

The Burger Court Opinion Writing Database

Regan v. Taxation with Representation of Washington

461 U.S. 540 (1983)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



Supreme Court of the United States
Washington, D. C. 20543

May 13, 1983

CHAMBERS OF
THE CHIEF JUSTICE

Re: No. 81-2338) - Donald T. Regan v. Taxation with
Representation of Washington
82-134) - Taxation with Representation of Washington v.
Donald T. Regan

Dear Bill:

I join.

Regards,



Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 16, 1983

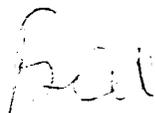
Re: Nos. 81-2338 & 82-135

Regan v. Taxation with
Representation, etc.

Dear Harry,

Please join me in your concurring
opinion.

Sincerely,



Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

May 16, 1983

Re: Nos. 81-2338 & 82-135

Regan v. Taxation with
Representation, etc.

Dear Bill,

Please join me.

Sincerely,



Justice Rehnquist

Copies to the Conference



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

April 18, 1983

Re: 81-2338 and 82-134 -

Regan v. Taxation with Representation of Washington
Taxation with Representation of Washington v. Regan

Dear Bill,

Please join me.

Sincerely,

Handwritten signature of Byron R. White.

Justice Rehnquist

Copies to the Conference

cpm

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 16, 1983

Re: No. 81-2338 and 82-134-Regan v. Taxation With
Representation and Taxation With Representation
v. Regan

Dear Harry:

Please join me in your concurring opinion.

Sincerely,

T.M.
T.M.

Justice Blackmun

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 28, 1983

Re: No. 81-2338 - Regan v. Taxation with Representation
No. 82-134 - Taxation with Representation v. Regan

Dear Bill:

Although I voted at conference to affirm in part in this case, I am persuaded that, assuming you have correctly described the IRS' requirements with respect to dual incorporation, Cammarano rather than Speiser and Perry indeed controls here. My current inclination is to join your opinion at least insofar as the First Amendment is concerned. I may add a few words setting forth my views of the constitutional consequences should the IRS attempt to impose "stringent requirements that are unrelated to the congressional purpose of ensuring that no tax-deductible contributions are used to pay for substantial lobbying," contrary to the assumptions in the majority opinion.

I also agree with the result and much of your reasoning in the equal protection portion of the case. I wonder if, however (although you already have a Court and are understandably reluctant to make any changes), you could be persuaded to modify two passages that, in my view, are superfluous to decision here and are arguably inconsistent with past cases and the logic of your opinion at other points.

First, the carryover paragraph at 8-9 may suggest that the unequal provision of subsidies for speech or other activity protected by the First Amendment is "not open to judicial review," but is instead entrusted to Congress to "disallow ... as it chooses." Extremely limited review of unequal subsidies or taxes is appropriate in the context of a tax on coconut oil, like that at issue in Cincinnati Soap, to the payment of sugar bounties, like that at issue in United States v. Realty Company, and to the conveyance to the States of title in submerged lands, like that at issue in Alabama v. Texas. But the application of this principle to unequal subsidies of First Amendment activities seems to me to be both unprecedented and inconsistent with the cases you rely on in the very next paragraph. In Buckley v. Valeo, although it did not apply strict scrutiny, the Court approved the unequal funding of political speech at issue only after determining that it "further[ed] a significant governmental interest," 424 U.S., at 96, and that it was "surely not an unreasonable way" to accomplish legitimate government objectives. Id., at 106.

I would much prefer that the carryover paragraph at 8-9 be eliminated. I think you would lose nothing by so doing, because, ultimately, you properly apply rational basis scrutiny anyway.

Second, at the bottom of page 9, I would be far more comfortable were the quotation from Maheer v. Roe modified. I agree that there is a basic difference between direct interference with speech and its unequal subsidization. But by stating that government may "encourage[] ... alternative activity consonant with legislative policy" subject to minimal review, the quoted passage may suggest that Congress enjoys broad discretion to use subsidies in order to encourage individuals or groups to engage in speech with particular content rather than speech with which Congress disagrees. While the Court has held that encouraging childbirth (and discouraging abortion) does not pose a constitutional problem, this stems from the nature of the underlying right. See Maheer, 432 U.S., at 471. The Court has held that the right to an abortion "implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds," id., at 474. But the Court has not sanctioned, without significant scrutiny, content-based discrimination in the First Amendment area, however it is effected.

I do not believe that you intend to suggest otherwise. As you observe at page 8, the subsidy at issue here does not encourage the choice of one "alternative action" over another, because the tax benefit is available to veterans' organizations regardless of the content of their speech and is unavailable to §501(c)(3) organizations whatever they choose to say (even for the benefit of veterans). The benefit to veterans here is based not on the content of the speech they are expected to engage in, but, as you say on page 10, on the "long standing policy of compensating veterans for their past contributions." A subsidy tied to expressing a particular viewpoint on an issue would raise problems far more serious than those raised by this case, as Cammarano itself clearly indicates, see 358 U.S., at 513 ("Nondiscriminatory denial of deduction from gross income to sums expended to promote or defeat legislation is plainly not "aimed at the suppression of dangerous ideas""), and as your draft recognizes at page 7 ("The case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to "aim[] at the suppression of dangerous ideas""). Yet the language quoted from Maheer might suggest that the same principles would apply.

I offer the following in lieu of the full passage from Maheer:

As we said in Maheer, "[c]onstitutional concerns are greatest when the State attempts to impose its will by force of law. ..." 432 U.S., at 476. At least where government does not discriminate invidiously in its provision of subsidies, cf. Cammarrano, supra, at 513, its "power to encourage actions deemed to be in the public interest is necessarily far broader." Maheer, supra, at 476.

If you can accept these suggestions, I shall join your opinion.

Sincerely,

A.G.B.

Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 11, 1983

Re: No. 81-2338 - Regan v. Taxation with Representation
No. 82-134 - Taxation with Representation v. Regan

Dear Bill:

I can live with your "halfway house," and shall join your opinion with the change you suggest. As I mentioned in my letter of April 28, I intend to circulate a short concurring opinion discussing the First Amendment consequences should the IRS attempt to impose stricter regulations than those you discuss in footnote 6. I also intend to add a few words about the equal protection holding. Even with the change you propose, I remain somewhat uneasy about the implications of this case.

Thank you for your careful attention to my concerns, and for accommodating me in part.

Sincerely,



Justice Rehnquist

cc: The Conference

Justice White
Justice Marshall
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Blackmun**

Circulated: **MAY 12 1983**

Recirculated: _____

[Handwritten scribbles and a large 'X' mark]

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-2338 AND 82-134

DONALD T. REGAN, SECRETARY OF THE
TREASURY, ET AL., APPELLANTS

81-2338

v.

TAXATION WITH REPRESENTATION OF
WASHINGTON

TAXATION WITH REPRESENTATION OF
WASHINGTON, APPELLANT

82-134

v.

DONALD T. REGAN, SECRETARY OF THE
TREASURY, ET AL.

ON APPEALS FROM THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[May —, 1983]

JUSTICE BLACKMUN, concurring.

I join the Court's opinion. Because 26 U. S.C § 501's discrimination between veterans' organizations and charitable organizations is not based on the content of their speech, *ante*, at 7-8, I agree with the Court that § 501 does not deny charitable organizations equal protection of the law. The benefit provided to veterans' organizations is rationally based on the Nation's time-honored policy of "compensating veterans for their past contributions." *Ante*, at 10. As the Court says, *ante*, at 7 and 9, a statute designed to discourage the expression of particular views would present a very different question.

I also agree that the First Amendment does not require

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 12, 1983

Re: No. 81-2338 - Regan v. Taxation with Representation
No. 82-134 - Taxation with Representation v. Regan

Dear Bill:

With the addition on your page 9 of the third draft, as set forth in your note of May 11, I join your opinion.

Sincerely,



Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 21, 1983

81-2338 Regan v. Taxation with Representation

Dear Bill:

Please join me.

Sincerely,



Justice Rehnquist

lfp/ss

cc: The Conference

Justice White
 Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Stevens
 Justice O'Connor

From: **Justice Rehnquist**

Circulated: APR 15 1983

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 81-2338 AND 82-134

DONALD T. REGAN, SECRETARY OF THE
 TREASURY, ET AL., APPELLANTS

81-2338

v.

TAXATION WITH REPRESENTATION OF
 WASHINGTON

TAXATION WITH REPRESENTATION OF
 WASHINGTON, APPELLANT

82-134

v.

DONALD T. REGAN, SECRETARY OF THE
 TREASURY, ET AL.

ON APPEALS FROM THE UNITED STATES COURT OF APPEALS
 FOR THE DISTRICT OF COLUMBIA CIRCUIT

[April —, 1983]

JUSTICE REHNQUIST delivered the opinion of the Court.

Appellee Taxation With Representation of Washington (TWR) is a nonprofit corporation organized to promote what it conceives to be the "public interest" in the area of federal taxation. It proposes to advocate its point of view before Congress, the Executive Branch, and the Judiciary. This case began when TWR applied for tax exempt status under § 501(c)(3) of the Internal Revenue Code, 26 U. S. C. § 501(c)(3). The Internal Revenue Service denied the application because it appeared that a substantial part of TWR's activities would consist of attempting to influence legislation, which is not permitted by § 501(c)(3).¹

¹ Section § 501(c)(3) grants exemption to:

"Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for

Justice Brennan
 Justice White
 Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Stevens
 Justice O'Connor

From: **Justice Rehnquist**

Circulated: _____

APR 21 1983

Recirculated: _____

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 81-2338 AND 82-134

81-2338 DONALD T. REGAN, SECRETARY OF THE
 TREASURY, ET AL., APPELLANTS
v.
 TAXATION WITH REPRESENTATION OF
 WASHINGTON

82-134 TAXATION WITH REPRESENTATION OF
 WASHINGTON, APPELLANT
v.
 DONALD T. REGAN, SECRETARY OF THE
 TREASURY, ET AL.

ON APPEALS FROM THE UNITED STATES COURT OF APPEALS
 FOR THE DISTRICT OF COLUMBIA CIRCUIT

[April —, 1983]

JUSTICE REHNQUIST delivered the opinion of the Court.

Appellee Taxation With Representation of Washington (TWR) is a nonprofit corporation organized to promote what it conceives to be the "public interest" in the area of federal taxation. It proposes to advocate its point of view before Congress, the Executive Branch, and the Judiciary. This case began when TWR applied for tax exempt status under § 501(c)(3) of the Internal Revenue Code, 26 U. S. C. § 501(c)(3). The Internal Revenue Service denied the application because it appeared that a substantial part of TWR's activities would consist of attempting to influence legislation, which is not permitted by § 501(c)(3).¹

¹Section § 501(c)(3) grants exemption to:

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 29, 1983

Re: Nos. 81-2338 & 82-134 Regan v. Taxation With
Representation

Dear Harry:

Thank you for your suggestions for the draft in this case. I think I share what I take to be your underlying concern, but my tentative reaction is that the opinion as it presently stands adequately accommodates the concern in the context of this case. The carryover paragraph at 8-9 seems to me expressly limited to this case by the quoted language "except in circumstances which here we are not able to find." Both that paragraph, and the quotation from Maier to which your suggestions are also addressed, seem to me limited by the statement at 7 that the case would be different if Congress were to discriminate invidiously in parceling out subsidies.

I will take another look at the suggestions when I have a little more time next week, but thought you would like a prompt reply.

Sincerely,



Justice Blackmun

cc: The Conference

Justice White
 Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Stevens
 Justice O'Connor

P
 P 4,5

From: **Justice Rehnquist**

Circulated: _____

Recirculated: APR 29 1983

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 81-2338 AND 82-134

DONALD T. REGAN, SECRETARY OF THE
 TREASURY, ET AL., APPELLANTS

81-2338

v.

TAXATION WITH REPRESENTATION OF
 WASHINGTON

TAXATION WITH REPRESENTATION OF
 WASHINGTON, APPELLANT

82-134

v.

DONALD T. REGAN, SECRETARY OF THE
 TREASURY, ET AL.

ON APPEALS FROM THE UNITED STATES COURT OF APPEALS
 FOR THE DISTRICT OF COLUMBIA CIRCUIT

[May —, 1983]

JUSTICE REHNQUIST delivered the opinion of the Court.

Appellee Taxation With Representation of Washington (TWR) is a nonprofit corporation organized to promote what it conceives to be the "public interest" in the area of federal taxation. It proposes to advocate its point of view before Congress, the Executive Branch, and the Judiciary. This case began when TWR applied for tax exempt status under § 501(c)(3) of the Internal Revenue Code, 26 U. S. C. § 501(c)(3). The Internal Revenue Service denied the application because it appeared that a substantial part of TWR's activities would consist of attempting to influence legislation, which is not permitted by § 501(c)(3).¹

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 11, 1983

Re: Nos. 81-2338 & 82-134 Regan v. Taxation with
Representation

Dear Harry:

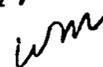
I have now had a chance to take a more careful look at the suggestions contained in your letter of April 28th, and think I can accommodate the second of these suggestions at least in substance by changing the quotation at the bottom of page 9 of the third draft to read as follows:

"As we said in Maher, '[c]onstitutional concerns are greatest when the State attempts to impose its will by force of law. ...' 432 U.S., at 476. Where governmental provision of subsidies is not 'aimed at the suppression of dangerous ideas,' cf. Cammarano, supra, at 513, its 'power to encourage actions deemed to be in the public interest is necessarily far broader.' Maher, supra, at 476."

I am still convinced, after further review, that the carryover paragraph at pages 8-9 is both consistent with and necessary to the analysis in the remaining parts of the opinion, and I prefer to retain it as is.

If this "halfway house" would persuade you to join the opinion, I will make the change indicated above.

Sincerely,



Justice Blackmun

cc: The Conference

4, 9-10

Justice White
 Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Stevens
 Justice O'Connor

From: **Justice Rehnquist**

Circulated: _____

Recirculated: MAY 13 1983

4th DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 81-2338 AND 82-134

DONALD T. REGAN, SECRETARY OF THE
 TREASURY, ET AL., APPELLANTS

81-2338

v.

TAXATION WITH REPRESENTATION OF
 WASHINGTON

TAXATION WITH REPRESENTATION OF
 WASHINGTON, APPELLANT

82-134

v.

DONALD T. REGAN, SECRETARY OF THE
 TREASURY, ET AL.

ON APPEALS FROM THE UNITED STATES COURT OF APPEALS
 FOR THE DISTRICT OF COLUMBIA CIRCUIT

[May —, 1983]

JUSTICE REHNQUIST delivered the opinion of the Court.

Appellee Taxation With Representation of Washington (TWR) is a nonprofit corporation organized to promote what it conceives to be the "public interest" in the area of federal taxation. It proposes to advocate its point of view before Congress, the Executive Branch, and the Judiciary. This case began when TWR applied for tax exempt status under § 501(c)(3) of the Internal Revenue Code, 26 U. S. C. § 501(c)(3). The Internal Revenue Service denied the application because it appeared that a substantial part of TWR's activities would consist of attempting to influence legislation, which is not permitted by § 501(c)(3).¹

¹Section § 501(c)(3) grants exemption to:

"Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for

STYLISTIC CHANGES THROUGHOUT

P. 10

To: The Chief Justice
 Justice Brennan
 Justice White
 Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Stevens
 Justice O'Connor

From: **Justice Rehnquist**

Circulated: _____

Recirculated: MAY 19 1983

5th DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 81-2338 AND 82-134

DONALD T. REGAN, SECRETARY OF THE
 TREASURY, ET AL., APPELLANTS

81-2338

v.

TAXATION WITH REPRESENTATION OF
 WASHINGTON

TAXATION WITH REPRESENTATION OF
 WASHINGTON, APPELLANT

82-134

v.

DONALD T. REGAN, SECRETARY OF THE
 TREASURY, ET AL.

ON APPEALS FROM THE UNITED STATES COURT OF APPEALS
 FOR THE DISTRICT OF COLUMBIA CIRCUIT

[May —, 1983]

JUSTICE REHNQUIST delivered the opinion of the Court.

Appellee Taxation With Representation of Washington (TWR) is a nonprofit corporation organized to promote what it conceives to be the "public interest" in the area of federal taxation. It proposes to advocate its point of view before Congress, the Executive Branch, and the Judiciary. This case began when TWR applied for tax exempt status under § 501(c)(3) of the Internal Revenue Code, 26 U. S. C. § 501(c)(3). The Internal Revenue Service denied the application because it appeared that a substantial part of TWR's activities would consist of attempting to influence legislation, which is not permitted by § 501(c)(3).¹

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

April 21, 1983

Re: 81-2338; 82-134 - Regan v. Taxation
with Representation of Washington

Dear Bill:

Please join me.

Respectfully,



Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

April 22, 1983

No. 81-2338 Regan v. Taxation with Representation
No. 82-134 Taxation with Representation v. Regan

Dear Bill,

Please join me.

Sincerely,

Sandra

Justice Rehnquist

Copies to the Conference