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THE FUNCTIONS OF THE CONSTITUTION AND THE ESTABLISHMENT CLAUSE

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DISCUSSIONS OF THE CONSTITUTION customarily are neatly divided into the areas of either constitutional law or political theory. Constitutional law deals with particular constitutional clauses and their case law interpretation. Political theory deals with problems such as the nature, origin and value of the Constitution. Seldom does constitutional legal inquiry explore its political theory assumptions.[1] Seldom does political theory examine its implications for particular constitutional clauses.[2]

The purpose of this paper is to join inquiry in both areas; to explore the meaning of the first amendment establishment clause of the United States Constitution in light of its broader context of inquiries into the nature of the whole constitution and its purposes.

The Nature and Purpose of the Constitution

A constitution may be defined as a deliberate and conscious attempt to organize the offices and powers of government in the form of

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[1] Customarily, constitutional law and legal commentary states the immediate political theory relevant to particular constitutional clauses with explicit inquiry into the nature and purposes of the constitution. In courses of constitutional law, "the constitution" is usually replaced by a concern over "judicial review." This bias is reflected also in articles relevant to the Supreme Court. *See, e.g.*, C. BLACK, THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY (1960); A. BICKEL, THE LEAST DANGEROUS BRANCH (1962).

[2] One of the central failures of such political theory is the absence of any systematic inquiry into the practical consequences of such theorizing. For practitioners, *i.e.*, lawyers, government administrators, and politicians, such theory seems irrelevant to day-to-day problems. An excellent exception is M. ADLER, ART AND PRUDENCE (1937).

explicitly stated rules.[3] These rules may be articulated by supreme courts, written "constitutions" or widely understood customs of the structure and operation of government.

When an attempt to establish a constitution is contemplated, and when an attempt is made to define or interpret the constitution, the purposes of having a constitution come into view. The constitution may be understood in terms of four purposes. The first purpose of the constitution is to consciously attempt to state a coherent relationship between the major institutions and offices of government. Thus, the constitution implies that certain institutions cohere or go along with one another more easily than other mixtures of institutions and powers.[4] It is this focusing upon the whole complex of government institutions which gives the constitution its broad and inclusive connotation. The second purpose of the organization of offices or powers is to provide a channel within which the government may operate. This "channel" allows for stable expectations by the rulers and the ruled of the duties and privileges of the rulers and the ruled. There is an economy of energy and thought which a constitution produces by establishing stable and routine ways in which the government and the people are organized. A third purpose of a constitution as the organization of powers and offices of government is to provide a standard by which future changes in governmental practices and operation may be measured. As a standard, the constitution provides for the possibility of focusing upon unanticipated accretions of power resulting from *ad hoc* isolated governmental actions which would be easily hidden if left unmeasured by a constitution. Thus, the constitution serves as an intellectual rule for calling to the attention of the citizens and the government possible significant changes in the structure of institutions in American society.[5] The fourth purpose of the constitution is to articulate the ideal structure of governmental offices and powers, and as written, act as a reminder of this idea to the citizens and to the government. In this sense, "the constitution" is not simply a term for referring to descriptive events within

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[3] Such a definition applies best to the American Constitution, but not the English Constitution, the latter being an historically derived organization of offices and powers. No definition is completely adequate to cover the loose usage of the term "constitution." For an excellent short discussion of the term, see 1 GREAT BOOKS OF THE WESTERN WORLD 233 (R. Hutchins ed. 1952).

[4] Little attention is given to the coherence of institutions where there is room for accidental growth and variety as there was in America in the eighteenth and nineteenth centuries. In twentieth century America, the convergence and interpenetration of institutions demand attention to the relationship between institutions. The Constitution forms a framework focusing upon the problems of producing such a "coherence."

[5] The concept of a constitution need not imply a stable form, although some political theorists such as Aristotle have emphasized such stability. ARISTOTLE, POLITICS, bk. V, ch. 8. The concept of ordered growth of the state made possible not by determined and unconscious forces but by deliberate action by the state's participants is one basis of constitutionalism. *See* THE FEDERALIST NO. 1 (Hamilton).

a society but, also, a term for referring to stated ideals of that society.[6]

Any specific constitutional clause will therefore have to be understood in terms of these four purposes of the constitution: stability, coherence, ordered growth, and fulfillment of ideals. The first amendment establishment clause of the United States Constitution, "Congress shall make no law respecting the establishment of religion," can be understood only in terms of: (1) defining, in relation to the rest of the Constitution, the way in which church and government are to be related, in coherence with the definitions and purposes of government contained in the other parts of the Constitution; (2) providing a channel of stable expectations through which church and government relations may be defined; (3) providing a standard by which to focus upon any possible change in church and government relations through *ad hoc* government or church actions; (4) defining the ideal relationship to obtain between church and government.

In the remaining parts of this paper, these four purposes of the Constitution will be examined in light of the establishment clause and the establishment clause in light of the Constitution's four purposes. In the first section, the establishment clause shall be examined as part of an entire constitution which attempts to define the relationship between offices and powers of the government so that a coherence of these offices and powers will result. In the second section, the establishment clause shall be examined as a channel through which the government powers can operate. In the third section, the establishment clause will be examined as a standard by which the people and the courts may focus upon unanticipated accretions of power which may change the relationships between church and government. In the final section, the establishment clause will be examined as an ideal organization of powers yet to be realized, but, nevertheless, defined in a written constitution.

I

The establishment clause is part of a constitution which organizes or distributes the powers of government in relation to matters concerning the church and religion. One of the purposes of the Constitution is to provide for a coherence of the major institutions within society. This establishment clause must be understood as only part of a complete constitutional statement of coherence[7] between

[6] For those philosophers who abhor "normative ambiguity," the mixing of the "is" and "ought," see H. LASSWELL & A. KAPLAN, POWER AND SOCIETY (1950). The Constitution is a very unclear document. Would it be possible to have two constitutions—one stating the actual existing organization of institutions and another stating the ideal towards which we move? Or does such a suggestion ignore the artistic and rhetorical quality of the written document?

[7] There are two types of "coherence." The first is an intellectual logical coherence within the justifications for political institution. Thus, the justification for a representative form of government must not contradict the justification for a Supreme Court if the two institutions are to "cohere" within the same Constitution. This is the kind of coherence examined here. A second type of "coherence" is the absence of practical conflict of such institutions in operation. M. ADLER & M. MAYER, THE REVOLUTION IN EDUCATION 55-63 (1958).

government and religion. To understand the establishment clause, one must interpret the entire Constitution's attempt to state the relations of church and government.[8] The Constitution, in many of its parts, contains implications for church-government relations. The preamble does not state the origin of the power of government to be in God. Rather, the origin of government is in "We, the People." If government originates, at least proximately, from the people's consent, the government cannot claim or justify the support or aid to one church on the ground that the government is an agent of God through that church since government is rather an agent of "We, the People." [9] Nor can government aid to churches be justified on the ground that the government, by such aid, is honoring its originator, since the origin of government lies in the people. *Thus, the preamble of the Constitution, by locating the proximate origin of the Constitution in government in the people rather than in God implies that the relationship between government and religion is mediated by the people and the consent of the people.* Any relationship between church and government must thus be compatible with the consent of the people. This is important because, in a pluralistic society such as the United States, the consent of the people would not and cannot be given to government support of only one of the many religious groups. Moreover, in a partially secularist American society, the consent of the whole people cannot be given to aid all churches.[10]

The Preamble

The preamble of the Constitution states the purposes of the Constitution: unity, peace, justice, common defense, general welfare, and liberty. This preamble omits any reference to the spiritual development of man or man's salvation. Although it is possible to read a religious content into the stated purposes, there is no explicit mention of religious purposes contained in the preamble of the Constitution. Therefore, the preamble appears to reflect the deliberate choice of the founders to organize the power of govment for non-religious purposes.[11] The American Constitution is, in this sense, a commitment to a secular national gov-

[8] Unfortunately, the Supreme Court has not viewed the establishment clause in relation to the clauses of the total constitution.

[9] There are phrases in Aquinas' *On Kingship* which can be construed as conceiving the government as "an agent" of God. This belief may underlie any Catholic's uneasiness with the Constitution itself.

[10] This argument based upon consent ignores the qualifications of the consent theory by political theory eroding literal consent to "virtual consent." For an excellent summary and interpretation of the consent theory, see A. GEWIRTH, POLITICAL PHILOSOPHY 1-30 (1965). The Preamble of the Constitution contains the belief that government, in some sense, depends upon the consent of the people. However, the supporters of government aid to churches and many other acute political theorists may implicitly, in their arguments, reject the consent theory of government. It is worth noting that both neo-thomistic and pragmatic philosophers may reject the conception that the origin of the government rests in "We, the People." This suggests that one point of difference between "separatists" and "establishmentarians" may rest upon their different conceptions as to the role of "consent" in political theory.

[11] THE FEDERALIST No. 10 (Madison).

ernment, rather than a "sacral state."[12] This means that the government cannot justify support of churches on the grounds that the spiritual development of man and his salvation is a proper purpose of government.[13] The establishment clause, if read in conjunction with this preamble which omits any reference to religious purposes, appears to exclude the possibility of aid to churches in order to promote spiritual development of the citizens.[14]

Article I

Article I of the Constitution provides the basis for a representative legislature. Implicit in article I are the founders' arguments for the desirability of the representative form of government. The tenth *Federalist Paper* argues for a representative form of government as the best form to provide the framework for containing "factions," *i.e.*, interest groups.[15] One of the "factions" was understood to be the religious sect. Thus, the draftsmen of the Constitution viewed a religious sect as a "faction" potentially threatening the peace and public welfare of the country and representation was seen as a method to neutralize this faction. If representation is seen as a method for neutralizing factions, it would seem that article I of the Constitution which sets down the basis of such representation would be a sufficient method for neutralizing religious factions, and thus the establishment clause would not be needed. Indeed, since the Constitution did not originally include any of the Bill of Rights, one might argue that the founders viewed the representative system itself as a sufficient guarantee of religious peace. Further, one might well argue that the representative principle does succeed, through pluralistic voting groups, in preventing any establishment of one particular religious sect. However, although the representative system might prevent government support to one particular religious sect, the representative principle may not prevent government aid to various religious groups. Thus, it would be easy to foresee the people of varying faiths joining in a program by which government might aid each and every one of those faiths. The very fact that the establishment clause was added

[12] For a summary of the "sacral state" theory, see J. MARITAIN, MAN AND THE STATE 147-87 (1951).

[13] This justification of "Establishment" with variations permeates Catholic thought: Aquinas, *On Kingship*; J. MARITAIN, MAN AND THE STATE 149 (1951); M. Adler & W. Farrell, *The Theory of Democracy*, in 4 THE THOMIST 312, 333 n.257 (1942).

[14] A second debate can revolve around the stated purposes of the preamble. Supporters of one or another form of government and of religion may believe contrary to our founding fathers that the government can and should participate in promoting man's spiritual development.

Unfortunately, three separate questions are often tangled together in a discussion of this topic: (1) Is the government capable of taking any action which might promote spiritual development? (2) If government is capable of promoting spiritual development of the individual, at what price, and is that price worth paying? (3) Even if the government is capable of promoting spiritual development and such action would not be costly, is it the role of the Supreme Court through judicial review to make additions to the purposes of the Constitution?

[15] THE FEDERALIST No. 10 (Madison).

to article I suggests that the founders may have hoped that such a clause would prevent what article I could not prevent, namely, government aid to *any* religion.[16]

Contained in the Federalist view of religion as a potential "faction" is the view of religion as a social group which is potentially dangerous to the peace. Religion is viewed as becoming warped into a possible object of self-interest rather than a necessary contributor to the common good. Thus, in the theory underlying article I of the Constitution is the founders' belief in the "factional" character of religion and the distorted self-interest character which religion may have. If this view of religion underlies article I of the Constitution, it is difficult to see how the establishment clause could be interpreted in any way which contradicted the theory of article I. *Therefore, the establishment clause should have, as an underlying presumption, that religious groups may act in their self-interest and may be counter to the common good and may threaten the peace.* Two inferences, however, may be drawn from such a presumption: first, that no aid should be given to religions since such religions may be counter to the common good; and second, that aid may be given only when religions serve a public purpose.

[16] This type of argument is dangerous because it rests upon the assumption that the founders' omniscience would result in no overlapping of constitutional clauses. It is quite possible that the founders did not really remember the protective purpose of representation when they created the establishment clause.

Separation of Powers

Articles I, II, and III of the Constitution set forth the legislative, executive and judicial powers of the government. These articles imply a division of powers in which the legislative, the judicial and executive powers are separated, and in which there is a potential system of checks and balances. The division of powers and the system of checks and balances are understood to purposefully limit government power by pitting ambition against ambition;[17] the division is based upon the presumption that "men and not angels must rule men." Thus, the authors of the Constitution rely upon a system of enumerated powers, a division of governmental powers and checks and balances in order to prevent the development of tyranny in government. Completely missing from the founders' conception of the limitations of government and the way in which tyranny should be prevented is the medieval concept of mixed government without separation of powers and checks and balances.[18] The medieval conception of government relied upon the religious education of the ruler and the religious sanctity of the subjects in order to limit tyranny.[19] The founders did not look to religious education or to the concept of religious sanctity of the subjects in order to limit the powers of government.

[17] THE FEDERALIST NO. 47 (Madison); THE FEDERALIST NO. 51 (Hamilton or Madison).
[18] A "mixed" government for Aquinas was not a government of separation of powers but merely a device to give the citizen a sense of participation.
[19] Aquinas, *On Kingship*.

Twentieth century neo-thomist philosophers such as Jacques Maritain and Mortimer Adler argue that Christianity can contribute to the success of democracy.[20] However, the Constitution appears to reflect the founders' belief that institutional arrangements must be used in order to prevent tyranny and preserve democracy. By implication, the founders appear to believe that religious beliefs are insufficient to prevent tyranny. This distrust of religion as a sufficient method of insuring democracy should also be read into the establishment clause of the first amendment. Therefore, government aid to religions on the grounds that religion can support democracy does not appear to be compatible with the founders' theory of the separation of powers. Such an argument, however, does not meet the counter argument that although religion is not a *sufficient* check on the growth of tyranny, it certainly is a *necessary* factor along with other institutional arrangements.

Summary

If one attempts to understand the meaning of the establishment clause in relation to the other clauses of the Constitution, one coherent view of religion emerges according to which the people consent to form governments (preamble) for secular purposes (preamble), and do not rely upon religious sanctions to prevent tyranny but rather upon the division of powers and representation (articles I, II, III) because religion may be a self-interested faction not contributing to the common good (article I). Without attempting to examine the question, it may be asked whether an "establishmentarianism" position would have to modify or counter each of these assertions, or whether a modification of one or another of these tenets would be sufficient to justify government aid to religion. In any case, the process of relating the establishment clause to the rest of the Constitution broadens the church-state debate to encompass the problem of finding theories of church-state relations which are conformable with theories of representation, division of powers, and the origin and purpose of government.

II

The meaning of the establishment clause can be approached from the point of view of another purpose of the Constitution, viz., to channel government powers in their operation. These channels are, in fact, the shared expectations of the citizens and the legal specialists of a community as to the proper exercise of governmental powers. Thus, the phrase, "Congress shall pass no law respecting the establishment of religion" may be viewed as a pointer to a cultural consensus in America on the proper relationship between church and government. Judicial review which "interprets" this clause then functions to preserve the expectations of non-violation of the cultural consensus, thus either limiting the areas of governmental function or permitting "and legitimating" governmental functions.[21]

[20] J. MARITAIN, MAN AND THE STATE 108-46 (1951); M. Adler & W. Farrell, *The Theory of Democracy*, in 4 THE THOMIST (1942).

[21] For a discussion of "legitimation" as a function of the constitution, see C. BLACK,

Since the stability of expectations which forms the basis for channeling government powers refers to the expectation of current living members of society, the extent to which the Constitution reflects the expectations of citizens or constitutional founders in 1787 is of limited value. The expectations of the citizens of 1787 are only relevant as possible indications of present expectations to the extent that there is a continuity of political culture.[22]

The indices of political culture or community consensus behind the Constitution are: (1) the judges' and legislators' intuitions of political culture; and (2) political and sociological information on current political culture.[23]

Judges' and legislators' intuitions of political culture are based upon history and shared values of the community. When judges review the history of church-state relations as an indicium of the present American consensus on church-state relations, these judges place reliance upon selected historical documents such as Madison's *Remonstrance* [24] or Jefferson's *Bill for Establishing Religious Liberty* [25] to determine the political consensus. These documents reveal that the purposes of the establishment clause were to eliminate religious persecution, religious strife and to promote freedom of religion and to maintain the separation of church and government. These purposes rest upon several assumptions of the founders.

The draftsmen of the first amendment establishment clause shared the historical assumption that establishment of religion in the past had caused religious strife. The assumption was derived from the recent experience of intolerance in England and Europe as well as in the early colonies.[26] It was further derived from the analysis of this historical experience by such theorists as John Locke and Voltaire.[27] As a result, these theorists saw a necessary correspondence between civil peace and disestablishmentarianism.

A second assumption of the founders was that the separation of church and state was a means to religious freedom. The founders appealed to disestablish-

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THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY (1960).

[22] Thus, the discussion of the importance of the founders' constitutional intentions must distinguish between the constitution as an attempt to produce coherence between institutions (and relevant issues of consent) where the founders' views may be relevant, and the constitution as a device for channeling the operations of government through consensus or shared expectations which may change through time and hence, where the founders' views may be irrelevant to the present.

[23] For a discussion of the relation of the law to culture, see Repouille v. United States, 165 F.2d 152 (2d Cir. 1947), and J. COHEN, R. ROBSON & A. BATES, PARENTAL AUTHORITY: THE COMMUNITY AND THE LAW (1958).

[24] Madison's *Remonstrance* as found in the Appendix to Everson v. Board of Educ., 330 U.S. 1, 63 (1947) and hereinafter cited as "Madison's *Remonstrance*."

[25] T. JEFFERSON, *Autobiography*, in 1 THE WRITINGS OF THOMAS JEFFERSON 62 (P. Ford ed. 1892).

[26] GREEN, 2 HISTORY OF THE ENGLISH PEOPLE 197-365; GREEN, 3 HISTORY OF THE ENGLISH PEOPLE 3-37; W. JORDAN, 1-4 THE DEVELOPMENT OF RELIGIOUS TOLERATION IN ENGLAND (1932-40).

[27] J. LOCKE, A LETTER CONCERNING TOLERATION (1800); F. VOLTAIRE, A TREATISE ON RELIGIOUS TOLERATION (1764).

ment in terms of religious freedom.[28] The founders understood that separation between church and state promoted religious freedom in the following ways: (1) the establishment clause prevented one church, with the aid of government, from persecuting, that is, interfering with the religious freedom of other religions;[29] (2) disestablishment prevented the compulsory taxation of a citizen of one religion for the benefit of another religion;[30] (3) disestablishment protected the churches from dependence on government and consequent governmental pressures;[31] (4) separation of church and government allowed the free competition of religion.[32]

Each one of these freedoms had a special appeal at the time of the writing of the Constitution. The fear of persecution and religious strife was a very real and immediate fear based upon events of persecution and religious wars in recent English history and in the American colonies.[33] This persecution stemmed from less concern for human life and pain, the belief in the possibility of the success of persecution, and a deeper commitment to religious values.[34] The fear of compulsory taxation to support religious groups whose religion may differ from the potential taxpayer must be understood against the background of the history of English dissent in colonial problems. English dissenters continually protested against contribution to the established church. This protest against the English church tax was a protest against the whole scheme of legislation which made the dissenters second-class citizens.[35] At the same time, the rapid migration of religious groups to America resulted in situations where the majority of citizens were being taxed to support a minority church group. The founders of the Constitution feared dependence of church upon government. This fear was based upon the belief that power corrupts and that giving the church the power of government would corrupt the church.[36] This view of power was derived in part from a long history of political theory and political history in which power came to be viewed as a necessary and dangerous evil, rather than a means derived ultimately from God for promoting the common good. The founders of the establishment clause created that clause in an era when the *laissez-faire* doctrine was in development. Religious establishment, like economic mercantilism, appeared to threaten the free competition of religious ideals and ideas.[37]

A third assumption of the writers of

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[28] Madison's *Remonstrance*; T. JEFFERSON, *Autobiography, supra* note 25.

[29] Madison's *Remonstrance.*

[30] *Ibid*; *Jefferson's Bill for the Establishment of Religious Freedom, supra note* 25.

[31] Madison's *Remonstrance.*

[32] The clearest statement of free competition for religion is in Jefferson's *Bill for the Establishment of Religious Freedom, supra* note 25.

[33] GREEN, HISTORY OF THE ENGLISH PEOPLE, *supra* note 26.

[34] W. JORDAN, 1-4 THE DEVELOPMENT OF RELIGIOUS TOLERATION IN ENGLAND (1932-40).

[35] R. COWHERD, THE POLITICS OF ENGLISH DISSENT 1, 86, 87, 89, 94, 99 (1956).

[36] Madison's *Remonstrance.*

[37] The *laissez-faire* ideal entered into Locke's concept of a "free and voluntary society." J. LOCKE, A LETTER CONCERNING TOLERATION (1800). *See also* S. FINES, LAISSEZ-FAIRE AND THE GENERAL WELFARE STATE (1956).

the Constitution was that the separation of church and government is a desirable end in itself. Separation was viewed as desirable because the church and government had essentially different purposes, organization, personnel and origin.[38]

If judges arrived at historical conclusions on the basis of these selected historical documents, such conclusions would rely completely on a neat surgical operation of all the available historical materials. If the history of the times is re-examined closely, a new historical picture emerges. The founders, especially Jefferson, were not necessarily representative of the prevailing culture in their attitudes toward religion.[39] It is possible to make the argument that the founders were much more biased toward separation of church and government than the bulk of the population. There is, perhaps, insufficient attention given to the fact that there were establishments of one religion at the time of the drafting of the Constitution within the states and there was widespread aid to religion.[40] Moreover, modern thinkers are probably unable to imagine the integration between everyday culture and religion existing in colonial times. Unlike today, the church was much more a center of community life and religious practices permeated colonial customs to a much greater extent.[41]

Such counter-evidence to the traditional kinds of historical evidences given to interpret the meaning of the establishment clause results in the conclusion *that history probably does not reveal any stable community expectations upon the meaning of the establishment clause in 1781.* This is hardly surprising but it is worth emphasizing because of the partisan arguments which have tended to distort the essential fact of the ambiguity of political culture in colonial times. The conclusion to be drawn is that history does not yield common expectations which may guide the relations of church and government.

If we turn from the historical evidence of the cultural consensus on the establishment clause to sociological and political science evidence of the current consensus in regard to the establishment clause, a similar ambiguity as to the meaning of the establishment clause results. If one examines the Supreme Court opinions as a sample reflecting general American political culture, one would find that the opinions are extremely nebulous. Aside from the customary Supreme Court split opinions,[42] there is a doctrinal vagueness which runs throughout the opinions. A "wall of separation" [43] and "no aid to religion" [44] is

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[38] Madison's *Remonstrance.*

[39] M. BELOFF, THOMAS JEFFERSON AND AMERICAN DEMOCRACY 7 (Collier Books 1962). The book gives a brief account of Jefferson's fight in Virginia with the establishmentarians.

[40] *See, for example,* the Connecticut situation. R. OSTERWEIS, THREE CENTURIES OF NEW HAVEN 1638-1938, at 85-91 (1953).

[41] *Ibid. See also* A. SIMPSON, PURITANISM IN OLD AND NEW ENGLAND (1955).

[42] Zorach v. Clauson, 343 U.S. 306 (1952); McCollum v. Board of Educ., 333 U.S. 203 (1948); Everson v. Board of Educ., 330 U.S. 1 (1947).

[43] Everson v. Board of Educ., 330 U.S. 1 (1947).

[44] *Ibid.*

countered by the somewhat strained respect for health and welfare measures,[45] and "no hostility" [46] toward religion. However, even if unanimity of understanding can be read into Supreme Court opinions, these opinions obviously do not necessarily reflect the culture of our times. These opinions do not reflect this political culture to the extent that they ignore the great changes in religious life in America in the last 150 years. Although in many areas of constitutional change, the Supreme Court has recognized the need for deliberately interpreting the constitutional clauses in order to adjust that clause to the changed circumstances, the Supreme Court has refused (with few exceptions) to recognize the changing role of the church in American society in its process of interpreting the establishment clause. Nevertheless, such change in the role of the American church has occurred. These changed circumstances have altered the extent to which the original purposes of the establishment clause are still valid.

Civil strife, infringement of religious freedom, and union of church and government may no longer be threatened by government aid to religion. There are many forces which may make strife between religious sects less of a threat to peace today in American society.[47] There has been a multiplication of conflicting parties which has diffused the struggle.[48] Differences between different sects, between religious and secular forces, between "religiosity" and "non-religiosity" have arisen. Different religions share similar religious values and different religions also share similar secular values. There is also a low intensity of religious belief on the part of many citizens. Non-religious participants also tend to mitigate the religious struggle.[49] Religious conflicts within individuals and within sects weaken conflicts between the sects. (Religious conflicts may become more localized if the diffusion of religious groups or members throughout the society results in eliminating religious ghettos.) The manner of religious conflict has become more indirect by centering upon political issues rather than on the direct doctrinal religious disputes.[50] Moreover, the channeling of aggression for or against the secular creed of communism may mean a decline in the aggression channeled in religious beliefs. The growth of bureaucratic churches also may tend to diminish the conflict. The representational system of government in a pluralistic society may mitigate opportunity for religious conflict. Expansion of the country since colonial times also makes nationwide religious conflict much less likely. Also, the growth of other powerful institutions diminishes the strength of the church's

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[45] *Ibid.*

[46] McCollum v. Board of Educ., 333 U.S. 203 (1948).

[47] *See Religious Conflict in the U.S.*, 12 JOURNAL OF SOCIAL ISSUES (1956).

[48] *Ibid.*

[49] *See* Williams, *Religion, Value Orientations and Inter-Group Conflict*, 12 JOURNAL OF SOCIAL ISSUES 5 (1956).

[50] *Social Cleavage and Religious Conflict*, 12 JOURNAL OF SOCIAL ISSUES (1956).

power and, hence, the seriousness of any conflict between different churches. It may be argued that even the free market economy tends to diminish religious conflict by separating production and consumption from religious considerations.[51] *All of these social changes may tend to make the fear of religious conflict, which existed in the time of our founders of the United States, an unreal fear in modern American society.* If this is so, then one of the main reasons for preventing aid to religion has disappeared.

The fear of infringement of religious freedom by compulsory taxation, church dependence upon government, and infringement of free competition between religions still exist, although the grounds for such fear today seem weak. Perhaps the lack of any recent serious infringement upon free exercise of religion within America contributes to a sense of safety from such infringement. Compulsory taxation for support to churches is less offensive today because we are compelled to support a wide variety of programs which may offend our political, economic, and social beliefs. Moreover, aid to religion now occurs in an indirect manner, lumped together with other taxes and hidden from the public gaze, thus making it less offensive. Some forms of "dependence" upon government are accepted. Safe sewerage, police and fire protection and other governmental "aid" are the standard examples of such indirect government aid to religion. Even the most extreme proponents of separation of church and state do not suggest that such aid be withdrawn from the church.[52] As far as the fear of dependence of the church upon government is concerned, it is extremely difficult to measure dependence or determine exactly what is feared about this dependence.

The fear of infringement of the competition between creeds depends upon an analogy between the competition between religious belief and the free market in economics. The attack upon the validity of the free economic market ideal may lead to the questioning of the free religious market ideal.[53] Moreover, the free

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[51] Perry, *Moral Bases of Agreement and Cooperation in a Pluralistic Society*, in ETHICS AND BIGNESS (1962).

[52] L. PFEFFER, CHURCH, STATE, AND FREEDOM 475 (1953).

[53] The free market in economics has "broken down" to the extent that there are government competitors and government aided competititors. This breakdown has occurred due to: (1) government interference to protect "the weak," the child, the small farmer, the laborer, and the woman; (2) government interference where it is believed that the free market allocation of resources has failed: price setting, production and rent controls; (3) government interference to increase production; (4) government interference where other "non-economic" values may be at stake, *e.g.*, city planning, and fall-out shelters.

The free market analogy was extended to the marketplace of ideas, by, among others, J. S. Mill and Holmes. A theoretical attack upon this analogy has been made by Hocking and Meiklejohn. The practical breakdown of the marketplace of ideas has occurred: (1) protection of the hours for minors, etc.; (2) an increase in the more "rational" allocation of ideas, *i.e.*, public education; (3) the increase by government production of ideas through public education and government research; (4) the preservation of other values, *e.g.*, the regulations on parks, street activity, and community peace.

market ideal applied to religion ignores essential differences between religious and economic groups.[54] *Therefore, the founders' arguments regarding the fear of infringement upon religious freedom seems to be less forceful today than they were at the time of the formulation of the establishment clause when the free market theory was extending its influence.*

The ideal of separation between church and government may be tarnished by a number of historical changes which have occurred in American society, the birth of the Constitution, and new religious groups which have arrived in America. Many members of these groups desire much closer connection between government and church. These desires rest upon traditions of theology and philosophy and these traditions challenge the religious traditions which may be tacitly built into the establishment clause. The very concept of religion as a "private affair" is called into question by these traditions which may view religion as having important public aspects.[55] At the same time, some modern Protestant theology challenges the assumptions behind the desire of separation of church and government. With the secularization of American culture and the expansion of government into the welfare and educational areas, once monopolized by the

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The most thorough extension of the free market analogy to religion has been by Pfeffer in his *Creeds in Competition*. Practically, the free market of religions has broken down: (1) to protect the weak through health laws, adoption laws and work regulations of minors, (*e.g.*, Prince v. Massachusetts, 321 U.S. 158 (1944)); (2) government reallocation of religious resources, *i.e.*, prison chaplains and army chaplains; (3) the government's increase in religious ideas which appear to be behind such items as the recently attempted New York Regents' oath; (4) the government's subordination of free play of religion for other general welfare values, *i.e.*, aid to sectarian hospitals and schools.

[54] As one moves from the economic to the religious "market" the reasons for government interference can become more tenuous to the extent that there may be less agreement on common religious doctrines than on economic doctrine. Moreover, the whole analogy from the economic marketplace to religious marketplace is subject to criticism for four reasons: (1) The general explanation of the force behind the free market system is the profit motive. Profit will stimulate economic activity. However, there is no necessary correlation in religious competition. Competition may lead to non-religious skepticism rather than stimulated religious activity.

(2) Profit functions to allocate production and distribution within an economic system. There is no evidence that there is any comparable working in the religious marketplace. In fact, the whole meaning of "rational allocation" of religious resources is difficult to understand.

(3) The free market model assumes that "private units" of production and consumption are possible and desirable. The model does not probe into the social basis of consumption and production. A parallel view of religious faiths is that they are privately arrived at and enjoyed. This is Locke's assumption. However, the social origins and framework of religious faith is increasingly being recognized by Protestant theologians. (St. Thomas was always aware of it; his whole theory of the theological virtues reflects it.)

(4) The purpose of free economic markets is to promote efficient production and allocation of goods according to effective demand. The profit margin is the standard of efficiency. In the marketplace of faiths, there is no agreed-upon standard of "efficiency." Although religious truths may be salable, that which is salable is not necessarily true.

[55] *See* J. MURRAY, WE HOLD THESE TRUTHS (1960).

churches, increased governmental functions not accompanied by aid to religion appear to many to threaten the Christian culture in America. *Therefore, changing social forces may diminish the desirability of separation of church and government.*

Thus, one can cite a number of historical changes which may make the three original purposes for the separation of church and government inapplicable to the present day. The fear of religious strife, of infringement upon religious freedom through government aid and the "inherent" desirability of church and government are purposes which have been weakened by some historical forces.

At the same time, although there may be modern social forces which mean less possibility of religious strife resulting from establishmentarianism, less danger of infringement of individual freedom by aid to religion, and less to be feared from closer connection between church and state, there are a number of forces within American political culture which indicate the necessity for a *new* application of the establishment clause. There has probably developed a new sensitivity to the harm that can result from potential government coercion of religious belief in school and in other situations.[56] At the same time, there perhaps has grown a new sympathy for the free expression of non-religious and anti-religious beliefs,[57] which requires protection. Moreover, religious establishments still appear to be a volatile issue in particular communities.[58] Also, it may be argued that the growing wealth and political power of larger religious groups requires a safeguard to control the growth of these groups by controlling aid to them. These safeguards may be especially necessary at a time when aid to religion can become thoroughly hidden in broader government aid programs. Also, new knowledge has pointed to subtle social establishmentarianism which still exists without our American community.[59] Even if the establishment clause cannot be used to fight this establishmentarianism, it nevertheless can serve as a reminder of the undesirability of such a situation. New knowledge has also pointed out the possible correlation between an authoritarian personality and religious beliefs. If an open and tolerant personality becomes one of the goals of an American society, to this extent perhaps the aid to religious beliefs would be inconsistent with that aim in government.

Thus, there is a wide variety of social, political, and theological changes which the Supreme Court has not explicitly taken account of in attempting to interpret the meaning of the establishment clause from the point of view of the political culture which lies behind this clause. However, even if such a consciousness

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[56] *But see* Zorach v. Clauson, 343 U.S. 306 (1952).

[57] *See* Everson v. Board of Educ., 330 U.S. 1 (1947) for a statement regarding freedom of non-behavior. One indication of this sympathy is the expanding legal conception of "religion" itself. *See* Fellowship of Humanity v. County of Alameda, 153 Cal. App. 2d 673, 315 P.2d 394 (1957).

[58] *See* Powell, *The School Bus Law,* New Haven Journal Courier, Dec. 5, 1961, at 1.

[59] G. LENSKI, THE RELIGION FACTOR (1961).

was reflected in the Supreme Court opinions, these changes could not give an unambiguous guideline for determining the meaning of the establishment clause. *Thus, although the establishment clause is to be looked at as a channel for the exercise of governmental powers, in the areas of church-state relations, this channeling cannot be determined by looking at the shared expectations of the members of the community, since these expectations are not shared.*

Contemporary social and political philosophers have expressed considerable concern over the resolution of conflicting values and expectations within society. Charner Perry has suggested that the economic market, political compromise, courts, bureaucracies, shared values other than the conflict values, changes of values, means-ends reasoning, and appeal to tradition are all factors which may contribute to resolving any lack of political consensus including the lack of consensus surrounding the establishment clause.[60] All of these factors offer possible grounds for "finding the meaning" of the establishment clause in the ambivalent political culture of the United States. Thus, the Court (or the minority) may point out that Sunday Blue Laws do not accomplish their avowed purpose (means-ends reasoning),[61] that prayers are customary (appeals to tradition),[62] that coercion of non-christian children is offensive (shared values),[63] that released-time instruction not on school property is satisfactory (compromise),[64] and that this aid is a health and welfare measure (because *the Court* as ultimate arbitrator says so).[65] However, the resolution of cultural conflicts on such an *ad hoc* basis does not provide unambiguous rules for channeling the operations of the government and hence, perpetuates the unsettled state of American political culture and American expectations regarding the relationship of church and government.

III

The history of the constitutional interpretations of the commerce clause reveals the changing economic and social powers and functions of federal and state governments. Although the commerce clause did not halt this change, it did provide an opportunity to focus attention upon the large scale changes in the shape of American technology. This focus is not only provided for the Supreme Court, but also for the legislative representatives, the executive and the citizenry.

The establishment clause may similarly be seen to provide a focus upon the power relations of church and government within America. A federal aid bill may result in unnoticed and unanticipated aid to religious organizations. This potential "establishment of religion" can only be flagged or focused upon if there is a constitutional provision which calls to the attention of the legislature, the courts and the people, unanticipated and unnoticed consequences of legislation.

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[60] *Supra* note 51.

[61] McGovern v. Maryland, 366 U.S. 420 (1961).

[62] Engel v. Vitale, 370 U.S. 421 (1962).

[63] *Supra* note 56.

[64] Zorach v. Clauson, 343 U.S. 306 (1952); McCollum v. Board of Educ., 333 U.S. 203 (1948).

[65] Everson v. Board of Educ., 330 U.S. 1 (1947).

The clauses of the Constitution provide rules which specify which relationships between institutions should be focused upon.[66] In reference to the establishment clause, the Supreme Court in its opinions has a duty to provide a clear focus upon the possible changed relationships between church and government implied by legislative or executive action.[67]

The Supreme Court, in its church-state opinions, has failed to provide a focus upon the choices of differing arrangements of power between the church and government. There is no opinion which thoroughly deliberates the choice as to whether the relationship of churches and state government are similar to the relationships between churches and federal government. There is no United States Supreme Court opinion which deliberately decides whether government aid to sectarian institutions, *i.e.*, churches, and schools, has similar power implications as government aid to direct religious institutions such as churches. The Court has not explicitly weighed whether the government aid in the form of criminal sanctions against discrimination against persons on the basis of their religious belief is the same as government financial aid to religious institutions. The Supreme Court has indeed, by implication, decided all of these issues. However, within its opinions, it has not explicitly weighed the alternatives. Rather, the Supreme Court has hidden the structure of constitutional choices which continually faces the Court and the American people in the area of church-state relations. One of the functions of a Supreme Court opinion would be to explore and deliberate in an explicit manner on these particular choices which face the American people.

The Supreme Court must not only provide a focus upon the constitutional changes in America; it must also make decisions legitimating or terminating legislation. These decisions must be understood as decisions about the *proper* relations of the power structure in a country. These decisions should be intended to preserve a stable power structure within the country by allowing or checking changes within that power structure. The Supreme Court and lower courts, through judicial review, provide a mechanism for deliberate and organized constitutional change. The task of the Supreme Court and constitutional theorists is thus to define the criteria necessary for choosing to allow organized and deliberate change.

Although the Supreme Court has not articulated the general criteria to determine organized and peaceful constitutional change, there appear to be three criteria for such change.[68] The first cri-

[66] This statement obviously is qualified in one sense, namely, the Constitution itself pays little explicit attention to institutions such as unions, corporations, executive bureaucracies, and the military. This lack of mention of institutions other than government is probably a carryover from the individualistic philosophy of John Locke and the state of these institutions at that time. Nevertheless, it is obvious that the Court itself, in its judicial review, can take note of the existence of growth of these institutions.

[67] The first amendment refers to "religion" not to "churches." Nevertheless, the "establishment of religion" clause implies the existence of churches.

[68] The three criteria are derived from Aristotle's treatment of how to preserve the state from

terion would be whether the constitutional change resulting from legislation so substantially alters the balance of institutions that peace is threatened by the resulting imbalance of these institutions. The second criterion is whether the proposed change increases the power of the legislature or executive to the extent that an abuse of power by these institutions would result in a significant infringement on freedom of the individual which could not be constitutionally rectified. The third criterion is whether the proposed change leads toward a form of government ideally suited to the American society. If legislation or executive action results in a substantial alteration of the balance of institutions so that peace is threatened, if legislation would result in infringement of individual freedom, if the proposed change does not lead toward a form of government ideally suited to American society, the court may invalidate the legislation.

The first standard of required peaceful change depends upon the Court's ability to predict when changes in institutions may lead to revolution. Such a prediction rests, at best, upon political wisdom about the social forces in the country and historical knowledge of the origins of past revolutions. Such a prediction will be undoubtedly difficult; nevertheless, such a prediction is necessary. The standards which help to predict revolutionary potentiality may be the following: Has the change caused by the legislation or terminating long standing legislation significantly increased the power of one social group? Is the legislation likely to result in disrespect for the law as an instrument of one pressure group? Is striking down the legislation likely to result in revolutionary disrespect for the Constitution? Does the legislation promote or exaggerate any of the known defects of republican democracy?

These questions may be asked under the framework of the United States Constitution in the interpretation of any particular clause of that Constitution. Within the establishment clause itself, these questions may be asked regarding legislation affecting religious groups. For example, the Court could ask about the released time program: Is the proposed new released time program part of a trend which would eventually cause a disproportionate increase in power of the church? Would the released time program prompt a sense of fear in a significant group of the population? Would a released time law be viewed with disrespect by parts of the population as a law which results from one pressure group? Would the terminating of released time programs be likely to result in disrespect for the Constitution or judicial review?

A second standard of constitutionally organized change is whether the change would increase the power of government to the extent that the power, if abused, would result in a significant infringement of freedom of the individual, an infringement which could not be constitutionally rectified. This standard can be broken down into four questions: (1) Is the power of the government increased? (2) Is there an opportunity for that power to

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revolution in Aristotle's *Politics, Book V.* ARISTOTLE, *Politics*, in BASIC WORKS OF ARISTOTLE 1232 (McKeon ed. 1941).

be abused? (3) If the power were abused, would a significant infringement of the individual's freedoms result? (4) Could the infringement be constitutionally rectified?

Within the establishment clause, these questions may be directed to, for example, the school prayer situation. If the New York Regents' prayer were constitutionally upheld, state government then would have the power to compose and require prayers for the national interest and have public school children recite these prayers.[69] Is this, however, a significant increase of power of the government? If the state government has power to compose prayers in the national interest, can this power be abused? What, for example, are the checks upon the Regents' powers? Is the Regent a representative political figure? If this power could be abused, could the above result in an infringement of freedom of the individual? In the case of the Regents' prayer, is the requirement of an atheist attending public school to recite a prayer, an infringement upon his freedom if he were free to go to a private school or not required to recite the prayer?

Whatever the answers to these questions may be, they are the questions which must be asked. No amount of legal sophistication can cover these basic questions with the gloss of legal technicality. Thus, the Court must make a difficult estimation of the consequences of legislation and executive action upon the stability of the country and the freedom of the individual.

A third standard for reviewing constitutional change is to determine whether such change leads toward an ideal relationship of power suitable to the society and its conditions. This standard is the subject of the final section of this paper.

IV

The establishment clause may be viewed as pointing towards an ideal organization of the institutions and powers of a country which are not yet realized, but should be realized in the future. Thus, the Constitution is not merely a reflection of a political consensus, but it also is a statement of what the ideal relationships should be between institutions in American society.

Two types of ideal constitutions may be distinguished.[70] First, there is the "absolute" ideal constitution where the material circumstances of a country are imaginatively reconstructed to provide for an ideal arrangement of power. This is the utopian ideal—the best constitution of all constitutions. However, there is a second type of ideal constitution which is relatively the best, that is, the best given that country's particular resources and limitations. This best American constitution is the best relative to the institutions and resources of America. It is not the role of judicial review to articulate the absolutely best constitutional arrangement. Such a task involves the imaginative reconstruction of the resources of a country which is a massive intellectual task mainly irrelevant to actual practical institutional law within a given country.

[69] Engel v. Vitale, 370 U.S. 421 (1962).

[70] This distinction is derived from Aristotle's *Politics*. ARISTOTLE, *supra* note 68, at 1205.

This task is reserved for the political philosophers. It is primarily the role of the Court within the United States to review constitutional changes in light of a constitution which is ideally suitable to the circumstances of the United States. This latter constitutional arrangement may not be yet realized in the United States but may be viewed as a realizable ideal adjusted to the circumstances of the country. Thus, although the best form of government could, for example, be a limited monarchy with one religion or secular democracy with no religion, this ideal is irrelevant to the American society.[71] The ideal constitutional framework within which judicial review must operate in America is the situation of representative pluralism. Any Supreme Court judicial review must articulate an ideal which is compatible with the existence of diverse religious groups within a representative democracy.

The Supreme Court has completely failed to examine alternative practical ideals for church-state relations within America. Thus, the Court has been completely absorbed with finding areas of political consensus through which to channel the government operations in regard to religion, without attempting to indulge in the definition of relatively ideal relationships between church and state.

However, constitutional theorists have succeeded where the Supreme Court has failed. Two alternate ideals have been developed. The first ideal is "laissez-faire pluralism." This ideal is exposited by Leo Pfeffer in his books, *Church, State and Freedom* and *Creeds in Competition.* A summary of "laissez-faire pluralism" is:

> Religious diversity is desirable in and of itself. The greatest spiritual good for the greatest number is most likely to be achieved if different religions or creeds compete in "the market place of souls." This competition between religious groups allows the individual to freely choose his faith among competing faiths. This competition, however, is peaceful. Hence, it becomes an effective substitute to more violent forms of religious conflict to which religions generally are prone. The competition should be free and uncoerced. The state keeps its hands off. It does not exert pressure or influence in favor or against any one religion. There should be no formal intervention by religious groups into political parties.

There are many difficulties with this ideal. The ideal depends upon an analogy between the competition of religious sects on the one hand and the free economic market on the other. I have commented on the weakness of this analogy above. The free market economy has been eroded in the last century. Government interference to protect the weak, the child, small farmer, laborer, and the woman has occurred. Where it is believed that the free market allocation of resources has failed, government interference such as rent control and production control has occurred. Government interference has been allowed in order to increase production. Finally, government interference has occurred where non-economic values may be at stake, for example, city planning and fallout shelters. A similar breakdown of the free market analogy as applied to religion may be predicted. Thus, one may expect

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[71] *See* J. MARITAIN, MAN AND THE STATE 147-87 (1951).

government interference to protect the weak through "breach of peace" laws, health laws, adoption laws and work regulations of minors,[72] all of which may interfere with religious competition. Also, the government has interfered to reallocate religious "resources" such as prison chaplains and army chaplains. The government's attempt to increase religious values appears to be behind such developments as the recent New York Regents' oath and released time programs. Also, the government has ignored "the free competition" of religion for other general welfare values even though indirect aid to religion may result.

There has been a breakdown in the free market economic system which extends into the free market religious system. Moreover, the analogy of the free market economic system does not apply to the "free market" religious system. The general explanation of the force behind the free-market economic system is the profit motive. Desire for profit presumably will stimulate economic activity. However, competition in religion may lead to non-religious skepticism rather than stimulated religious activity. Also, in the economic free market system, profit functions to allocate production and distribution within an economic system. There is no evidence that there is any comparable working in the religious marketplace. In fact, the whole meaning of "rational allocation" of religious "resources" is nebulous. The free market economic model assumes that private units of production and consumption are possible and desirable. John Locke has extended this assumption to religion.[73] However, the social origins and framework of religious faiths is increasingly being recognized by some Protestant theologians and was always recognized by Catholic theology. As a consequence, one cannot assume "private" units of production and consumption in religion. Finally, a purpose of the free economic market is to promote efficient production in allocation of goods according to effective demands. The profit margin is a standard of efficiency. In the marketplace of faith, there is no agreed-upon standard of "efficiency" in religious beliefs. Although religious truth may be salable, that which is salable is not necessarily true.

The second ideal of church-state relations has been stated by Catholic philosophers such as Jacques Maritain[74] and John Courtney Murray.[75] This ideal may be stated as the "church-government cooperationist ideal." The tenets of this ideal are the following:

> The human person is both part of the body politic and superior to it through what is eternal in him and in his final destination. The spiritual end of man is the ultimate end and has a 'Primacy' of spiritual. The churches are institutional means for meeting the spiritual needs of the person. The church and the body politic can be distinguished; the purpose of the latter is common good in this life; the purpose of the former is

[72] Prince v. Massachusetts, 321 U.S. 158 (1944); Cantwell v. Connecticut, 310 U.S. 296 (1940).

[73] J. LOCKE, A LETTER CONCERNING TOLERATION (1800).

[74] J. MARITAIN, MAN AND THE STATE (1951).

[75] J. MURRAY, WE HOLD THESE TRUTHS (1960).

eternal life. An absolute division, however, between church and body politic is impossible because both are united within the person. Although it may be ideally desirable in the ideal state to have a union of church and state, within the United States, this ideal has to be adjusted to the religious pluralistic situation. Here, political power is not a secular island of spiritual power, and faith is not to be imposed by constraint. Free inquiry is to be allowed and the free conscience respected. Within pluralism, each faith allows, but does not approve conduct and belief contrary to its faith. Necessary cooperation between church and state includes: (1) the indirect assistance of law and order and material prosperity which a state can promote; (2) public acknowledgement of the faith which embodies the majority's tenets of belief; (3) mutual assistance in both religious, social and educational work.

There are several difficulties with this ideal. Contained within the ideal may be "an intolerance" to non-believers and non-Christian believers. Also, the church-state cooperationist ideal does not delineate how the various faiths can be related within a community. Thus, this ideal contains no actual substitute for the questionable principle of competition in the "laissez-faire separationists" idea. Various religious thinkers such as Walter J. Ong and John Courtney Murray have attempted to substitute the concept of "dialogue" as the concept which will find the relationships between various religious states.[76] Such a concept however, is hyper-intellectual and does not account for the clash between particular institutions and the potential that can result from deep religious beliefs.

A number of intermediate positions have been offered between these two particular ideals. These positions include: (1) the permitting of certain traditional connections between church and government such as coin, mottos, and prayers, but the maintenance of separation in all other areas;[77] (2) the allowance of state establishmentarianism but not federal establishmentarianism; (3) the allowance of government aid to churches to the extent of preserving religious freedom, for example, chaplains in prison;[78] (4) the allowance of government aid to sectarian institutions, for example, schools but not churches;[79] (5) the permitting of aid only upon an equal basis to all denominations;[80] (6) the permitting of aid in the form of time, but not in the form of money or in the form of time and money, but not in the form of coercive criminal statutes.

All of these intermediate positions are not actually intermediate ideals so much as compromise positions between the two stated ideals. It remains for a middle ideal to be stated between the two ideals which meets the objections to either ideal.[81]

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[76] W. Ong, *The Religious-Secular Dialogue*, in RELIGION IN AMERICA 170 (1958).

[77] This appears to be the main thrust of Mr. Justice Stewart's dissent in Engel v. Vitale, 370 U.S. 421 (1962).

[78] Katz, *The Case for Religious Liberty*, in RELIGION IN AMERICA 95 (1958).

[79] This was argued for in the *Everson* case and has been implied by numerous arguments of Catholic thinkers.

[80] E. CORWIN, A CONSTITUTION OF POWERS IN A SECULAR STATE 88-118 (1951).

[81] The ultimate difficulty with articulating an ideal statement of the relationship between

Conclusion

In the recent church-state cases, the Supreme Court has tried to establish its "neutral" role in relation to religious beliefs. At the same time, but independently, certain constitutional theorists have attempted to establish that the Constitution contains certain "neutral" principles.[82] Neither the Court nor constitutional theorists have succeeded in defining clearly what makes these constitutional principles or the Court's judicial review "neutral." The argument above, however, points to the meaning of "neutrality," its limits in relation to judicial review, and the kind of neutrality which the establishment clause may have.

First, the Constitution is "neutral" to the extent that it refers (by explicitly formulated rules) to objective relationships between institutions within America. These objective relationships and explicit rules greatly limit the alternative justifications which the Supreme Court can give in making its decisions. Thus, for example, it is quite impossible for the Court to ignore the *fact* that the institutions of church and government are, for the most part, distinct institutions. Nevertheless, the vagueness of these constitutional rules and the ambiguity of the relationships between institutions permits considerable discretion and expression of personal preference of the judiciary. In this latter sense, the Constitution is not "neutral." Thus, it is the ambiguity of the actual church-government relations in United States society which gives the judiciary considerable discretion in de-

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the church and the government is that such an effort requires the careful attempt to understand the nature of religion. Since this inquiry is productive of great debate and difference, the Court has attempted to avoid such an issue—to remain "neutral." Nevertheless, in order to perform its functions of defining the ideal relationships between institutions within America, the Court must engage in the difficult task of defining the ideal relationships between church and government in America. Otherwise, the Court must restrict its role to focusing open change, demanding coherence of institutions, and channeling the government powers.

The defining of relative ideals by the Court is not always believed to be a function of the Court. Modern constitutional theorists criticize such a function because they view the Court as a basically aristocratic institution with no special moral wisdom, making decisions in a fundamentally democratic society. These critics, I believe, ignore several basic principles underlying the Supreme Court. First, they ignore the principle that the United States is a *constitutional* democracy. A constitution involves objective relationships between institutions made objective by explicit rules. Thus, the Court is not merely "inventing" decisions out of its own consciousness, but deciding in the face of an actual constitutional structure of the nation. Second, we in America are not merely a representative democracy, but also a *constitutional* representative democracy. As a consequence, we have allocated in part to the Court the power to decide large questions relating to the purposes of the Constitution. One of these purposes is the definition of relative constitutional ideals. Opponents of this function of the Court do not distinguish properly between ideals relative to particular society, and absolute ideals which are the province of the political philosopher. The former requires a practical deep wisdom and knowledge about the institutions of our country and the ability to make decisions in view of ideals relative to the country's circumstances.

[82] P. KURLAND, RELIGION AND THE LAW (1962).

fining the relationship of church and government through judicial review.

Second, the Constitution and judicial review is "neutral" in the sense that the Constitution distributes and shapes the form of the government powers, without specifying directly the particular purposes of the exercise of the power. Thus, the Court and Constitution do not initiate and support child labor laws, foreign aid programs, TVA, etc., although it may make decisions as to how these programs affect the constitutional structure. Yet, insofar as the constitutional structure intends to promote and emphasize some purposes rather than other purposes (as the preamble implies), the Constitution itself is not "neutral." As we have seen above, the Constitution does not appear to be "neutral" in defining the relationship of church and government. The Constitution has taken sides to the extent of determining that the government's purpose is not to promote the spiritual development of man.

Third, the Constitution provides an instrument for channeling the operations of government according to certain shared expectations of the community. Although these expectations are values, to the extent that they are *shared* values, they appear "neutral," *i.e.*, there is no conflict to point up their lack of neutrality. However, we have seen that not all of the expectations in relation to the relationships between church and state are shared. To the extent that values are not shared by the community, the Court in deciding cannot be "neutral."

Fourth, the Constitution provides a focus for unanticipated accretions of power which threaten freedom and stability. The Constitution is neutral to the extent that it is concerned with stability in itself as well as the selection, order and direction of change in the country. Moreover, the Constitution provides a neutral focus upon change in order to illuminate these changes. Nevertheless, the Constitution, as interpreted through judicial review, becomes more than a focus for attempting to change; the Court must decide and evaluate what changes are allowable. To the extent that the Court does not merely "allow" change, but also guides change, it is not neutral. The consequence of the Court's decisions may be to interfere with legislation which attempts to promote a specific relationship between church and government.

Finally, the Constitution is neutral to the extent that the alternative ideals which are selected by the Court must be appropriate to the political and historical traditions of the country. Thus, the Court is "neutral" in the sense that it excludes absolute ideals which may be irrelevant to the particular traditions and power structure of America. The Constitution may further be neutral to the extent that the Court can find a middle way between extreme ideals. But, the Constitution, in embodying certain ideals, and the Court, in articulating these ideals, is not "neutral" but rather committed to discovering and setting forth the best constitution for the United States.