

In the

Supreme Court of the United States

UNITED STATES,

Appellant,

v.

EDWIN D. LEE

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NO. 80-767

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Pages 1 thru 39

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2 ORAL ARGUMENT OF

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4 on behalf of the Appellant

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5 FRANCIS X. CAIAZZA, ESQ.,

6 on behalf of the Appellee

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7 LAWRENCE G. WALLACE, ESQ.,

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1 P R O C E E D I N G S

2 CHIEF JUSTICE BURGER: The Court will hear
3 arguments first this morning in the United States against
4 Lee.

5 Mr. Wallace, you may proceed whenever you are
6 ready.

7 ORAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.,
8 ON BEHALF OF THE APPELLANT

9 MR. WALLACE: Mr. Chief Justice, and may it please
10 the Court, the Appellee in this case is a member of the old
11 order Amish religious sect who employed other members of
12 that sect on his farm and in his carpentry shop during the
13 taxable years involved, 1970 through 1977. He did not
14 withhold social security taxes from their wages or pay the
15 employer's share of those taxes, and after an Internal
16 Revenue Service assessment in 1978, he paid the taxes for
17 one quarter of one year for an employee, and brought this
18 suit for a refund, claiming that the tax as applied violated
19 the free exercise clause of the First Amendment.

20 The basis for this claim is the belief of the old
21 Amish sect to which he adhered that the members are to care
22 for their aged, their sick, and their unemployed, and do not
23 need any form of social welfare benefits from outside their
24 religious community, and that it is a sin either to accept
25 social security benefits or to pay the social security taxes.

1 The District Court upheld his claim that the tax
2 was unconstitutional as applied, and the United States
3 appealed to this Court.

4 QUESTION: At the time he made the first quarterly
5 payment, Mr. Wallace, what were his alternatives? Was he
6 subject to a likely seizure or levying on his property?

7 MR. WALLACE: Well, the ordinary enforcement
8 procedures to collect the taxes would be utilized, Mr. Chief
9 Justice, but of course this case has been litigated, and
10 none of those procedures have been put into effect. The
11 case was tried on a stipulation, and counsel have agreed
12 that the amount of taxes owing will be agreed upon should
13 the United States prevail in this case.

14 QUESTION: Well, but his act at that time in
15 paying presumably did not compromise his religious beliefs
16 because he had no choice, no real choice. If he wanted to
17 continue his business, he had to yield to the government's
18 demand.

19 MR. WALLACE: He at least was willing to make the
20 payment. I can't really speak for whether that offended his
21 religious beliefs. He made it under a claim of right to a
22 refund, and perhaps that reconciled it with his belief.

23 QUESTION: He is still claiming here today --

24 MR. WALLACE: He is still claiming the right to a
25 refund.

1 QUESTION: Mr. Wallace, in the face of that
2 finding of the District Court that it was a sin not only to
3 accept but also a sin to pay these taxes, can the Court go
4 behind that?

5 MR. WALLACE: Well, I don't --

6 QUESTION: I mean, do we have to decide this case
7 by accepting --

8 MR. WALLACE: We are not asking --

9 QUESTION: -- by accepting that holding, that it
10 is a sin to pay as well as --

11 MR. WALLACE: We accept that holding, that that is
12 his religious belief, and --

13 QUESTION: But you rely on the balancing aspect.

14 MR. WALLACE: We do, Mr. Chief Justice.

15 QUESTION: But I gather that --

16 MR. WALLACE: We do ask the Court to look behind
17 that religious view.

18 QUESTION: Does that imply then that you don't
19 question that to pay would seriously infringe upon his free
20 exercise rights?

21 MR. WALLACE: We don't agree with quite that
22 formulation, Justice Brennan. We don't question that he in
23 good faith and with sincerity believes that it would be a
24 sin to pay the tax, and he is making --

25 QUESTION: But nevertheless, nevertheless, to the

1 extent that infringes upon free exercise rights, I gather
2 the government's position is that the governmental interest,
3 what, overrides? Is that it?

4 MR. WALLACE: That is our position.

5 QUESTION: It has to give way to the governmental
6 interest?

7 MR. WALLACE: That this is not in the
8 circumstances of a generally applicable tax protected by the
9 free exercise clause.

10 QUESTION: What I am trying to get at is --

11 MR. WALLACE: They are -- to pay a tax assessed on
12 all persons --

13 QUESTION: What I am trying to get at --

14 MR. WALLACE: -- for an economic activity.

15 QUESTION: Mr. Wallace, wait, will you? Are you
16 suggesting, then, that this is a strict scrutiny kind of
17 analysis, and that the government interest under strict
18 scrutiny prevails over the free exercise right?

19 MR. WALLACE: We haven't really suggested a test
20 of that kind. The Court has spoken in terms of a balancing
21 test in the pertinent cases, looking toward the interest
22 claimed under the free exercise clause and the governmental
23 interest. I don't know that it is --

24 QUESTION: Well, what is the test by which we
25 determine that the free exercise right must give way to the

1 governmental interest?

2 MR. WALLACE: Well, I am not sure that I can
3 formulate it in an abstract way other than to use what the
4 Court has used, that you examine the claim that is made
5 under the free exercise clause, and the nature of the
6 government's interest, and make a determination. This claim
7 is quite different from many others that have been before
8 the Court, and we have tried to describe some of those
9 differences in our brief.

10 I don't really think that the case can be answered
11 with an abstract standard.

12 QUESTION: Congress attempted to provide some
13 relief for these people, did it not?

14 MR. WALLACE: It did provide an exemption from the
15 self-employment tax, which we have referred to in our brief,
16 but it was very careful in providing that exemption to limit
17 it only to the self-employment tax, and the committee report
18 specifies that the committee did not want to go beyond that
19 and compromise the principle that social security
20 contributions are not to be a voluntary matter beyond that
21 narrow area.

22 QUESTION: On the constitutional point, though, if
23 he believes it is a sin for him to pay himself, apparently
24 he also believes that it is a sin for him to pay for workers
25 who are now working on his farm.

1 MR. WALLACE: Well, the claim does embrace the
2 employees' share of the tax as well as the employer's share.
3 Under the social security laws, both the employer and the
4 employee are responsible for part of the tax, although as it
5 happens in this case, since he did not withhold anything
6 from the wages of the employees, he himself was responsible
7 for the entire tax.

8 QUESTION: Mr. Wallace --

9 MR. WALLACE: He has to pay whether he withholds
10 or not.

11 QUESTION: Do you think the exemption with respect
12 to self-employed Amish runs afoul of the establishment
13 clause?

14 MR. WALLACE: We do not think so, Mr. Justice.

15 QUESTION: Why?

16 MR. WALLACE: Although there is admittedly some
17 tension with it, but we think it is a permissible
18 accommodation of values, of religious values that the
19 government can make under a number of this Court's cases
20 that do permit some area of legislative discretion in
21 accommodating religious beliefs with the general
22 requirements of the law, and indeed, we think that the
23 exemption could be extended to the employment taxes if
24 Congress saw fit to do so.

25 QUESTION: But at present, does it work this way,

1 that the exemption applies to an individual, but if he
2 engaged or employed -- how many people before the exemption
3 would not be applicable?

4 MR. WALLACE: It is not applicable to the
5 employment relationship at all.

6 QUESTION: So if he had a single employee, the
7 exemption would not be applicable?

8 MR. WALLACE: To the employment relationship.

9 QUESTION: Yes.

10 MR. WALLACE: It is still applicable to his own
11 self-employment.

12 QUESTION: Of course.

13 MR. WALLACE: Even though it is not applicable to
14 the wages that he pays to his employee.

15 QUESTION: Mr. Wallace, perhaps you have stated
16 it, but if so, I have missed it. What is the situation as
17 to the employees here? Are they also old order Amish?

18 MR. WALLACE: The stipulation so states, although
19 it doesn't say how many there are. The record just doesn't
20 show that.

21 QUESTION: Would the case be different if they
22 were not?

23 MR. WALLACE: I think there would be less basis
24 for the claim that there was a right to exclude them under
25 the free exercise clause from social security coverage.

1 Yes, Mr. Justice.

2 QUESTION: Is it not true that some of the old
3 order Amish have left the faith?

4 MR. WALLACE: So far as I am aware --

5 QUESTION: The record doesn't show this?

6 MR. WALLACE: The record does not show this. The
7 committee report which Congress issued and that it enacted
8 the exemption for self-employment in 1965 did emphasize that
9 the proposed exemption in their belief must be on the basis
10 of individual choice to exclude all members of a religious
11 group from social security coverage would not take account
12 of the variances in individual beliefs within any religious
13 groups, and would deny social security protection to those
14 individuals who want it.

15 Among the old order Amish, for example, there have
16 been some indications of a change in attitude towards social
17 security, particularly among the younger people. Some
18 members of the old order Amish who have become eligible for
19 social security benefits have claimed the benefits.

20 QUESTION: Is this Report Number 213?

21 MR. WALLACE: That is Number 213. However,
22 nothing in the record of this case indicates anything of
23 this kind.

24 QUESTION: Even though you may not have made it as
25 sharply as I am about to state it, I took the sum and

1 substance of your position in the brief to be that the
2 government of the United States can't run a nationwide
3 program like tax collection or social security and one like
4 this if there are these ad hoc exceptions, except as
5 Congress explicitly makes them. Is that pretty close to
6 your position?

7 MR. WALLACE: Yes, it is, Mr. Chief Justice.

8 QUESTION: Well, then, how do you distinguish
9 Sherbert against Verner, or the Thomas case of last year?

10 MR. WALLACE: Well, we discuss those cases in our
11 brief.

12 QUESTION: I realize you do.

13 MR. WALLACE: They involved much more serious
14 problems for the claimant of the free exercise right,
15 choosing between, in the Sherbert case, observance of one's
16 Sabbath or one's economic livelihood, and in the Thomas case
17 something very comparable, because of the loss of employment
18 that was involved there, in order not to perform something
19 that one believed could not be performed.

20 Here, the Amish, who do not want to be within the
21 social security program, of course, do not have to accept
22 benefits, and there is no indication that they believe that
23 the furnishing of benefits to others in the national
24 community who are covered by the program is in any way in
25 conflict with their beliefs. Their claim really is that

1 there is, as they see it, an implication in their paying the
2 tax that somehow they will become eligible for the benefits,
3 and that indicates the sin of not planning to take care of
4 their own community.

5 But that is, with all respect to their belief, a
6 construction that they choose to put on the payment. So far
7 as Congress is concerned, this is just a generally
8 applicable tax on a commercial relationship, and the
9 employment relationship for engaging in commercial activity.

10 QUESTION: Well, couldn't you say the same thing
11 about Thomas last year?

12 MR. WALLACE: Well, in the Thomas case, he was
13 performing work that was contrary to his religious belief,
14 and by denying him unemployment compensation rights for
15 giving up the job for that reason, there would be economic
16 pressure on him to engage in work that is contrary to his
17 religion. I realize --

18 QUESTION: I take it, Mr. Wallace, you suggest
19 here that they can pay the taxes; that doesn't stop them
20 from continuing to support their own people.

21 MR. WALLACE: That is correct, Mr. Justice.

22 QUESTION: Which is the distinction from Sherbert
23 and Thomas that you make.

24 MR. WALLACE: It is the essence of the distinction
25 that we make.

1 QUESTION: They don't lose what Thomas and Verner,
2 or Sherbert, or whoever it was, would have lost.

3 MR. WALLACE: Yes.

4 QUESTION: But that suggests that in the scale of
5 values the economic one is the top one rather than the
6 religious belief of the particular claimant.

7 MR. WALLACE: Well, all religious beliefs as
8 beliefs stand on the same footing under the Constitution. A
9 religious group might believe that it is a sin to pay any
10 tax to secular authority, and that as a belief would stand
11 on the same footing as the interpretation of social security
12 tax payments that this group chooses to put on those
13 payments, but that doesn't mean that there is a
14 constitutional right to act on those beliefs and to refuse
15 to pay the taxes that are levied on non-religious grounds
16 generally in the community on the basis of commercial
17 activities.

18 QUESTION: Mr. Wallace, may I ask, is there
19 anything in this record that suggests that the Amish would
20 stop supporting their own people if they lost this case?

21 MR. WALLACE: Not at all. Not at all, Your Honor.

22 QUESTION: Nothing in the stipulation or otherwise?

23 MR. WALLACE: Not at all, and --

24 QUESTION: Is there anything to prevent them from
25 having all of the social security or the other payments of

1 this kind come back to a fund, the same kind of a fund that
2 the Amish use to take care of their needy, in other words,
3 so that it wouldn't come back to assist any individual
4 except through the group operation?

5 MR. WALLACE: There is nothing in the law, Mr.
6 Chief Justice, that would prevent a member of the Amish
7 faith who is eligible to receive social security payments
8 from receiving those payments and paying them over to a
9 general fund in the community to care for members of the
10 community. There may be an impediment to doing that in his
11 religious faith, but there is nothing in the law that
12 requires him to receive the benefits at all if he chooses
13 not to receive the benefits. This is a right protected by
14 the free enterprise clause.

15 QUESTION: Mr. Wallace, I would like to ask you to
16 identify what the compelling interest is of the government
17 in requiring the Amish to pay into the social security
18 system under the stipulated facts, which indicate that the
19 Amish will not be withdrawing from the fund, and there is
20 very little in the record that I can find that would focus
21 on the real impact on the government of allowing them not to
22 pay.

23 MR. WALLACE: Well, Justice O'Connor, we don't
24 really, as we view the case, start from the standpoint that
25 we need to show a compelling interest, but however one

1 characterizes that, the interest is really one set forth in
2 one of the classic opinions of Justice Stone, writing for
3 this Court in one of the cases in Volume 301 of the U. S.
4 Reports that upheld the constitutionality of the Social
5 Security Act itself, and that established that the payments
6 as Congress characterized them are taxes, and not insurance
7 premiums, as is sometimes confused, and on Page 28 of our
8 brief, we have set out the key paragraph of that opinion,
9 and I would like to, if I may, turn our attention to it,
10 because it seems to me to go to the heart of this case.

11 We don't really feel that the tax, that Congress's
12 power to tax need be justified in terms of whether the Amish
13 will be withdrawing benefits from the fund, the general fund
14 that is collected, a tax as at that time Mr. Justice Stone
15 said for the Court, "is not an assessment of benefits. It
16 is a means of distributing the burden of the cost of
17 government. The only benefit to which a taxpayer is
18 constitutionally entitled is that derived from his enjoyment
19 of the privileges of living in an organized society,
20 established and safeguarded by the devotion of taxes to
21 public purposes. Any other view would preclude the levying
22 of taxes except as they are used to compensate for the
23 burden on those who pay them, and would involve the
24 abandonment of the most fundamental principle of government,
25 that it exists primarily to provide for the common good."

1 There are many contributions made in the community
2 at large that contribute toward the maintenance of the way
3 of life that the Amish have fashioned, and that under
4 Wisconsin against Yoder they have a constitutional right to
5 maintain as they choose to fashion it, but the fact is, it
6 is not only through their efforts that that way of life can
7 be maintained. There are others in the community in general
8 who are willing, for example, to train themselves in the
9 advanced technology that is needed to defend the country in
10 today's world, and to protect the constitutional form of
11 government which provides for the free exercise of religion,
12 and others who are willing to serve in the armed forces, et
13 cetera.

14 The fact that the free exercise clause confers
15 upon a community such as the Amish the right to maintain the
16 way of life that they choose to fashion for their community
17 does not negate the obligations they have to the larger
18 community, including the obligation to pay generally
19 applicable taxes on commercial activities.

20 QUESTION: How does this square with Thomas of
21 last year?

22 MR. WALLACE: Well, I realize that in your view,
23 Justice Rehnquist, it probably doesn't.

24 QUESTION: I don't think it does, but I mean
25 taking the majority in both cases.

1 MR. WALLACE: Well, I think the burden involved in
2 Thomas, as Justice Brennan pointed out, was of greater
3 magnitude, and here, there is nothing in the payment of
4 taxes that prevents the Amish from maintaining their system
5 of providing for the social welfare of the members of their
6 own community through their own efforts, which is their
7 basic religious teaching, even though the --

8 QUESTION: The Court -- were you finished?

9 MR. WALLACE: I am sorry, Mr. Chief Justice.

10 QUESTION: About 25 years ago -- I could not
11 identify the cases -- was there not a series of cases of
12 Jehovah's witnesses and other groups, perhaps Quakers, who
13 are strongly opposed to war in any form, who sought to have
14 the aggregate amount of the income taxes levied on them
15 segregated between that part which went to the maintenance
16 of the military and the civilian? I think the Court did not
17 decide any of them, but regularly certiorari was denied in
18 those cases, for whatever that is worth.

19 MR. WALLACE: That is correct, Mr. Chief Justice.
20 One of the most prominent of those more recent cases in
21 which certiorari was denied in 1970 is a case in which we
22 have set out a quotation in our reply brief, on Page 3,
23 called Autenrieth v. Cullen.

24 In that case a large number of people with very
25 serious, they claimed, conscientious scruples against the

1 activities that the government was engaged in in Vietnam
2 wished not to pay the share of their income taxes that would
3 be attributed to supporting that activity, and the Court of
4 Appeals for the Ninth Circuit rejected that claim, and we
5 have quoted a passage of its opinion, and this Court denied
6 certiorari. There are other cases collected in our
7 principal brief.

8 In a way, this is a more serious claim of
9 conscience than we are involved in in this case, and I don't
10 mean in any way not to respect the claim that is being made
11 here, but there is no claim in this case that the religious
12 views of the Amish are offended by the use to which these
13 moneys will actually be put, to take care of the social
14 welfare problems of other persons in the general community,
15 whereas in many of these other cases in which people have
16 claimed a conscientious scruple against paying taxes, they
17 found it contrary to their conscience to have the money
18 spent the government was planning to spend the money. Here,
19 the money need not be spent in a way that would offend their
20 religious beliefs, but it is the payment of the tax itself
21 which they construe to be a sin.

22 Now, I do think it is important to keep in mind
23 that while the social security laws do use the word
24 "insurance" and use a trust fund concept, the payments that
25 are involved here have from the beginning been recognized to

1 be taxes and not insurance premiums, as they are sometimes
2 loosely called. This may be very obvious on the facts of
3 this case in which the payments are due from the employer
4 but the credit is to go toward the account of the employee,
5 for himself or his survivors. Nonetheless, there can be
6 some confusion about this.

7 On Page 16 of the Appellee's brief he refers to
8 this as the payment of insurance premiums. Any possible
9 doubt on this subject was dispelled by a decision of this
10 Court not cited in any of the briefs which I want to call to
11 the Court's attention, and I called it to counsel's
12 attention, Fleming against Nester, decided in 1960, 363 US
13 603, which made it clear that there is no accrued property
14 right under the system, that it is, as Congress provided, in
15 a savings provision subject to change and adjustment through
16 the normal exercise of the Article I legislative powers.

17 From the beginning, the cases have construed the
18 payments due as taxes, as Congress characterized them.

19 I would like to reserve the balance of my time,
20 please.

21 CHIEF JUSTICE BURGER: Very well.

22 Mr. Caiazza?

23 ORAL ARGUMENT OF FRANCIS X. CAIAZZA, ESQ.,

24 ON BEHALF OF THE APPELLEE

25 MR. CAIAZZA: Caiazza.

1 Mr. Chief Justice, and may it please the Court,
2 after listening to the questions asked by the Court and the
3 government's responses thereto, I think I would find it
4 necessary really to depart from the prepared argument that I
5 have made, because I feel that in arguing a question
6 involving -- excuse me -- questions involving the freedom of
7 religion certainly is a question that has to come from the
8 feelings of the individual practitioner who is arguing the
9 question.

10 Perhaps it is not permissible and proper for an
11 attorney to become so personally involved with a particular
12 issue. Maybe I have overstepped my bounds. But I think the
13 Court has to remember in this case that religion is
14 something like beauty. Beauty is in the eyes of the
15 beholder. I think that religion is the same thing. I think
16 religion also has to be in the eyes of the believer.
17 Religion means different things to different people. To
18 some people, it may mean go to church on Sunday, or the
19 Sabbath. Perhaps it has a social connotation to other
20 people. But to some people the basic and the underlying
21 principle of religion is the salvation of one's soul.

22 That basically is what the Amish people are
23 about. It is pretty hard, really, to describe the Amish
24 people without living with them, without going to see them,
25 visiting their homes, talking to them, and I think by doing

1 that you perhaps gain an insight into what the Amish people
2 are about.

3 QUESTION: In the Thomas case last spring, didn't
4 the Court say rather clearly that the judges can't get into
5 the business of parsing out the doctrinal differences within
6 a particular faith?

7 MR. CAIAZZA: That is true, Mr. Chief Justice, but
8 I think that is very applicable here, too, because I think
9 in this particular case, what the government has said, that
10 it is really a sin, they admit that it is a sin on behalf of
11 the Amish people to pay into the system, but then what they
12 go on to do is to say, well, that is not that great of a
13 sin. The Amish people, pure and simple, live by the Book of
14 Timothy. The Book of Timothy, of course, paraphrased, says,
15 if you don't take care of your own neighbors, you are worse
16 than an infidel. That is the basic underlying principle of
17 this particular case. That is the belief of the Amish
18 people.

19 QUESTION: But isn't this whole social security
20 system an organized way for a country of 200 million people
21 to try to take care of their neighbors in an organized,
22 institutionalized way?

23 MR. CAIAZZA: That is true, but there are
24 exceptions to that. As an example, Federal employees are
25 not part of the social security system. They have their own

1 system to take care of themselves. The Amish have their own
2 system, which is the best system I have ever seen. They
3 take care of their own. If they have tragedy, they are
4 there to take care of them. About two weeks ago --

5 QUESTION: Counsel, does the record show that any
6 employees of these Amish were not Amish?

7 MR. CAIAZZA: No, all of the employees of Mr. Lee
8 were members of the old order Amish.

9 QUESTION: Well, of course, the stipulation
10 doesn't say that in so many words, does it?

11 MR. CAIAZZA: No, it does not, but there were no
12 -- I think that it does. I think the stipulation states
13 that all of the employees were members of the old order
14 Amish. Mr. Lee did not employ anybody who was not a member
15 of his own sect.

16 QUESTION: Mr. Caiazza, I gather from what you
17 have said that if you lose this case, the Amish will not
18 stop following their religious principle which, as you say,
19 underlies this whole belief of taking care of their own.

20 MR. CAIAZZA: They will not -- right.

21 QUESTION: They will continue.

22 MR. CAIAZZA: They would continue to take care of
23 their own. There is no question about that.

24 QUESTION: Well, is there anything in the record
25 at all that indicates that the payment of these taxes in any

1 wise actually burdens their ability to take care of their
2 own?

3 MR. CAIAZZA: No, but I think it burdens their
4 religious belief. I think that is the issue. Again, they
5 do consider it a very serious sin to pay into the system,
6 because what they are doing is denying their faith in the
7 destiny of God. They believe very frankly in the destiny of
8 God, that God will --

9 QUESTION: Does that suggest that it is a sin of
10 such consequence that entirely without reference to their
11 ability to take care of their own, it is an offense to their
12 religion to pay --

13 MR. CAIAZZA: Yes. I think -- I feel very
14 strongly about that. I think that once a particular group
15 of individuals such as the Amish establish the fact that
16 certain conduct is sinful, and that opinion is a sincere
17 opinion such as the Amish people have, I don't think this
18 Court or the government or anybody else can question the
19 sincerity of that belief, and attach a sin to it as being
20 mortal or venial in nature.

21 QUESTION: Well, I didn't understand that the
22 government was questioning at all, and certainly I do not,
23 the sincerity of the belief.

24 MR. CAIAZZA: They weren't questioning the
25 sincerity of the belief, but they are saying the sin would

1 simply be an incidental sin. It wouldn't be that great.

2 QUESTION: What about the cases that we dicussed
3 with Mr. Wallace? In the Ninth Circuit case, it was really
4 a political belief. They were -- the objectors were
5 objecting to a particular war. But in the earlier cases,
6 where the Court declined to review similar holdings, there
7 were religious beliefs asserted against all wars. Now, that
8 is certainly a profound belief, is it not?

9 MR. CAIAZZA: I think it would be.

10 QUESTION: And yet these people in these religious
11 groups were required to pay their share of the cost of the
12 World War Two and all other military activities. How do you
13 distinguish that, if you think you need to distinguish it?
14 Because the Court didn't decide it. We merely decided not
15 to review it.

16 MR. CAIAZZA: I think I do need to distinguish
17 that, and I think you have to look at the compelling state
18 interest. I think the compelling state interest in those
19 instances was much different than the compelling state
20 interest here. The government has said that the compelling
21 state interest is the broad participation of individuals in
22 the social security laws. I don't think that -- that is
23 what the compelling state interest as far as --

24 QUESTION: But you do then apparently concede that
25 the government interest may be such in a particular case

1 that would override the free exercise infringement?

2 MR. CAIAZZA: Very definitely I do.

3 QUESTION: So that it is a matter of -- you

4 concede it is a matter of balancing the competing interests?

5 MR. CAIAZZA: Yes. I think very definitely.

6 QUESTION: And you simply say it should be

7 balanced in your favor here.

8 MR. CAIAZZA: Yes, I do.

9 QUESTION: What about the Federal income tax?

10 MR. CAIAZZA: I think the Federal income tax is

11 different. I think that the argument has been made --

12 QUESTION: If it were a sin under some religious

13 beliefs to pay the income tax, would you say that the income

14 tax could nevertheless be collected?

15 MR. CAIAZZA: Yes. Again, I think you have to

16 distinguish again between social security and the federal

17 income tax.

18 QUESTION: And the property tax?

19 MR. CAIAZZA: The Amish people pay all taxes.

20 They pay income taxes, they pay all property taxes, they pay

21 every tax you and I pay.

22 QUESTION: Are any of those deemed -- Is the

23 payment of any of those taxes deemed to be a sin?

24 MR. CAIAZZA: No.

25 QUESTION: Mr. Caiazza, suppose we come to the

1 day, as from reading the newspapers we may, when we have to
2 fund the social security system in part, at least, out of
3 general income taxes? What then would be the Amish position?

4 MR. CAIAZZA: I think that is, of course, a
5 different case than we have here, but I think that -- again,
6 I think they would have to take the position that it would
7 still be a sin. I think if that happens, I think you have
8 the compelling state interest shifting.

9 QUESTION: You are familiar, I know, with the
10 polygamy decisions and the peyote decisions and the like --

11 MR. CAIAZZA: Yes, I am.

12 QUESTION: -- where because of their illegality,
13 as I recall it, those cases held that free exercise was not
14 protected.

15 MR. CAIAZZA: Yes, sir.

16 QUESTION: How do you distinguish those cases?
17 Non-payment of FUTA and FICA taxes is a crime, isn't it?

18 MR. CAIAZZA: That's true.

19 QUESTION: It can be a crime?

20 MR. CAIAZZA: Yes, it can be.

21 QUESTION: How do you distinguish those old cases?

22 MR. CAIAZZA: Because I think again, we have to
23 again, I think, look at the compelling state interest. I
24 think that the crimes such as you have cited, if they were
25 permissible under the laws of our country, I think it could

1 lead to chaos. I don't think that is true as far as the
2 Amish people are concerned, when you consider the social
3 security tax and the number of Amish people that you have in
4 this country.

5 QUESTION: How can you say there would be chaos if
6 people practiced the Mormon faith as it was some decades
7 ago, where it was a sin not to take several wives, for
8 example? Would that cause chaos?

9 MR. CAIAZZA: Well, maybe I shouldn't use the word
10 "chaos", but what I --

11 QUESTION: Or say they smoke the peyote in a
12 ritual periodically. Would that cause chaos if it were
13 permitted?

14 MR. CAIAZZA: No, I don't think it would cause
15 chaos, and I would like to back up on that statement, but I
16 think that -- certainly I think that the result of the
17 practice of polygamy in this country would be much different
18 than the law not requiring the Amish people to pay into the
19 social security system.

20 QUESTION: Does your case turn on the fact that
21 they will not participate in the benefits, do you think?

22 MR. CAIAZZA: They never -- they do not
23 participate in the benefits.

24 QUESTION: Well, how can you guarantee that the
25 employees might not at some time be non-members of the sect

1 or might leave the sect before they become eligible for
2 benefits?

3 MR. CAIAZZA: They may leave the sect --

4 QUESTION: Because there are people who leave the
5 faith, are there not?

6 MR. CAIAZZA: Yes, there are, very definitely.
7 There are people that leave the faith. But I think when you
8 read Mr. Chief Justice Burger's opinion in the Yoder case,
9 he alludes very clearly to the fact that the Amish children
10 in the Yoder case had to be protected, that if they went to
11 school beyond the eighth grade in that particular case, that
12 they would be taught the ways of the world, and I think the
13 same thing is true here as far as -- the same reasoning
14 applies as far as the social security is concerned. If you
15 make social security payments eligible, if you make the
16 Amish people eligible to receive social security, that is
17 there for them to receive, they may receive it and then deny
18 their faith. That is what some of the older Amish people
19 are concerned about, and I think rightly so.

20 QUESTION: In other words, the taxpayer here is
21 concerned about protecting his employees from the temptation
22 of accepting welfare benefits later on?

23 MR. CAIAZZA: Yes, I would think so, and I think
24 that same reasoning applies in the Yoder case, as far as the
25 temptation of students going to school beyond the eighth

1 grade, and I think that is what the parents in Yoder were
2 concerned about, and that is what the Amish employers are
3 concerned about --

4 QUESTION: What would happen if another religion
5 pops up? We would have to change again, wouldn't we?

6 MR. CAIAZZA: I don't think that is a concern. If
7 another religion --

8 QUESTION: Why not?

9 MR. CAIAZZA: If another religion such as the
10 Amish popped up, I think the same reasoning would apply.

11 QUESTION: I didn't say such as the Amish.
12 Another religion would pop up and say, it's a sin to pay
13 income tax.

14 MR. CAIAZZA: I think that the Amish people date
15 back --

16 QUESTION: I am not talking about old.

17 MR. CAIAZZA: Well, I --

18 QUESTION: They would say, we date back, too.

19 MR. CAIAZZA: Yes, they would date back, and that
20 same reasoning could apply.

21 QUESTION: And we would have how many different
22 tax systems in this country?

23 MR. CAIAZZA: I just don't think that that --

24 QUESTION: Well, isn't everybody is striving for a
25 uniform tax system.

1 MR. CAIAZZA: I can't see where that is a reality
2 in this particular case, because I don't think --

3 QUESTION: Why isn't it a reality if we say, you
4 are just like everybody else?

5 MR. CAIAZZA: Because I think that the Amish
6 people predate back to the 16th century in Switzerland.
7 They came to this country for religious freedom. They have
8 established this history from the 16th century.

9 QUESTION: Didn't some other people come here for
10 religious freedom, too?

11 MR. CAIAZZA: I understand that, but I think that
12 the Amish people can predate their history back to the 16th
13 century. If there is another religious faith --

14 QUESTION: You are not asking that the Amish
15 people be given a preferred status under the First
16 Amendment, are you?

17 MR. CAIAZZA: No, I am not.

18 QUESTION: But certainly the Amish and the Mormon
19 faith both go back a long way in their belief that a
20 practice proscribed by the Congress was illegal.

21 MR. CAIAZZA: That's true.

22 QUESTION: And nonetheless, this Court sustained
23 the Congressional action.

24 MR. CAIAZZA: Yes. I think again if we are going
25 back to the compelling state interest, I think that is what

1 is important here. I think we have to look at the
2 compelling state interest, and you have to, I think, ask
3 your question whether or not the state interest is
4 justified. In my opinion, it is not justified in this
5 particular case when we look at the Amish payment into the
6 social security system.

7 QUESTION: How do we decide whether a compelling
8 state interest is justified, or not? Do the nine of us just
9 get in a room and flip a coin?

10 MR. CAIAZZA: Well, I think you have to look at
11 what the purpose of the social security system is. I think
12 this is where the compelling state interest comes into
13 play. The Amish people take care of themselves. I think
14 the compelling state interest is whether or not the Amish
15 people as a group have the means to care for themselves.
16 They have taken care of that compelling state interest
17 themselves. I think that is what is important.

18 They do have a system whereby they take care of
19 their older people, they take care of their younger people,
20 their sick people. They do it themselves. That is the
21 compelling state interest, I think. Can they take care of
22 the situation themselves? They have done that since the
23 16th century. They have their own social security system.
24 I think that is what is important.

25 The compelling state interest is, in my mind,

1 anyway, as far as the Social Security Act is concerned, is
2 to take care of older people, aged people, people that are
3 disabled. They do that themselves. They have taken care of
4 the compelling state interest themselves with their own
5 actions and by their own beliefs based upon their belief in
6 God and the destiny of God.

7 QUESTION: I take it what you are saying to us is
8 that they have their own little social security system and
9 insurance within their own church organization.

10 MR. CAIAZZA: They do.

11 QUESTION: Well, now, what is to prevent them from
12 having all the returns which come to individual Amish paid
13 into that fund? Would that be regarded as tainted money,
14 because it has gone into the government and back into the
15 Amish fund?

16 MR. CAIAZZA: I would think that it would be,
17 because I think that what they are doing by paying into the
18 system is denying their belief in the destiny of God. That
19 is what is important.

20 QUESTION: Well, when they get it back, haven't
21 they washed that out?

22 MR. CAIAZZA: They don't really take care of each
23 other, though, by the use of moneys. What they do is, they
24 take care of each other by the use of their physical labor.

25 QUESTION: They must use money, too, I would think.

1 MR. CAIAZZA: They definitely do. Of course, they
2 need money, like anybody else, in order to subsist, but I
3 think that the -- I think that the important situation is
4 the fact that when they do pay into the system, what they
5 are doing is denying their belief that their future is
6 guided by the destiny of God.

7 QUESTION: Mr. Caiazza, I am not clear yet whether
8 you would take the same position you are taking if the
9 employees were not Amish. Would it still be a sin to pay
10 the tax, the social security tax?

11 MR. CAIAZZA: If the employee of Mr. Lee was not
12 Amish?

13 QUESTION: Correct.

14 MR. CAIAZZA: All right. The employer, of course,
15 has his half to pay and the employee has his half to pay.

16 QUESTION: Yes. So would your argument still be
17 that it is a sin to pay the tax?

18 MR. CAIAZZA: I think it would be a sin to pay the
19 employer's half. It would not be a sin to pay the
20 employee's half. As a matter of practicality, the Amish
21 people just employ old Amish. They are a very close-knit
22 community. They --

23 QUESTION: But it would be your position that even
24 if non-Amish employees were hired, that it would still
25 constitute a problem?

1 MR. CAIAZZA: Yes, it would.

2 QUESTION: Now, would that not in effect mean that
3 the government is running into establishment clause
4 problems, and is in effect favoring the Amish and enabling
5 them to compete in a manner that other people don't have to
6 contend with?

7 MR. CAIAZZA: Of course, there is a lot of tension
8 between the establishment clause and the free exercise
9 clause. I think when you consider the number of Amish
10 people there are in this country, I think when you consider
11 their general practices of Amish people working together and
12 not employing members who are not members of the old order
13 Amish, I don't think you really run into that question.

14 If the situation did arise whereby an Amishman did
15 hire an individual who was not a member of the Amish faith,
16 yes, you would have a problem, but as a matter of
17 practicality, that just does not come up because they are a
18 very close community. They stay within their own bounds.

19 QUESTION: Wouldn't you have a similar problem of
20 larger magnitude if the government chose to tax, say, the
21 wine that people of Jewish faith use in their religious
22 rituals, or the people of the Christian faith use in their
23 religious rituals?

24 MR. CAIAZZA: If you would tax the wine that they
25 use?

1 QUESTION: Yes.

2 MR. CAIAZZA: I really don't know how to answer
3 that question. I would say that, yes, you would, if there
4 were taxes that was placed upon the wine that, let's say,
5 was used at a Catholic mass. I would not know the reason
6 for legislation such as that, but I think that you could run
7 into the same problem if there were taxes placed upon the
8 wine. Perhaps the problem becomes more paramount if the
9 Catholic priest couldn't buy the wine because of the tax. I
10 think you would run into a problem there. But if he could
11 still purchase the wine, I can see nothing wrong with that.

12 QUESTION: Even though it is heavily taxed?

13 MR. CAIAZZA: Yes, which it is, at least where I
14 come from.

15 QUESTION: Counsel, many people think it is
16 immoral to fund abortions from the Medicaid component of
17 social security. Do you think they would have the same
18 right that you are contending for here today?

19 MR. CAIAZZA: Certainly they would have the same
20 right to present their case. I haven't really thought about
21 that in great detail. I would have to give you a quick
22 answer. I would say yes, they would have that right.

23 QUESTION: They would have the same right.

24 MR. CAIAZZA: Yes, to present their case.

25 QUESTION: Quite a few people entertain that view.

1 MR. CAIAZZA: I would hate to comment myself on
2 what direction I would go in, but I would certainly think
3 that they would have the right to present that issue, but
4 again I think we get back to the compelling state interest.

5 QUESTION: It would have a devastating effect on
6 the social security tax, at least on the Medicaid component,
7 if that view prevailed, wouldn't it?

8 MR. CAIAZZA: Yes, sir.

9 I realize that probably the greatest problem with
10 this case is the fact that we are dealing with taxes. Of
11 course, social security, I feel, in my mind, is more of an
12 insurance than a tax. Of course, the name of the Act is the
13 Federal Insurance Contribution Act. It is set up in a trust
14 fund, and I think that the moneys are distributed basically
15 the same way that insurance carriers distribute annuity
16 funds.

17 QUESTION: What about that old decision of Justice
18 Stone? Wrong?

19 MR. CAIAZZA: Well, I would have to say that --

20 QUESTION: It was wrong.

21 MR. CAIAZZA: Of course, that does present
22 problems, but I think that again --

23 QUESTION: Well, Fleming is against you, too, on
24 that point, isn't it?

25 MR. CAIAZZA: Yes, sir.

1 QUESTION: That is wrong, too. Right? You say
2 that is wrong, too?

3 MR. CAIAZZA: I would say, yes, in my opinion, it
4 is.

5 QUESTION: Well, then, just to make it clear, you
6 do take the position that if social security were financed
7 out of general revenues, that you could make the same
8 argument about the regular income tax?

9 MR. CAIAZZA: I don't really think so. I think if
10 social security was financed out of general revenues, I
11 think your compelling state interest would be different.
12 Social security funds are set aside. Many of the Amish
13 people are against many social welfare programs that are
14 really financed by general revenues which come from income
15 tax which they pay, but I don't think that it would be fair
16 or proper to place on the government the responsibility to
17 distinguish where everybody's tax dollar goes on a dollar by
18 dollar basis.

19 That is not true as far as the Social Security Act
20 is concerned. The money goes into the system and is paid
21 out of the system.

22 QUESTION: You are saying the legal question will
23 be different, but would it not be equally a sin for the
24 Amish to pay income tax if the income tax were used to
25 finance welfare programs that would be available to some

1 members --

2 MR. CAIAZZA: Yes. I think -- I think that it
3 would also be -- it also could be a sin, but I think again --

4 QUESTION: Could be? It would be, if I understand
5 you.

6 MR. CAIAZZA: It would be a sin, but I think you
7 get back again to the compelling state interest.

8 QUESTION: Then you are saying the governmental
9 interest would override.

10 MR. CAIAZZA: It would override it. That is my
11 position.

12 I forgot where I was.

13 CHIEF JUSTICE BURGER: Very well.

14 Do you have anything further, Mr. Wallace?

15 ORAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.,

16 ON BEHALF OF THE APPELLANT - REBUTTAL

17 MR. WALLACE: I just would like to point out
18 Footnote 11 of our brief, which shows that we long since
19 have reached the point that Mr. Justice Brennan posed in a
20 question where federal funds out of the general revenues are
21 being used for social welfare programs, such as the aid to
22 families with dependent children program, but also they are
23 being used for a supplemental program within the Social
24 Security Act itself that we have documented there.

25 Other than that, we will rest on our brief, unless

1 there are further questions.

2 CHIEF JUSTICE BURGER: Thank you, gentlemen. The
3 case is submitted.

4 (Whereupon, at 10:51 o'clock a.m., the case in the
5 above-entitled matter was submitted.)

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UNITED STATES vs. EDWIN D. LEE

NO. 80-767

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