, Your Honor, but it  
22 establishes ---

23 Q You have no trouble, I take it, with the school  
24 which is teaching religion to children at an early age or to  
25 college students at a later age?

1           A     I have no trouble in exempting the real estate  
2 from taxation. And in any event, Your Honor, the statute relieves  
3 us of this problem, because the statute we are addressing our-  
4 selves to exempts only property which is used exclusively for  
5 religious purposes. And we do not have to address ourselves to  
6 what might be a more difficult problem, as to whether a hospital  
7 run by a church institution, whether physical care is sufficiently  
8 permeated with religious instruction to render it suspect.

9           We don't have to deal with that.

10          Q     I want to ask you this question. Supposing New  
11 York changed the statute and granted exemption to every kind of  
12 charitable organization except a purely religious organization.  
13 Do you think that would give rise to a free exercise question?

14          A     No, Your Honor, I do not.

15          Q     You don't?

16          A     I think the Constitution does not forbid the  
17 Legislature to grant exemptions to charitable organizations,  
18 but only to religious organizations.

19                It is our position, Your Honors, that if prayer and  
20 Bible reading in the public schools are an aid to religion, it  
21 is inescapable that the practical economic, financial aid of  
22 real estate tax exemption is an aid to religion. This proposi-  
23 tion is so simple that it is rather difficult to expand upon  
24 it. Its very statement is its own proof.

25                Unless this Court is prepared to say that factually

1 an exemption is of purely religious purposes, is not an aid to  
2 religion -- unless the Court is prepared to say that, it must  
3 say that it is an aid to religion which is unconstitutional.

4 I think I would like to say a few words about the  
5 defense, if I may call it that, of the argument which the cor-  
6 poration counsel has presented in his brief on the subject. And  
7 these are the defenses presented usually to support awkward  
8 facts that we have in all of the states of this exemption. And  
9 although we have had it all of the states for 180 years, it now  
10 for the first time comes squarely before this Court for con-  
11 sideration.

12 The first argument in support of it the argument, how  
13 is it that this exemption stands on the books of all the states  
14 for so long without having been challenged in this Court? The  
15 answer, I think, is a tribute to the great political power of  
16 religious organizations in this country that have been able to  
17 achieve this exemption from taxation for so long.

18 Another reason is that when this started, at the begin-  
19 ning of our Republic, the tax question was a very minor one.  
20 The tax question has only loomed large when with all of these  
21 tax exemptions the religious organizations accumulated literally  
22 hundreds of millions dollars of property. And now with the  
23 increasing social services that are required, the matter becomes  
24 acute as to whether this isn't part of the real estate in the  
25 United States which constitutionally should be subject to taxes.

1           And indeed another simple argument is that history  
2 cannot turn "aid" into "no aid" not only in real estate tax  
3 exemption, but it has been common in our public schools saying  
4 public prayers and Bible reading. This has been going on since  
5 the beginning of the Republic. And it has only reached this  
6 Court in the last 20 years when citizens determined to raise the  
7 issue.

8           Take the Sunday School [sic] laws. The Sunday School  
9 laws at this Court in its decisions recognizes these, of course,  
10 had a religious origin, and yet they went on with this religious  
11 justification, legislative justification with religion. They  
12 went on from the beginning of the Republic until a few years  
13 ago and the Court in its opinion stated, "We would strike these  
14 Sunday laws down as unconstitutional establishment of religion,  
15 if it were not for the fact that in the development of our coun-  
16 try a secular reason for these laws had supplanted the original  
17 religious purpose of the laws."

18           And the Court said, "If the purpose was aid to reli-  
19 gion, the Sunday laws would have been stricken down." And it  
20 stayed because the purpose had become secular.

21           But it is only as our country developed and people  
22 wanted to open up stores on Sunday, the stores that were involved  
23 that the question was presented to this Court, despite the fact  
24 that it was in its origins unconstitutional, although not tested.

25           I think that this takes care of the arguments in

1 history to the extent that it can be taken care of. I do not  
2 mean to blink at the point that a practice which existed for so  
3 long carries with it a certain historical momentum of its own.  
4 But this Court is no stranger to striking down laws as unconsti-  
5 tutional, which the American people have accepted for a long  
6 period of time until the time comes when a citizen properly  
7 raises the question, as I believe Mr. Walz has done, and requires  
8 that these laws be stricken down.

9 Now the second point that Mr. Rankin makes also had its  
10 interest, is that the exemption really supports the purpose of  
11 the amendment, which was to prevent strife between religion and  
12 the secular state, that leaving the state alone in this respect  
13 promotes that neutrality, which was one purpose of the First  
14 Amendment.

15 If the Court please, my answer to that is that taxing  
16 real estate used for religious purposes like other real estate,  
17 is just as neutral as not taxing it. There is not intended by  
18 this to promote any conflict with the Church and I cannot see  
19 how it will produce a conflict with the Church, to treat such  
20 property as all other real estate is treated.

21 Now, the third argument that Mr. Rankin refers to in  
22 his brief is also a common one, that what the legislatures have  
23 done is to consider religion like other charities which it  
24 exempts. That it is true, of course, that religion until a  
25 more recent period of our history took up the burden of charity --

1 the alms houses, the hospitals, the orphanages, the old people's  
2 homes, all of this in earlier days was largely left to religious  
3 private activities. This, of course, is no longer the case and  
4 it explains, I think, why the legislatures have placed religious  
5 activity into the same statutory framework as other charitable  
6 activities.

7 But it cannot satisfy the constitutional requirements  
8 that both the Congress and all of the legislatures are expressly  
9 prohibited from treating religion like other charitable activities.  
10 The states and Congress are prohibited from this.

11 Now another answer is that the prayer in the public  
12 schools and the Bible reading in the public schools which this  
13 Court has stricken down as unconstitutional, that promotes  
14 moral values just as religious activity promotes moral values.

15 But just as that is not a sufficient basis, to say a prayer,  
16 the fact that it promotes a secular object, if you will, namely,  
17 moral consideration -- it is not enough to say a prayer, then  
18 it is not enough to save the tax exemption.

19 Now the last argument which is made on this point by  
20 Mr. Rankin is that this Court has approved other exemptions.  
21 For example, the Selective Service exemptions where the Court  
22 excuses ministers -- or rather, the statutes excuse ministers  
23 and conscientious objectors. And the Sunday laws, not the ones  
24 that the Court struck down, but those laws which a state has  
25 chosen to give an exemption to people who observe the Sabbath

1 and let them run their business on Sunday.

2           The distinction, we submit, is that the power of the  
3 Congress in the interest of national defense and general wel-  
4 fare, it didn't have to give those exemptions. It did give them  
5 out of respect for acts of conscience, for religious conscience.  
6 But it has not been suggested by the Christian churches that the  
7 payment of real estate taxes would offend their freedom of reli-  
8 gion in the sense of their freedom of conscience. Surely a  
9 church which recognizes that Caesar shall have what is his and  
10 God shall have what is his would not make the argument that to  
11 pay real estate taxes violates their conscientious scruples.  
12 They merely ask to be exempt from the payment of taxes, and I  
13 think that this is a great distinction between these cases.

14           Now I am going to address myself just very briefly to  
15 an argument that is not made by the City of New York, and that  
16 is this statute is required by the free exercise of laws. That  
17 argument is made in the brief of the National Council of Churches  
18 of Christ in the United States of America by Mr. Tuttle, who is  
19 here today, to hear the argument.

20           Now Mr. Tuttle relies for that contention that these  
21 laws are not only permissible, but are required, on the Murdock  
22 case and the Follett case. And as Your Honors will recall, Mur-  
23 dock, the Court stated that you could not place a license tag  
24 on the very activity of distributing religious literature by  
25 members of a religious sect, for whom the essence of their

1 religious activity was going from house to house, distributing  
2 and selling their literature. But, as Mr. Justice Douglas said  
3 in that case, "This is quite different from the tax on property  
4 used for religious activities. It is one thing to tax a preach-  
5 er's property and another to tax his teachings."

6 We say that there is a very obvious distinction between  
7 the direct tax upon a religious activity involved in the Murdock  
8 case and the tax on the land and the wooden stones which con-  
9 stitute the properties of religious real estate.

10 Q I have some difficulty in that separation of the  
11 chapel and the teachings. Is that your point, the chapel and  
12 the teachings?

13 A Yes, Your Honor, my point is that the Court in  
14 the Murdock case and the Follett case that followed it, in  
15 stating that a tax directly upon the activity was unconstitu-  
16 tional because it did limit the free exercise provision that  
17 Mr. Justice Douglas for the Court and Mr. Justice Frankfurter,  
18 in his concurring opinion, expressly distinguished that tax and  
19 the tax that we have here.

20 Justice Frankfurter said in plain words, "It is alien  
21 to our constitutional system to suggest that it exempts church-  
22 held land from state taxation." In other words, the Court itself  
23 has said very plainly made the distinction from the direct exer-  
24 cise of religion not being subject to a license tax.

25 And indeed I hardly have to go further and state that

1 if this argument were true, would it mean that the great real  
2 estate holdings of our church and our TV organizations should  
3 be subject to taxes because they are engaged in exercise of the  
4 freedom of the press? It is hardly distinguishable.

5 The land used by the New York Times to print its paper  
6 is just as much involved in the freedom of the press as the  
7 church building is used in expressing religion.

8 Now I would like to close my argument, if the Court  
9 please, by a one-sentence statement from James Madison, whom  
10 this Court has recognized in many opinions as the very architect  
11 of the First Amendment.

12 When he retired as President to Montpelier, he had a  
13 chance to review what he had done and the attention he had given  
14 to this important question of establishing of religion. In his  
15 detached memorandum, which I hope Your Honors will again read  
16 because he had the fervor and the eloquence in this matter which  
17 I cannot match. He indeed went so far in this detached memoran-  
18 dum to say that the Chaplains in the Congress and in the Army  
19 and Navy are establishments of religion, and should not be allowe  
20 and he concludes, as I will conclude my argument, with one sen-  
21 tence.

22 He said, "It is safer to adhere to a right principle  
23 and trust its consequences than to confide in reasoning, however  
24 specious, in fear and reliance upon a wrong one."

25 I submit, Your Honors, that the exemption of churches

1 is aid to religion and is barred by the First Amendment. These  
2 various arguments which have been made attempt to excuse it,  
3 but do not excuse it and are a form of specious reasoning which  
4 the Court should not accept, but should hold as simple logic  
5 in the words of the Constitution that an exemption is as much  
6 an aid to religion as if the taxes were collected and returned  
7 upon collection.

8 Thank you very much.

9 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Ennis.

10 Mr. Rankin?

11 ARGUMENT OF J. LEE RANKIN, ESQ.

12 ON BEHALF OF APPELLEE

13 MR. RANKIN: Mr. Chief Justice, may it please the  
14 Court:

15 It is the position of the City of New York that this  
16 case should either be dismissed as not presenting any substan-  
17 tial Federal question in light of the record or that it should  
18 affirmed.

19 We have considerable difficulty with the position of  
20 Mr. Ennis and the Civil Liberties Union in their brief because  
21 they here recognize that if you single out religious establish-  
22 ments or institutions and deny to them an exemption which you  
23 grant to other nonprofit charitable, education activities, such  
24 as are allowed this exemption under this statute and under the  
25 Constitution of the State of New York, you have serious problems.

1 They do not frankly say that it is a free exercise problem, but  
2 I do. As you will note in our brief, I did not assert that we  
3 reach a free exercise problem with regard to this exemption as  
4 it is granted. But if you are going to say that religious  
5 institutions, who have the same legal standing and economic stand-  
6 ing are non-profitable and engaged in charitable and educational  
7 activities, are thereby to be singled out and told that they  
8 cannot enjoy the same exemption by reason of those activities  
9 of other people.

10 I do not see how you can face up to say that that does  
11 not inhibit religion in this country.

12 I call to the Court's attention and emphasize the  
13 history of this exemption, and I do not say that it is conclu-  
14 sive upon the Court. Of course it is not. But it has great  
15 bearing -- 200 years of a course of conduct by the people of  
16 this country.

17 And I challenge the statement of it just to a great  
18 lobby. To me it is an action of the people of this country in  
19 recognition of the service and value of religion which has sus-  
20 tained this country throughout its various activities. It is  
21 200 years of universal, consistent conduct, either in the con-  
22 stitutional provisions and statutes, and uniform decisions  
23 sustaining it, including the various actions of this Court some  
24 four times, finding that there was not a substantial Federal  
25 question in three cases and, in the fourth, not taking action.

1           What is glibly assumed in the argument here is that  
2 exemption is the same as aid to religion, comparable to taxes.  
3 And any careful examination of this situation will not bear  
4 that out. It isn't supported by the law of this Court in inter-  
5 pretations of the Constitution with regard to taxation.

6           But before I leave the history, I should like to call  
7 to the Court's attention the very real problem that you present  
8 the Government in trying to maintain neutrality, neither advanc-  
9 ing nor inhibiting. If you say to the Government, "You must go  
10 in the City of New York to St. Patrick's Cathedral and assess  
11 and tax based upon the fair and reasonable market value at the  
12 highest use of that property or go with me to Trinity Church  
13 down in Lower Manhattan and tell us to do the same." Or any  
14 little chapel in outlying areas -- Harlem, Bronx, Queens, Brook-  
15 lyn.

16           Now it can be done, but in that process what do we  
17 do to the relationship between Government that we are trying to  
18 say that there is a separation wall? It is difficult to imagine  
19 how much taxes how much taxes we would assess against St. Pat-  
20 rick's or Trinity Church or some of the other areas.

21           On the other hand, I don't want to minimize the effect  
22 on the little chapel in the community, which proportionately  
23 may have as much difficulty or more in meeting this assessment.

24           Now how does 200 years of history bear upon that?  
25 It bears upon the fact of the way people live in the pluralism

1 of our religion and throughout 200 years of experience in deal-  
2 ing with this very problem. They have proceeded upon the assump-  
3 tion from the earliest days, at the very same time that this  
4 establishment took place, that they did not have to provide the  
5 taxes for their place of worship because it was recognized by  
6 the people and their legislatures, and the exemption was granted  
7 either in the Constitution or legislation, or both.

8 Now after 200 years with established parishes and  
9 many difficult financial problems otherwise, and 200 years of  
10 such experience of our people, all has to be changed overnight  
11 by a ruling of this Court. They have to find a way to either  
12 provide the taxes out of additional contributions by their  
13 parishioners or move the church someplace that they can afford.

14 Q Mr. Rankin, why do you say that this record is  
15 insufficient to decide the issue in this case?

16 A I think that it does not adequately show the  
17 effects of a tax exemption of this kind or tax exemption, if you  
18 are to assume that they are an aid to an establishment, on other  
19 taxpayers in the community. This appellant had purchased the  
20 property for a hundred dollars. I think he paid \$5.47, or some-  
21 thing like that, in taxes. That is a very skimpy record to act  
22 upon if you are going to overturn something that has been present  
23 for ---

24 Q That goes really to a question of standing,  
25 doesn't it? Like Flast against Cohen, it seems to me, pretty

1 well lays that aside.

2 Q If it is a constitutional question, Mr. Rankin,  
3 can the Court be concerned with the impact in the same way that  
4 you would on construction of the statutes where no constitutional  
5 question were involved?

6 A Well, it seems to me that it gives the Court  
7 guidance and enlightenment insofar as you have information that  
8 is hard evidence in a record, as distinguished from assumptions  
9 or inferences or whatever picture the counsel can portray or  
10 with regard to the proper situation.

11 That is what I was calling attention to in regard to  
12 this first point.

13 Q This is a field not here under discussionary  
14 review.

15 A That's right.

16 The next problem, as I see it, is the assumption in  
17 regard to the system of taxation, and the question of whether  
18 it is an exemption, is the same in the consideration of aid to  
19 religion as it would be if there were a tax. It seems to me  
20 that it is clear that the exemption is neutral as distinguished  
21 from the tax, which can be discriminatory very easily in many  
22 ways.

23 But beyond that, they says, "Religious institutions do  
24 not pay their fair share of the burden of Government." Now  
25 that is not a constitutional criterion. This Court has said

1 legislatures have the power and right to decide who shall be  
2 taxed, dependent upon the question of whether or not two persons  
3 in precisely similar situations as to economic and legal condi-  
4 tions are treated differently by the Government.

5 I do not think that if there was a mere exclusion as  
6 distinguished from exemption that this Court would be willing  
7 to accept that as an added distinction for constitutional pur-  
8 poses. But there is no question but what the Court -- the legis-  
9 lature could choose various types of persons who are not simi-  
10 lar in economic and legal position and decide to tax them, and  
11 decide not to tax a religious house of worship.

12 That is the fallacy in this situation. There is an  
13 assumption that religious institutions have to be taxed just like  
14 others or there is aid. There is no proof of it and it doesn't  
15 follow our law in regard to the imposition of taxes and the  
16 power of legislatures to make decisions about who should be  
17 taxed and who should not be not.

18 It doesn't deal with what other churches pay in the  
19 course of the whole tax structure of the community, in New York  
20 or other communities that have similar exemptions throughout  
21 the country. It just says that there must be a share in the  
22 cost of maintaining these benefits and it is entirely inadequate  
23 to meet the problems from a constitutional standpoint.

24 Q What would you say about a statute -- or suppos-  
25 ing New York repealed its exemption for all noncharitable

1 corporations, nonreligious charitable corporations, and let it  
2 standing only with respect to religious corporations?

3 A I would find much more difficulty with regard to  
4 that except that you do have the general principles of tax law  
5 allowing the legislature to decide that a corporation, for  
6 instance, or all corporations should pay taxes, no corporation  
7 should pay taxes, but all natural persons pay taxes. The Court  
8 said that any number of times, so the legislature has the power  
9 and the right to decide that if becomes necessary to maintain  
10 the Government may be taken from such selected groups, provided  
11 you don't violate this principle that I just stated as a matter  
12 of constitutional law.

13 Now the problem is whether you are getting into the  
14 question of advancing or inhibiting religion in that particular  
15 area. That is the only problem that that kind of a situation  
16 raises.

17 On the other hand, if they are similar in regard to  
18 their functions to charitable and educational institutions and  
19 nonprofiting, and then you say, "Just because you are religious,  
20 you can't have any exemption," it seems to me you are singling  
21 him out in the same manner that the Constitution does not permit

22 Q Mr. Rankin, when I put the question to Mr. Ennis  
23 about church-operated schools where religion is regularly  
24 taught, understandably he didn't want to argue the case he has  
25 here and not some other case, but I wonder if you would care to

1 comment on whether a Court could find such a church-operated  
2 school which received tax exemption was not receiving the same  
3 kind of "aid to religion" that is argued is now extended to  
4 churches.

5           A       Well, it is the position of the City of New York  
6 that it is. As I view it -- I frankly say I am not familiar  
7 with all the religions in this country, I do consider one of  
8 the great assets of this country is the fact we have varieties  
9 in religion, that you can start any religion without interfer-  
10 ence by Government. But the religions I know, a number of them,  
11 all have an inherent part of the religion itself that you shall  
12 care for the sick, that you shall care for the orphans and the  
13 elderly. You shall provide for them.

14           The ones I know have a mite box or a collection time  
15 after time throughout the year to support those activities.  
16 Some that I know have a Deacon's Fund administered within the  
17 church structure itself to care for the poor and the unfortu-  
18 nate and it is a part of the doctrine and beliefs of the Church.  
19 You can go through a whole cross-section of them that people  
20 who have that religion will respect it, believe it, and that  
21 is part of the doctrine that you not only believe in, but con-  
22 tribute to as a part of your worship. And you conduct that in  
23 the house of worship and the solicitation is made there.

24           Almost every week, at least periodically, in many  
25 church there are provisions for their own institutions that

1 they maintain, and the parishioners are asked to contribute to  
2 them as a part of their religious beliefs and an obligation as  
3 a part of that belief.

4 Q Your argument, therefore, I gather, is directed  
5 to the position that as a consequence the Government would not  
6 constitutionally be able to finance the church school or the  
7 hospital then?

8 A I think that where you finance a church school or  
9 a hospital, you will do it. Whether this Court will permit it  
10 by the Government, it will be in connection with a case like  
11 Allen or other situations where you are carrying out the secular  
12 functions, aiding secular functions, which is not directly  
13 advancing the religion. But I don't think that you can say that  
14 you can separate out of religion the elements of charity or  
15 assistance to education or other aspects that are at the heart  
16 of it and have been for a thousand years.

17 Q So you suggest, I take it, that the Government  
18 should make a direct grant to a church to carry on charitable  
19 activity?

20 A No, I think you have ruled that of an activity  
21 out.

22 Q But what you are arguing now is that you can  
23 grant tax exemption though, because the churches are engaged  
24 in charities?

25 A Oh, but the tax exemption is quite different from

1 direct taxing and imposing a tax on individuals in order that  
2 he contribute to the support of a particular religious activity.  
3 A tax exemption may not mean anything to Mr. Walz or to me as  
4 a taxpayer in New York City or many others. It is neutral in  
5 its effect.

6 It is entirely different by nature under tax laws,  
7 tax constitutional principles, from the others.

8 Q Mr. Rankin, if the appellant were to prevail with  
9 his argument that this constitutes an aid to religion, the  
10 establishment of religion, would you see any bearing on that  
11 kind of a ruling and the allowance of deductions for contributions  
12 which is now governed by regulations? I think most of the states  
13 would turn to the Federal Government.

14 A Well, I ---

15 Q Could that exemption survive if the appellant  
16 prevailed here?

17 A I can see many problems in that area if the  
18 appellant were to prevail here, because, as Professor Bitger  
19 develops in his article in the Yale Law Journal, you would have  
20 the similar problem with regard to the Internal Revenue Act,  
21 the various provisions that, Mr. Chief Justice, you are describ-  
22 ing, and tax laws throughout the Federal structure as to whether  
23 or not if this is aid to education -- aid to religion, that would  
24 not also be aid to religion. And you would conflict immediately  
25 in that whole area with those laws.

1 I think it would cause a reexamination of the entire  
2 tax structure and the exemptions that are allowed in connection  
3 with religious charitable and educational activities and gifts  
4 as state benefits.

5 Finally, I would like to say that I think this would  
6 have a great impact upon the social structure of this country  
7 if the appellant should prevail in this action. I think it would  
8 penalize the small churches; the great establishments would be  
9 able to adjust to it. The little parish church in the core  
10 city, in the countryside is not able to fall back upon a general  
11 congregation throughout the country.

12 MR. CHIEF JUSTICE BURGER: I think we will stop until  
13 12:30, Mr. Rankin.

14 (Whereupon, at 12 o'clock noon the hearing recessed,  
15 to reconvene at 12:30 p.m. of the same day.)  
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1 AFTERNOON SESSION

2 (The argument in the above-entitled matter resumed at  
3 12:30 p.m.)

4 MR. CHIEF JUSTICE BURGER: Mr. Rankin, you may proceed

5 ARGUMENT OF J. LEE RANKIN, ESQ. (resumed)

6 ON BEHALF OF APPELLEE

7 MR. RANKIN: Mr. Chief Justice, may it please the  
8 Court:

9 I would like to conclude my argument very briefly.  
10 It seems to me that one of the things the Court would like to  
11 examine, which I have looked at in connection with this case,  
12 is what has happened after 200 years of this exemption with  
13 regard to the fears that this Court has described that brought  
14 about the provisions in the First Amendment about establishment  
15 and free exercise.

16 Have any of those feared conditions that were the  
17 basis for these provisions of the First Amendment come about or  
18 appear on the horizon in connection with this matter? The Court  
19 will recall its reference to various things, the fears that  
20 brought about this amendment -- the destruction of government,  
21 the degradation of religion, persecutions that occurred trying  
22 to obtain political and religious supremacy for various reli-  
23 gions, the establishment of a particular governmental faith which  
24 was established at about the same time as the exemptions were  
25 passed by the legislatures, the various persecutions and the tax

1 upon individuals who didn't support the established church, taxes  
2 for the payment of ministers' salaries in churches.

3           There has been at least one case this Court passed  
4 upon in regard to taxing to build a church, and it was stricken.  
5 And we find none of those particular fears that brought about  
6 the amendment that are either present in our situation after 200  
7 years or, as I can see it, threaten. We have a great pluralism  
8 in religion of all kinds of beliefs, either of a God or no God,  
9 and then you can hardly imagine the range that they cover in  
10 this country. As I said before, it is one of our great assets.

11           But if you decide to sustain the appeal in this case,  
12 we are going to have Government up to its ears in religions, in  
13 religious examination of all these exemptions that are provided  
14 in the tax laws for religious institutions, because we will have  
15 to know what they make, what their properties are worth, what  
16 they claim they are worth. We will have all kinds of certiorari  
17 contests like we do with other people in the community about the  
18 value of their church property and that the taxes are too high  
19 compared with other people, and we will have to know what money  
20 they take in -- all of those various things.

21           So instead of being neutral, as this exemption permits  
22 and provides, we will be so engrossed in religious activities  
23 which are the very thing, I submit to you, that the country has  
24 been trying to provide against by this amendment and this Court  
25 has used such great care to provide and insist upon a separation

1 of church and state.

2 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Rankin.

3 REBUTTAL ARGUMENT OF EDWARD J. ENNIS, ESQ.

4 ON BEHALF OF APPELLANT

5 MR. ENNIS: I would like to read just two statement,  
6 if it please the Court, one, that the corporation counsel has  
7 gone outside the record to tell the Court some knowledge he has  
8 about the value of Mr. Walz's property and how much his taxes  
9 were. I don't have that information and in a five-page affidavit  
10 in support of the motion for summary judgment, the City of New  
11 York, which could easily have the information available about  
12 that property, did not choose to make that point.

13 I think that should be taken into account.

14 And about this specter that the corporation counsel  
15 raises that if we have to value the property of churches for  
16 real estate tax purposes, there are going to be a lot of cer-  
17 tiorari proceedings and the like, there will. One of the  
18 socially undesirable factors in the exemption of church property  
19 is that we don't have any idea of what the value of such property  
20 is and there is no reason why we shouldn't.

21 It is not true to suggest that knowledge is un-neutral  
22 or hostile. In fact, it would be a good thing if we knew the  
23 value -- the increasing value of the property of religious  
24 organizations in the United States. Why not?

25 Thank you, Your Honor.

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MR. CHIEF JUSTICE BURGER: Thank you, Mr. Ennis.

Thank you for your submission. Thank you, Mr. Rankin, for yours.

The case is submitted.

(Whereupon, at 12:37 p.m. the argument in the above-entitled matter was concluded.)