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CHURCH AND STATE—THE MANDATE OF THE ESTABLISHMENT CLAUSE: WALL OF SEPARATION OR BENIGN NEUTRALITY?

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I. INTRODUCTION

Freedom of religion is one of the most important freedoms guaranteed by our Constitution.[1] In fact, the United States Supreme Court has concluded that the religious liberty secured by the Constitution is of a higher dignity than some of our other constitutional guarantees.[2] A search for greater religious freedom was a significant motivation for the colonization of America,[3] and although in practice the early colonists rated little better than the Mother Country in their religious toleration, our dedication to religious liberty has grown through the years so that no one would now seriously question the framers' wisdom in protecting that religious liberty by the religion clauses of the first amendment.[4]

Religious liberty in America is widely perceived to be the product of the principle of "separation of church and state,"[5] and although that phrase does not appear in the Constitution, it is generally thought that the religion clauses — "Congress shall make no law

1. *See* Hudspeth, *Separation of Church and State in America,* 33 TEXAS L. REV. 1035, 1047 n.49 (1955).

2. *See* Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943) (freedom of religion in favored position); R. MILLER & R. FLOWERS, TOWARD BENEVOLENT NEUTRALITY: CHURCH, STATE, AND THE SUPREME COURT 63-64 (1982).

3. *See* Hudspeth, *Separation of Church and State in America,* 33 TEXAS L. REV. 1035, 1038 (1955) (freedom from persecution and freedom to worship were motivating factors for many early colonists not of same beliefs).

4. *See* Stanmeyer, *Free Exercise and the Wall: The Obsolescence of a Metaphor,* 37 GEO. WASH. L. REV. 223, 224 (1968) (religion clauses meant to prevent government from crushing personal conscience and religious dissent).

5. *See* Zorach v. Clauson, 343 U.S. 306, 312 (1952). In delivering the Court's opinion, Justice Douglas stated: "There cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated." *Id.* at 312; *see also* Stanmeyer, *Free Exercise and the Wall: The Obsolescence of a Metaphor,* 37 GEO. WASH. L. REV. 223, 223 (1968) (most citizens perceive church-state relation to be one of separation); Toscano, *A Dubious Neutrality: The Establishment of Secularism in the Public Schools,* 1979 B.Y.U. L. REV. 177, 190-91 (Constitution does not mention separation yet Supreme Court works from that theory).

respecting an establishment of religion, or prohibiting the free exercise thereof"[6] — mandate such a separation. Separation, however, like many other terms used in church-state relations, means different things to different groups;[7] even if all could agree on a general principle of separation, they would still differ greatly on its proper application.[8] To some it means *no* governmental recognition or interaction with religion; to others it simply means neutrality and non-interference.[9] The subject is complex and provokes deep emotion, and there is no general agreement on ultimate principles or solutions.[10]

The religion clauses were designed to avoid rather than cause trouble, but as Joseph Tussman observes, they have troubled us a great deal and the storm has not yet passed: "The First Amendment in its attractive brevity leaves much unstated and seems to take much for granted. . . . Is it the practical expression of a 'religious people'? Or is it a tolerant statement of a commitment to a secular experiment."[11] There is no easy answer to the question, and the Supreme Court, instead of providing sound principles and solutions, has compounded the problem.[12] Its decisions in this area, particu-

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6. *See* U.S. CONST. amend. I.

7. *See* C. LOWELL, THE GREAT CHURCH STATE FRAUD 7-10 (1973); Derr, *The First Amendment as a Guide to Church State Relations: Theological Illusions, Cultural Fantasies, and Legal Practicalities,* in CHURCH, STATE AND POLITICS 75, 83 (J. Hensel ed. 1982).

8. *See* Walz v. Tax Comm'r, 397 U.S. 664, 694 (1970) (Harlan, J., concurring) (easier to agree on goals of religion clauses than on "the Standards that should govern their application"). *See generally* H. BROWN, THE RECONSTRUCTION OF THE REPUBLIC 125, 126 (1977) (discusses differing viewpoints as to its meaning); Hudspeth, *Separation of Church and State in America,* 33 TEXAS L. REV. 1035, 1056 (1955) (many advocate separation, yet all differ in its application).

9. *See* H. ABRAHAM, FREEDOM AND THE COURT 261-62 (1972) (neutrality and separation were intent of framers, yet concepts may be interpreted differently; courts face problem of line drawing); Schwarz, *No Imposition of Religion: The Establishment Clause Value,* 77 YALE L.J. 692, 709 (1968) (some believe religion clauses only prohibit an official religion, others believe they only mean no governmental aid to religion); Comment, *Religious Activity in Public Schools: A Proposed Standard,* 24 ST. LOUIS U.L.J. 379, 392-93 (1980) (general discussion of "cooperation," "separation," and "neutrality" theories of interpretation).

10. *See* M. KONVITZ, RELIGIOUS LIBERTY AND CONSCIENCE, A CONSTITUTIONAL INQUIRY 49-50 (1968) (one man's beliefs may be totally different from another's, yet each is constitutionally protected; there is no test for determining validity of those beliefs); *cf.* NAACP v. Button, 371 U.S. 415, 445-46 (1963) (Constitution protects without regard to the "truth, popularity, or social utility of the ideas and beliefs which are offered").

11. *See* THE SUPREME COURT ON CHURCH AND STATE xiii (J. Tussman ed. 1962).

12. *See* Walz v. Tax Comm'r, 397 U.S. 664, 668-69 (1970) (first amendment religion clauses, if construed to their logical extreme, necessarily conflict); Choper, *The Religion*

larly in establishment clause cases, have been inconsistent, and more often than not have failed to command the full accord of the Court.[13] They have been received by the public and legal experts with mixed feelings and have stirred up some of the liveliest and most partisan debates in our nation's history.[14] The Court's justices frankly admit their failure to develop any theory which produces a principled analysis of the church-state issues coming before them.[15] Justice Jackson said: "It is a matter on which we can find no law but our own prepossessions."[16] Justice White has commented that the problems "are not easy; they stir deep feelings; and we are divided among ourselves, perhaps reflecting the different views on this subject of the people of this country."[17]

The Supreme Court should recognize that it has misinterpreted the establishment clause and adopt a new standard of interpretation consistent with the text of the first amendment, the history leading to its adoption, the intent of the framers, and one which will avoid the egregious results the existing theories of interpretation have produced.

Clauses of The First Amendment: Reconciling the Conflict, 41 U. PITT. L. REV. 673, 675 (1980). From the view taken by this author, one is led to the conclusion that because the religion clauses are viewed "as embodying two independent mandates," the Supreme Court has been forced to apply separate tests to each provision. *See id.* at 673-74. The application of these separate tests has led to confusion and unanswered questions as to the intent of the framers of the Constitution. *See id.* at 673-74.

13. *See, e.g.,* Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646 (1980) (5-4 decision in establishment clause case, two dissents filed); Wolman v. Walter, 433 U.S. 229 (1977) (establishment clause provision construed, five justices concurred in part and dissented in part); Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203 (1948) (two concurring opinions filed, one dissent filed in case construing religion clauses).

14. *See* Hudspeth, *Separation of Church and State in America,* 33 TEXAS L. REV. 1035, 1035 (1955) (church-state relations of high public interest).

15. *See* Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 663 (1980) (Blackman, J., dissenting) (any line which the Court has drawn must, as a result of varying decisions, be considered a wavering line at best); *see id.* at 671 (Stevens, J., dissenting) (cases have been decided on an ad hoc basis); Wolman v. Walter, 433 U.S. 229, 266 (1977) (Stevens, J., dissenting) (courts' attempts have been ineffective and have failed to provide guiding principles); Zorach v. Clauson, 343 U.S. 306, 325 (1952) (Jackson, J., dissenting) (distinctions made by Court in construing cases of this type have been trivial and minor).

16. *See* Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203, 238 (1948) (Jackson, J., concurring).

17. *See* Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 662 (1980).

II. THE CONCEPT OF RELIGIOUS LIBERTY

The early colonists in America had either experienced or observed the oppression which resulted from the establishment of state churches in Europe.[18] The resulting fear of alliances between government and the church carried over to future generations and still prevailed when the Constitution and the Bill of Rights were formed.[19] Although many Americans at that time were perfectly willing to allow established churches at the state level,[20] they were wary of the federal government and took positive steps to prevent it from interfering with the existing state churches or the right of the citizens to fully express and exercise their religious beliefs.[21]

The colonists' conception of the strictures placed on government in religious affairs was not as expansive as that of many people today,[22] but although limited, it was essentially a concept of religious liberty, and they employed the language of the religion clauses to protect that liberty from the federal government.[23] So, although the clauses are separate, they complement one another and together express the single concept of religious liberty.[24] The framers could see in the violation of either the establishment clause or the free exercise

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18. *See* A. STOKES & L. PFEFFER, CHURCH AND STATE IN THE UNITED STATES 20-23 (1964).

19. *See id.* at 24 (largest influence of framers was desire to separate church and state); *cf.* Everson v. Board of Educ., 330 U.S. 1, 8 (1947) (colonists came to America to escape tyranny of laws and compelled support of state churches).

20. *See* L. PFEFFER, CHURCH, STATE AND FREEDOM 91-92 (1967) (at time of revolution, majority of states had some form of establishment).

21. *See* Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict,* 41 U. PITT. L. REV. 673, 676 (1980) (purpose of establishment clause is to shield state churches from federal government); *see also* Toscano, *A Dubious Neutrality: The Establishment of Secularism in the Public Schools,* 1979 B.Y.U. L. REV. 177, 190 (framers' intent was not separation, but to restrict federal government from interfering with state churches).

22. *See* L. PFEFFER, CHURCH, STATE AND FREEDOM 89-102, 119 (1967) (general discussion of nature of religious activity and ideals in colonies prior to revolution); Borden, *Federalists, Antifederalists, and Religious Freedom,* 21 J. CHURCH & ST. 469, 469-82 (1979).

23. *See* H. ABRAHAM, FREEDOM AND THE COURT 247 (1972) (establishment clause more the result of desire for freedom generally than non-establishment specifically); Howard, *Up Against the Wall: The Uneasy Separation of Church and State,* in CHURCH, STATE AND POLITICS 5, 24 (J. Hensel ed. 1981).

24. *See, e.g.,* Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict,* 41 U. PITT. L. REV. 673, 677 (1980) (central purpose of religion clauses was protection of religious liberty); Howard, *Up Against the Wall: The Uneasy Separation of Church and State,* in CHURCH, STATE AND POLITICS 5, 24 (J. Hensel ed. 1981) (purpose is to promote and protect religious liberties); Pfeffer, *Freedom and/or Separation: The Constitutional Dilemma of the First Amendment,* 64 MINN. L. REV. 561, 567 (1980) (purpose of separation is

clause an element of coercion and a resulting denial of liberty: an established church involves coercive support by the taxpayers; interference in the free exercise of religion involves coercion in the form of negative restraints.

III. THE PRESENT STATE OF CONFUSION

It has not been easy to delineate the scope of religious liberty. The meaning of the religion clauses is not self-evident.[25] Chief Justice Burger has said that they are "at best opaque."[26] Line drawing has been difficult, and one commentator has aptly described establishment clause interpretation as a "hornet's nest."[27] The Supreme Court, after years of struggling to find a reasonable interpretation of the clauses, has left us a legacy of confusion, contradiction, and inconsistency. As said by Professor A.E. Dick Howard of the University of Virginia Law School: "The uninitiated observer who seeks to make sense of the Supreme Court's rulings in establishment clause cases is in for a shock."[28] A few examples vividly illustrate the truth of that statement:

— the government may not supplement parochial school teachers' salaries,[29] but it may employ and pay with public tax money chaplains in legislative bodies, the armed services, and in public prisons and hospitals, and it may pay for veterans' sectarian training for the ministry;[30]

— the states may not allow noncompulsory prayer, Bible reading, or meditation in the public schools,[31] but it is permissible to have

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to promote religious freedom) (quoting Katz, *The Case for Religious Liberty,* in RELIGION IN AMERICA 97 (J. Cogley ed. 1958)).

25. *See* R. MILLER & R. FLOWERS, TOWARD BENEVOLENT NEUTRALITY: CHURCH, STATE, AND THE SUPREME COURT 297 (1982).

26. *See* Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

27. *See* H. ABRAHAM, FREEDOM AND THE COURT 207 (1972).

28. *See* Howard, *Up Against the Wall: The Uneasy Separation of Church and State,* in CHURCH, STATE AND POLITICS 5, 21 (J. Hensel ed. 1981).

29. *See* Lemon v. Kurtzman, 403 U.S. 602, 607 (1971).

30. *See* Marsh v. Chambers, __ U.S. __, __, 103 S. Ct. 3330, 3336, 77 L. Ed. 2d 1019, 1029 (1983) (compensation of chaplain with state money is not in violation of establishment clause); Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203, 253-54 (1948) (Reed, J., dissenting) (Congress has chaplain, army has chaplains, veterans may receive training for ministry at government expense).

31. *See* School Dist. of Abington Township v. Schempp, 374 U.S. 203, 223 (1963) (reading from Bible in school violates establishment clause); Engel v. Vitale, 370 U.S. 421, 436 (1962) (states may not allow students to recite a composed prayer in school).

opening prayers in Congress and the Supreme Court, as well as "In God We Trust" on our currency, and "Under God" in the Pledge of Allegiance and the National Anthem;[32]

— high schools may not *allow* religious groups to use school property even after school hours,[33] but colleges may not *refuse* to do so;[34]

— states may furnish bus transportation to parochial school children,[35] but may not pay the expenses of their field trips for instructional purposes;[36]

— the state may loan textbooks to parochial schools,[37] but not other teaching and testing materials;[38]

— a state may exempt church property and schools from taxation,[39] but may not reimburse church schools for expenses of tests and examinations;[40]

— a state may not give financial aid to repair a church supported secondary school,[41] but may build academic buildings for sectarian colleges[42] and lease state land to a church school for the purposes of working a tax exemption;[43]

— a state may compel a business to close on Sunday and may pay

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32. *See* School Dist. of Abington Township v. Schempp, 374 U.S. 203, 299-304 (1963).

33. *See* Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203, 212 (1948) (use of state's public buildings for religious purposes is not separation of church and state); Lubbock Civil Liberties Union v. Lubbock Indep. School Dist., 669 F.2d 1038, 1046 (5th Cir. 1982) (authorization of meetings, whether prior or subsequent to school day, have primary effect of promoting religion), *cert. denied,* __ U.S. __, 103 S. Ct. 800, 74 L. Ed. 2d 1003 (1983). *But cf.* Brandon v. Board of Educ., 635 F.2d 971, 978 (2d Cir. 1980) (neutral policy allowing all student groups to meet in public school buildings is not promotion of religion, but promotion of extracurricular activities), *cert. denied,* 454 U.S. 1123 (1981).

34. *See* Widmar v. Vincent, 454 U.S. 263, 267-69 (1981) (where state university has opened its facilities to public, it may not then discriminate against religious groups seeking its use).

35. *See* Everson v. Board of Educ., 330 U.S. 1, 17 (1947).

36. *See* Wolman v. Walter, 433 U.S. 229, 254 (1977).

37. *See* Meek v. Pittenger, 421 U.S. 349, 362 (1975); Board of Educ. v. Allen, 392 U.S. 236, 245-48 (1968); Cochran v. Board of Educ., 281 U.S. 370, 375 (1930).

38. *See* Meek v. Pittenger, 421 U.S. 349, 372-73 (1975).

39. *See* Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 812 (1973) (Rehnquist, J., dissenting) (tax benefit consistent with neutrality); Walz v. Tax Comm'r, 397 U.S. 664, 673 (1970).

40. *See* Levitt v. Committee for Pub. Educ. & Religious Liberty, 413 U.S. 472, 480 (1973).

41. *See* Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 774-75 (1973).

42. *See* Tilton v. Richardson, 403 U.S. 672, 678-80 (1971).

43. *See* Hunt v. McNair, 413 U.S. 734, 749 (1973).

for and display a nativity scene on public property,[44] but may not allow schools to display the Ten Commandments in their hallways;[45]

— public schools may not allow released time for religious services on school property,[46] but may for services held off the premises;[47]

— states may not give tax relief only for tuition paid to parochial schools,[48] but may allow tax deductions for such tuition if the program also allows a similar deduction for public school expenses;[49]

— and the state may provide therapeutic and diagnostic health services to a church school in a mobile unit parked next to the school,[50] but not in the school itself.[51]

IV. SCHOLARLY RECOGNITION OF THE PROBLEM

Constitutional law scholars and other observers are virtually unanimous in labeling the Supreme Court's decisions in establishment cases as inconsistent and unprincipled judgments based on the Court's perceived notions of public policy and the exigencies of the

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44. *See* Lynch v. Donnelly, __ U.S. __, __, 104 S. Ct. 1355, 1362-63, 79 L. Ed. 2d 604, 614-15 (1984); McGowan v. Maryland, 366 U.S. 420, 426 (1961).

45. *See* Stone v. Graham, 449 U.S. 39, 41 (1980).

46. *See* Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203, 210 (1948) (amounts to use of tax supported schools to further religious groups).

47. *See* Zorach v. Clauson, 343 U.S. 306, 314 (1952) (Constitution does not require government to have callous indifference towards religion).

48. *See* Sloan v. Lemon, 413 U.S. 825, 832 (1973) (effect is promotion of religion by giving incentive for parents to send children to sectarian school); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 783-86 (1973) (whether grants go to parents or directly to sectarian school is of no consequence as it provides monetary support for non-secular groups).

49. *See* Mueller v. Allen, __ U.S. __, __, 103 S. Ct. 3062, 3066-67, 77 L. Ed. 2d 721, 728 (1983) (where intent is to reduce educational costs regardless of the type of school involved, the purpose is secular).

50. *See* Wolman v. Walter, 433 U.S. 229, 248 (1977) (services do not have the effect of advancing religious purposes).

51. *See* Meek v. Pittenger, 421 U.S. 349, 368-69 (1975). The act involved in this case provided that the state supply auxiliary services to students through state employees. Appellants argued that this was an establishment of religion because the services were provided on the grounds of the nonpublic school. The Supreme Court rejected the district court's determination that, because the services were provided directly to the students and not to the schools, any benefit to the school was incidental. The basis for the Supreme Court's rejection of this position was that the district court erred in relying "on the good faith and professionalism of the secular teachers and counselors functioning in church related schools to ensure that a strictly nonideological posture is maintained." *See id.* at 368-69.

moment.[52] Many of the Court's decisions on this subject are diametrically opposite and appear to be "tailor made" for the particular case. In an article on establishment clause cases, Jeremy Plust and Gary Brewsaugh observed:

> Thus, the cases have not been determined by rules of law; the rules have been created according to the dictates of each case. . . . [T]his mode of analysis has led the Court to partake of logically indefensible rhetoric; [and] has led to unnecessary inconsistency as the Court has struggled to free itself from the entanglement of precedent. . . .[53]

Experts in this area of constitutional law, such as Kurland, Kauper, Choper, and Giannella, among others, have also decried the Court's lack of principled analysis and have urged new tests or theories of adjudication designed to solve the dilemma.[54] But the strongest criticism of the Court's decisions has come from the justices themselves.

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52. *See* H. ABRAHAM, FREEDOM AND THE COURT 271, 278 (1972) (courts have failed to provide clear answers); D. OAKS, THE WALL BETWEEN CHURCH AND STATE 4 (1963) (determination of meaning of establishment clause often begins with conclusion as to desirability of one solution, followed by rejection or acceptance of theories based on their conformity with the conclusion); *see also* Clark, *Comments on Some Policies Underlying the Constitutional Law of Religious Freedom,* 64 MINN. L. REV. 453, 456 (1980) (Court's rationale for explaining distinctions made in cases is unsatisfactory); Hudspeth, *Separation of Church and State in America,* 33 TEXAS L. REV. 1035, 1035 (1955) (decisions inconsistent and little agreement among justices); Scheffer, *The U.S. Supreme Court and the Free Exercise Clause: Are Standards of Adjudication Possible?,* 23 J. CHURCH & ST. 533, 534 (1981) (meaning given to religion clauses essentially Supreme Court substituting its own legal values for the justices' individual spiritual ideals); Comment, *The 1971 U.S. Supreme Court and the Religion Clauses: The Wall Becomes an Indistinct Barrier,* 24 BAYLOR L. REV. 565, 572, 576 (1972) (federal government feels need to aid nonpublic schools financially; recent decisions discard "wall" for indistinct, wavering line.)

53. *See* Comment, *Toward the Logical and Consistent Adjudication of Establishment Clause Cases,* 5 W. STATE U.L. REV. 117, 127 (1977).

54. *See* Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict,* 41 U. PITT. L. REV. 673, 675 (1980). This author's proposal for proper application of the establishment clause is that an act is unconstitutional if (1) its sole purpose is religious, irrespective of any incidental secular benefits which might result, and (2) it is likely to inhibit religious liberty by "coercing, compromising, or influencing religious beliefs." *See id.* at 675; *see also* Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development,* 80 HARV. L. REV. 1381, 1382-88 (1967); Kauper, *Everson v. Board of Education: A Product of the Judicial Will,* 15 ARIZ. L. REV. 307, 307-26 (1973); Kurland, *Of Church and State and the Supreme Court,* 29 U. CHI. L. REV. 1, 96 (1961). The author states that:

> The freedom and separation clauses should be read as stating a single precept: that government cannot utilize religion as a standard for action or inaction because these clauses, read together as they should be, prohibit classification in terms of religion either to confer a benefit or to impose a burden.

Id. at 96.

They have recognized that the Court's interpretation of the clauses has caused continuing confusion.[55] Justice Stevens has complained that " 'corrosive precedents' have left us without firm principles on which to decide these cases."[56] Chief Justice Burger has referred to "[t]he considerable internal inconsistency in the opinions"[57] and has apologized for the confusion by saying the Court's principle of interpretation in these cases is founded more on experience and history than on logic.[58] Justice Jackson's comment in *Saia v. New York*[59] confirms that lack of logic: "I cannot see how we can read the Constitution one day to *forbid* and the next day to *compel* the use of public tax-supported property to help a religious sect spread its faith."[60] Justice Powell made the greatest understatement yet seen in the opinions when he noted that, in seeking to arrive at some principles of adjudication, the Court's endeavor has resulted in a loss of some "analytical tidiness."[61] But the confusion, inconsistency, and incorrect decisions in establishment clause cases have not resulted from the difficulty of the problem; they have resulted from the Court's failure to recognize the proper theory of church-state relations mandated by the Constitution, and the incorrect interpretation of the establishment clause which that failure has produced.

V. THEORIES OF INTERPRETATION

There is probably no field of law where there is as much semantics and confusion of terms as in the church-state field. Some of the terms used to describe a principle of interpretation, such as "separation," "neutrality," and "accommodation," are contradicted by the very decisions which invoke them. We can, however, broadly divide the philosophies of establishment clause interpretation into three theories: the Wall of Separation or Absolute Separation theory; the Strict Neutrality theory; and the Accommodation theory.[62]

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55. *See* Wolman v. Walter, 433 U.S. 229, 236 (1977) (each case presents analytical difficulties).

56. *See id.* at 266.

57. *See* Walz v. Tax Comm'r, 397 U.S. 664, 668 (1970).

58. *See* Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 802 (1973) (Burger, C.J., concurring).

59. 334 U.S. 558 (1948).

60. *See id.* at 569-70 (Jackson, J., dissenting) (emphasis added).

61. *See* Wolman v. Walter, 433 U.S. 229, 262 (1977) (Powell, J., concurring in part, dissenting in part).

62. *See* H. ABRAHAM, FREEDOM AND THE COURT 253-71 (1972). *See generally* R.

A. *Wall of Separation*

The Wall of Separation theory gets its name from the famous metaphor used by Thomas Jefferson in his letter to the Danbury Baptist Association,[63] when he referred to the Constitution as "building a wall of separation between church and state."[64] The theory is also variously called Absolute Separation,[65] Strict Separation,[66] and sometimes the No Aid theory.[67] It was articulated by the Supreme Court in *Everson v. Board of Education,*[68] where the Court held that New Jersey's reimbursement to parochial school children's parents for the cost of bus transportation to their schools did not violate the establishment clause.[69] In a strong statement of principles which seems utterly out of harmony with the decision, Justice Black set out the Wall of Separation theory:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will

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MILLER & R. FLOWERS, TOWARD BENEVOLENT NEUTRALITY: CHURCH, STATE, AND THE SUPREME COURT 297-302 (1982) (discussing various theories of interpretation); Howard, *Up Against The Wall: The Uneasy Separation of Church and State,* in CHURCH, STATE AND POLITICS 5, 21-27 (J. Hensel ed. 1981) (discusses Court's efforts to find proper test or tests for analysis).

63. *See* THE WRITINGS OF THOMAS JEFFERSON 113 (1861).

64. *See id.* at 113.

65. *See* H. ABRAHAM, FREEDOM AND THE COURT 253 (1972) (theory is one of strict separation); L. PFEFFER, CHURCH, STATE & FREEDOM 177-78 (1967) (test used in *Everson* and *McCollum* cases is one of absolute separation); R. MILLER & R. FLOWERS, TOWARD BENEVOLENT NEUTRALITY: CHURCH, STATE, AND THE SUPREME COURT 297 (absolute separation theory means no aid from government); THE SUPREME COURT ON CHURCH AND STATE xiii (J. Tussman ed. 1962).

66. *See* H. ABRAHAM, FREEDOM AND THE COURT 253 (1972) (Strict Separation Theory requires that government not support religious groups); R.E. MORGAN, THE POLITICS OF RELIGIOUS CONFLICT 20-26 (1968).

67. *See* H. ABRAHAM, FREEDOM AND THE COURT 253 (1972) (test is that government may give no aid to religious groups); Schwarz, *No Imposition of Religion: The Establishment Clause Value,* 77 YALE L.J. 692, 708-09 (1968) (some believe test to be used is one of no aid); Comment, *Establishment Clause Neutrality and the Reasonable Accommodation Requirement,* 4 HASTINGS CONST. L.Q. 901, 911 (1977) (theory in establishment clause cases has sometimes been "no aid to religion").

68. 330 U.S. 1 (1947).

69. *See id.* at 3, 18. *But cf.* Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203, 231 (1948) (allowing religious teachers to come into public school to instruct is constitutionally objectionable).

> or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or nonattendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or group and vice versa. In the words of Jefferson, the clause . . . was intended to erect "a wall of separation between Church and State."[70]

Justice Rutledge's dissent expressed the separation idea this way:

> [T]he object was broader than separating church and state in this narrow sense. It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion. . . . The prohibition broadly forbids state support, financial or other, of religion in any guise, form or degree. It outlaws all use of public funds for religious purposes.[71]

The theory is also supported by several commentators, although every approach differs in some respects.[72]

B. *Strict Neutrality*

After *Everson,* the Court did little but pay lip service to the Wall of Separation theory, although it seemed to turn in that direction again somewhat in the school prayer and Bible reading cases.[73] For the most part, though, it moved closer to the second theory: Strict Neutrality. This theory, best articulated by Professor Phillip Kurland, generally holds that government must be religion blind and cannot use religion as a standard for action or inaction; stated another way, the Constitution prohibits any classification in terms of religion, either creating a benefit or imposing a burden.[74]

Professor Choper urges a similar kind of strict neutrality, but his

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70. Everson v. Board of Educ., 330 U.S. 1, 15-16 (1947).

71. *Id.* at 31-33 (Rutledge, J., dissenting).

72. *See* R. MILLER & R. FLOWERS, TOWARD BENEVOLENT NEUTRALITY: CHURCH, STATE, AND THE SUPREME COURT 297 (1982); L. PFEFFER, CHURCH, STATE AND FREEDOM 253 (1967); Howard, *Up Against the Wall: The Uneasy Separation of Church and State,* in CHURCH, STATE AND POLITICS 5, 25-27 (J. Hensel ed. 1981).

73. *See* School Dist. of Abington Township v. Schempp, 374 U.S. 203, 203 (1963) (Bible reading case); Engel v. Vitale, 370 U.S. 421, 421 (1962) (school prayer case).

74. *See* Kurland, *Of Church and State and the Supreme Court,* 29 U. CHI. L. REV. 1, 96

approach would only invalidate state or federal action which is likely to compromise one's religious beliefs or influence a religious or conscientious choice.[75] Schwarz urges a similar philosophy which he calls the "no imposition of religion" test.[76] Most of the Supreme Court's decisions in establishment cases come nearer to fitting into this theory in its purest form than the others,[77] because the three-prong test now used by the Court proscribes state action unless it has a purely secular purpose and a primary effect which neither advances nor inhibits religion,[78] and these are the hallmarks of the Strict Neutrality or Religion Blind theory.[79]

C. *Accommodation*

The third main theory of interpretation is Accommodation.[80] Purists of this persuasion "argue that since there is no possibility of a national church today, there should be a de-emphasis of the establishment clause and an adherence to free exercise principles."[81] Thus, the most commonly accepted Accommodation theory would permit government cooperation with and assistance to religion in general and churches and church schools in particular, even direct financial aid, so long as the action is nonpreferential among religions.[82] As Tussman states, accommodationists find no constitu-

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(1961). *See generally* H. ABRAHAM, FREEDOM AND THE COURT 257 (1972) (discusses the argument propounded by Professor Kurland).

75. *See* Comment, *Religious Activity in Public Schools: A Proposed Standard,* 24 ST. LOUIS L.J. 379, 393 (1980) (discussing Choper's viewpoint).

76. *See* Schwarz, *No Imposition of Religion: The Establishment Clause Value,* 77 YALE L.J. 692, 693 (1968). The author argues that the dilemma of the religion clauses has resulted from a too broad reading of the establishment clause. Schwarz's theory is that the establishment clause should be interpreted only as prohibiting that aid which has the significant effect or purpose of imposing a religious belief. *See id.* at 693.

77. *See id.* at 696.

78. *See* Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971); *see also* Comment, *Establishment Clause Neutrality and the Reasonable Accommodation Requirement,* 4 HASTINGS CONST. L.Q. 901, 911-15 (1977) (discusses the primary purpose of effect test and its application by the Supreme Court).

79. *Cf.* Kurland, *Of Church, State and the Supreme Court,* 29 U. CHI. L. REV. 1, 96 (1961) (based on Court's opinions, the test used is the primary effect test).

80. *See* Comment, *Religious Activity in Public Schools: A Proposed Standard,* 24 ST. LOUIS U.L.J. 379, 392 (1980) (accommodation theory is cooperation between government and religious groups).

81. *See* Comment, *Religious Activity in Public Schools: A Proposed Standard,* 24 ST. LOUIS U.L.J. 379, 392 (1980).

82. *See* Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict,*

tional barrier to various forms of government aid to or cooperation with the religious life of the community, and believe it is altogether fitting for government "to treat sympathetically the demands of religious life, to aid in furthering the spiritual development of the people—as it furthers material and intellectual development—provided that it does so with an even hand, without intrusion or control, and without coercion of non-believers."[83]

VI. THE SUPREME COURT'S THREE-PRONG TEST

Some of the elements of all three theories may be found in Supreme Court decisions, but no clear standards or principles have emerged.[84] The Court has failed to adopt a broad philosophical theory of church-state relations within the framework of which guidelines for consistent, constitutionally sound, and workable adjudications can be formulated. Instead, there has evolved from its decisions a narrow, mechanical, three-prong or three-tier test to determine if state action constitutes an establishment of religion: To survive constitutional challenge the government action must (1) have a purely secular purpose, (2) have a primary effect which neither advances nor inhibits religion, and (3) not result in an excessive entanglement between government and religion.[85] The first two prongs of the test were articulated in *School District of Abington*

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41 U. PITT. L. REV. 673, 695 (1980) (if accommodations for religion impose only nonreligious costs, they are not unconstitutional); *see also* Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development,* 81 HARV. L. REV. 513, 516 (1968); Howard, *Up Against the Wall: The Uneasy Separation of Church and State,* in CHURCH, STATE AND POLITICS 5, 25-27 (J. Hensel ed. 1981) (discusses Accommodation and Neutrality theories and difference within each); Schwarz, *No Imposition of Religion: The Establishment Clause Value,* 77 YALE L.J. 692, 710 (1968) (even most extreme separationists concede some types of nonpreferential aid). *See generally* Comment, *The 1971 U.S. Supreme Court and the Religion Clauses: The Wall Becomes an Indistinct Barrier,* 24 BAYLOR L. REV. 565, 573 (1972) (author discusses view of Professor Pritchett that establishment clause does not prohibit nonpreferential treatment).

83. *See* THE SUPREME COURT ON CHURCH AND STATE xv (J. Tussman ed. 1962).

84. *Cf.* Comment, *Jefferson and the Church-State Wall: A Historical Examination of the Man and the Metaphor,* 1978 B.Y.U. L. REV. 645, 660-61 (although Court has used preferential treatment and total separation tests, they have, in recent cases, retreated somewhat from strict application of these tests).

85. *See* R. MILLER & R. FLOWERS, TOWARD BENEVOLENT NEUTRALITY: CHURCH, STATE, AND THE SUPREME COURT 300-01 (1982) (examines development of three-prong test from *School Dist. of Abington Township* and *Walz* cases). *See generally* Note, *Florey v. Sioux Falls School Dist.,* 49 UMKC L. REV. 219, 220 (1981) (review of major cases).

Township, Pennsylvania v. Schempp.[86] The third prong first appeared in *Walz v. Tax Commissioner,*[87] and "[i]n all establishment clause cases after *Walz,* the [three-prong test has] been used."[88] There have been hints of another prong—that of political divisiveness—but it has not yet been formally adopted as a part of the test.[89] The test has not made the Court's task any easier,[90] and in fact has, in the words of Professor Choper, "generated ad hoc judgments which are incapable of being reconciled on any principled basis."[91]

VII. INADEQUACIES OF THE TEST

The three-prong test has generated confusion because it is constitutionally unsound and functionally defective. Its first two prongs, which require that all state action have a purely secular purpose and a primary effect that does not advance religion, fly in the face of principles developed by scholarly constitutional analysis,[92] and, if strictly followed, would invalidate many practices both historically

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86. 374 U.S. 203 (1963).

87. 397 U.S. 664 (1970).

88. *See* R. MILLER & R. FLOWERS, TOWARD BENEVOLENT NEUTRALITY: CHURCH, STATE, AND THE SUPREME COURT 301 (1982).

89. *See* Meek v. Pittenger, 421 U.S. 349, 372 (1975) (establishment clause designed to protect against political division along religious lines); R. MILLER & R. FLOWERS, TOWARD BENEVOLENT NEUTRALITY: CHURCH, STATE, AND THE SUPREME COURT 617 (1982). The basis for the origin of this idea is that the framers believed that conflicts based upon religious beliefs have the potential of placing substantial strains on the political system itself. *See id.; see also* Howard, *Up Against the Wall: The Uneasy Separation of Church and State,* in CHURCH, STATE AND POLITICS 5, 22 (J. Hensel ed. 1981) (not clear whether political divisiveness is a test or simply a reinforcement of other tests).

90. *See* Howard, *Up Against the Wall: The Uneasy Separation of Church and State,* in CHURCH, STATE AND POLITICS 5, 24 (J. Hensel ed. 1981) (so long as test is used in supplementary manner it may be controlled; if used as independent test, there should be cause for concern).

91. *See* Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict,* 41 U. PITT. L. REV. 673, 680 (1980).

92. *See* T. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW 224 (1898). The author concludes that the establishment clause was meant only to prevent the setting up of a state church or the favoring of one religion over another. The author goes on to say that the Constitution was not meant to prevent the government from recognizing religion or to prevent the government from providing for it where "a proper recognition of Divine Providence in the working of the government might seem to require it," and where it might be done without favoritism. *See id.* at 224; *see also* J. STOREY, 2 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 593-95 (1851); Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict,* 41 U. PITT. L. REV. 673, 686-88 (1980) (religious purpose alone not enough for invalidation, must also have threat of impairment of religious liberty).

and presently accepted as constitutional by the judicial, executive, and legislative branches of government, as well as society in general.[93] The sanitizing effect of these two requirements would isolate all public institutions and activities from any religious influence, and promote a government hostility to religion, an attitude which is neither mandated nor permitted by the Constitution.[94]

Nothing in the text or history of the first amendment justifies a conclusion that all government action must have a secular purpose and primary effect. Indeed, the religion clauses themselves had a religious purpose and primary effect: to protect freedom of religion and promote its free exercise.[95] Not only do the clauses themselves fail the secular purpose and primary effect prongs, but a consistent application of those prongs would invalidate many laws and state activities routinely accepted by our institutions as valid, e.g., statutes designed to protect religious worship services, such as those prohibiting raucus acts within certain distances of churches, and prohibiting the sale and consumption of alcoholic beverages nearby.[96] Clearly, statutes of this type have both a religious purpose and a primary effect which benefit religion. The same is true of the Sunday closing laws and tax exemptions for church properties, although, in cases involving those enactments, the Supreme Court majority used ingenious rationalizations to deny the obvious.[97] The released time program, approved by the Court in *Zorach v. Clau-*

93. *See* Engel v. Vitale, 370 U.S. 421, 444 (1962) (Stewart, J., dissenting); Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict,* 41 U. PITT. L. REV. 673, 685 (1980) (taken literally, the Court's test would forbid commonly accepted things such as exemption for conscientious objectors and Amish children's exemptions from mandatory school attendance laws).

94. *See* Stone v. Graham, 449 U.S. 39, 45 (1980) (Rehnquist, J., dissenting) (establishment clause does not require that public be insulated from religion); Sherbert v. Verner, 374 U.S. 398, 414 (1963) (Stewart, J., concurring) (free exercise clause will conflict with Court's construction of establishment clause).

95. *See* Howard, *Up Against the Wall: The Uneasy Separation of Church and State,* in CHURCH, STATE AND POLITICS 5, 24 (J. Hensel ed. 1981). The author states that religious liberty may be obtained by ensuring that individuals will have the right to freely exercise their religious beliefs, and by prohibiting the establishment of a religion. The religion clauses are made up of the free exercise clause and the establishment clause, hence the aim is to secure religious liberty. *See id.* at 24; *see also* Choper, *The Religious Clauses of the First Amendment: Reconciling the Conflict,* 41 U. PITT. L. REV. 673, 678 (1980) (central purpose of religion clauses is to safeguard religious liberty).

96. *See* TEX. ALCO. BEV. CODE ANN. § 109.33 (Vernon Supp. 1984) (counties may enact ordinance prohibiting sale of alcohol within 300 feet of church).

97. *See* W. KATZ, RELIGION AND AMERICAN CONSTITUTIONS 14 (1963).

son,[98] had a religious purpose and a primary effect of advancing religion.[99] The overwhelming weight of historical evidence teaches that the framers did not intend to impose secularism upon the government or require that it avoid all activity which would benefit religion.[100] The first amendment was not a product of secularism but of the very opposite—a deep seated desire to preserve religious liberty and promote its free exercise.[101]

The entanglement prong of the current test has been aptly described as nonsensical, and its product condemned as a value not judicially secured by the Constitution.[102] Our society is permeated with activities which result in an entanglement between government and other institutions. Some of the activities are sponsored by the government; others are only regulated by it. It has never been considered that those activities were constitutionally infirm simply because they produced an entanglement. Instead, the degree of entanglement or difficulty in administering them has properly been seen as a matter of policy. If the state stays within its sphere of constitutional authority, its actions should be upheld; if it exceeds those bounds, its actions should fall. They should not be held unconstitutional on the basis of a policy judgment that they cause an excessive entanglement with religion.[103] Moreover, the entanglement test leads the Court to more and more subjective adjudications and away from reasoned analysis on the basis of neutral principles,

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98. 343 U.S. 306 (1952).

99. *See id.* at 311 (program allowed students to miss regular school in order to attend religious classes).

100. *See* Meek v. Pittenger, 421 U.S. 349, 395 (1975) (Rehnquist, J., dissenting) (nothing in first amendment requires Court to side with those who believe society should be entirely secular).

101. *See* W. MARNWELL, THE FIRST AMENDMENT 111-13 (1964).

102. *See* Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict,* 41 U. PITT. L. REV. 673, 681 (1980) (avoiding entanglement is not a value "to be judicially secured by the Establishment Clause"); Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court,* 24 VILL. L. REV. 3, 19 (1978-79) (entanglement test nonsensical).

103. *See* P. KAUPER, CIVIL LIBERTIES AND THE CONSTITUTION 51 (1962). Kauper argues that the issue of constitutional power should not be confused with the question of whether it is desirable or wise as a matter of policy for the government to exercise that power. With respect to governmental assistance to parochial schools, for example, he argues that the issue should be viewed from both the perspective of its impact on public schools and from the perspective of what, if any, submission to governmental control will result from the assistance, and that discussion of the issues should not be "obscured by indiscriminate invocation of the separation principle derived from the First Amendment." *See id.* at 51.

and it is incapable of application in any consistent way.[104]

Defenders of the entanglement prong argue that it is an appropriate test in church-state cases because one of the framers' motives in proposing the amendment was the fear of an excessive entanglement between the state and religion.[105] There is no historical basis for that view. The framers were mainly interested in protecting state authority in religious matters from usurpation by the federal government.[106]

That the test is functionally defective can hardly be gainsaid. The unpredictability of decisions, the inconsistency, and the constant "moving of the wall of separation" to allow for state action deemed innocuous all confirm the fact.[107] The test provides virtually no guidance for determining the proper interplay between church and state,[108] and its absolutist approach is a barrier, rather than an aid, to enlightened constitutional analysis.[109] In addition, the three-prong test exacerbates the conflicts between the establishment clause and the free exercise clause. The secular purpose and primary effect requirements effectively prohibit any aid or benefit to religion;[110]

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104. *See* Ripple, *The Entanglement Test of the Religion Clauses — A Ten Year Assessment,* 27 UCLA L. REV. 1195, 1238 (1980).

105. *Cf.* Walz v. Tax Comm'r, 397 U.S. 664, 674 (1970) (if state is involved in too great a degree, it amounts to an establishment).

106. *See* R. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION 8 (1982); Comment, *Government Aid to Church-Related Education: An Alternative Rational,* 1978 B.Y.U. L. REV. 617, 652 (framers changed wording of amendment to protect already established state churches).

107. *Cf.* Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict,* 41 U. PITT. L. REV. 673, 685-86 (1980) (Court's decisions have been inconsistent depending on circumstances); Comment, *Toward the Logical and Consistent Adjudication of Establishment Clause Cases,* 5 W. ST. U.L. REV. 117, 147 (1977) (Court's decisions have been untidy; tests have arisen so that "absolute" wall may be moved when necessary).

108. *See* Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict,* 41 U. PITT. L. REV. 673, 674 (1980).

109. *See* Stanmeyer, *Free Exercise and the Wall: The Obsolescence of a Metaphor,* 37 GEO. WASH. L. REV. 223, 240 (1968) (Court's method of interpretation is "rigid, all-embracing, rock like 'No Establishment' interpretation"); Comment, *Toward the Logical and Consistent Adjudication of Establishment Clause Cases,* 5 W. ST. U.L. REV. 117, 127 (1977) (Court's method of analysis has caused inconsistency and inability to properly consider countervailing interests).

110. *See* Everson v. Board of Educ., 330 U.S. 1, 15 (1947); *see also* Schwarz, *No Imposition of Religion: The Establishment Clause Value,* 77 YALE L.J. 692, 692 (1968) (establishment clause interpreted to forbid aid). *But see* School Dist. of Abington Township v. Schempp, 374 U.S. 203, 222 (1963) (aid, the purpose of which is exclusively secular, may incidentally benefit religion).

yet, the free exercise clause, in many cases, requires accommodations which do benefit religion,[111] e.g., released time programs in school for religious exercises,[112] use of college facilities by religious groups on an equal basis with other groups,[113] prohibition of discrimination in public welfare and unemployment compensation programs because of the religious beliefs of potential recipients,[114] chaplains in the military and public institutions,[115] and the like.

Thus, constitutional scholars as well as the Court's justices have called for a new, better reasoned, and consistent approach than that provided by the narrow and mechanical three-prong test.[116] Some justices have proposed discarding some or all of the prongs, and seemingly all of them are disenchanted with the test.[117] Justice Rehnquist has called for the Court to abandon its present position on the establishment clause,[118] and he blames the Court's overly expansive interpretation of both the establishment and free exercise clauses for the constant narrowing of the "channel between the Scylla and Charybdis through which any state or federal action must pass in order to survive constitutional scrutiny."[119]

VIII. THE NEED FOR A NEW APPROACH

The three-prong test should be discarded for a new theory of interpretation. As stated by Justice Stewart:

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111. *See* Schwarz, *No Imposition of Religion: The Establishment Clause Value,* 77 YALE L.J. 692, 692 (1968) (free exercise clause requires aid); *cf.* Sherbert v. Verner, 374 U.S. 398, 404 (1963) (government should not place "burden upon the free exercise of religion").

112. *See* Zorach v. Clauson, 343 U.S. 306, 311 (1952).

113. *See* Widmar v. Vincent, 454 U.S. 263, 267-69 (1981).

114. *See* Sherbert v. Verner, 374 U.S. 398, 410 (1963).

115. *See* Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203, 254 (1948).

116. *See* Stanmeyer, *Free Exercise and the Wall: The Obsolescence of a Metaphor,* 37 GEO. WASH. L. REV. 223, 243 (1968). The author states that:

> the courts must return, as engineers and architects of the "Wall," to reread the no establishment clause in living harmony with the free exercise clause—to discover that in an age of tolerance and cooperation the first amendment must be endowed with a meaning at once more profound and more restricted than its frequent use as a ritualistic procrustean bed against which to measure all problems.

Id. at 243.

117. *See* Howard, *Up Against the Wall: The Uneasy Separation of Church and State,* in CHURCH, STATE AND POLITICS 5, 22 (J. Hensel ed. 1981).

118. *See* Thomas v. Review Bd., 450 U.S. 707, 727 (1981) (Rehnquist, J., dissenting) (agrees with abandonment of establishment clause rhetoric but recognizes need for more flexibility).

119. *See id.* at 721.

> I think it is the Court's duty to face up to the dilemma . . . . For so long as the resounding but fallacious fundamentalist rhetoric of some of our Establishment Clause opinions remains on our books, to be disregarded at will as in the present case, or to be undiscriminatingly invoked as in the *Schempp* case, so long will the possibility of consistent and perceptive decisions in this most difficult and delicate area of constitutional law be impeded and impaired. And so long, I fear, will the guarantee of true religious freedom in our pluralistic society be uncertain and insecure.[120]

The Court should adopt a broad theory in establishment clause cases which will be constitutionally correct, consistent, and workable and which will avoid the bizarre results the present test has produced.[121] It is submitted that none of the three main theories which have gained acceptance in our society, and which have been described here, is proper or adequate to do this. They are all contrary to the text and the history of the Constitution as well as the intent of the framers who proposed the first amendment.[122]

IX. THREE MAIN THEORIES INADEQUATE BECAUSE NOT SUPPORTED BY:

A. *Text of the Constitution*

Nothing can be found in the literal text of the establishment clause which mandates absolute separation of church and state or which mandates that government may not recognize religion as a basis for any action, as called for by the Wall of Separation and the Religion Blind theories.[123] In accordance with long accepted canons of constitutional interpretation, "establishment" should be given the

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120. Sherbert v. Verner, 374 U.S. 398, 416-17 (1963) (Stewart, J., concurring).

121. *Compare* Marsh v. Chambers, __ U.S. __, __, 103 S. Ct. 3330, 3336, 77 L. Ed. 2d 1019, 1029 (1983) (compensation of chaplain with state money does not violate establishment clause) *with* Lemon v. Kurtzman, 403 U.S. 602, 607 (1971) (supplementing parochial school teachers' salaries violates establishment clause).

122. *See* Sherbert v. Verner, 374 U.S. 398, 414 (1963) (Stewart, J., concurring). "I think that the Court's approach to the Establishment Clause has on occasion . . . been not only insensitive, but positively wooden, and that the Court has accorded to the Establishment Clause a meaning which neither the words, the history, nor the intention of the authors . . . even remotely suggests." *Id.* at 414.

123. *Cf.* Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 820 (1973) (White, J., dissenting). "No one contends that he can discern from the sparse language of the Establishment Clause that a State is forbidden to aid Religion . . . ." *Id.* at 820.

ordinary and usual meaning ascribed to it by those who employed it.[124] As will be shown later in this paper, neither the framers nor the colonists, in general, thought of a religious establishment in any but the strictest sense, i.e., an official church directly supported by tax money.[125] Certainly, they did not equate cooperation with establishment. Neither, it is submitted, can the text be said to support direct financial aid to churches as the accommodationists urge. If direct financial aid is not an establishment of religion, it would seem nothing would be.[126] As indicated, direct support by compulsory tax levies was one of the principal evils the framers wanted to avoid.

Some have argued that because the establishment clause uses the phrase "*respecting* an establishment of religion"[127] instead of simply saying Congress may not establish a religion, the text can support a broad interpretation prohibiting any cooperation with or aid to religion.[128] But that argument is contradicted by the history of the first amendment.[129] When Madison's proposed amendment first came out of congressional committee, it read: "No religion shall be established by law, nor shall the equal rights of conscience be infringed."[130] Because that language could possibly be construed to outlaw the existing state religious establishments, proposals were advanced to change it, and ultimately the phrase "respecting an establishment of religion" was adopted.[131] Hence, the phrase "respecting an establishment" was meant to serve as a two-edged sword

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124. *See* 16 C.J.S. *Constitutional Law* § 16 (1956).

125. *See* D. HUTCHISON, THE FOUNDATIONS OF THE CONSTITUTION 287 (1975); Comment, *Government Aid to Church-Related Education: An Alternative Rationale,* 1978 B.Y.U. L. REV. 617, 663-65.

126. *See* Comment, *Government Aid to Church-Related Education: An Alternative Rationale,* 1978 B.Y.U. L. REV. 617, 664-65.

127. *See* U.S. CONST. amend. I.

128. *See, e.g.,* Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (language is opaque, framers did not simply forbid establishment); School Dist. of Abington Township v. Schempp, 374 U.S. 203, 220 (1963) (religion clauses overlap, present broad area for interpretation); McGowan v. Maryland, 366 U.S. 420, 442 (1961) (amendment interpreted broadly); *see also* C. LOWELL, THE GREAT CHURCH-STATE FRAUD 8 (1973).

129. *Cf.* Comment, *Government Aid to Church-Related Education: An Alternative Rationale,* 1978 B.Y.U. L. REV. 617, 652-53 (discussion of drafting of amendment and why it was drafted as it was).

130. 1 ANNALS OF CONG. 729, 731 (Gales & Seaton eds. 1789).

131. *See* Comment, *Government Aid to Church-Related Education: An Alternative Rationale,* 1978 B.Y.U. L. REV. 617, 652; *see also* Toscano, *A Dubious Neutrality: The Establishment of Secularism in the Public Schools,* 1979 B.Y.U. L. REV. 177, 192 (churches established by state were placed beyond power of federal government); Comment, *The Historical Mean-*

which would prevent the federal government from either establishing a national religion or disestablishing the existing state religions.[132] It was not intended as broad language to prohibit government cooperation with religion.

B. *History of the Religion Clauses*

The history of the religion clauses does not support Absolute Separation, Strict Neutrality, or Accommodation in all their elements. Neither does it support the three-tiered test used by the Supreme Court.[133] Constitutional scholars, as well as the Court's own justices, have complained that the Court's expansive interpretation of the establishment clause is supported neither by history nor by the intent of the framers.[134] Although the scholarly writing about the history of the religion clauses is filled with contradictions[135] and is often slanted or misstated by advocates seeking to support a particular viewpoint,[136] historical background is an accepted tool of consti-

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ing and Judicial Construction of the Establishment of Religion Clause of the First Amendment, 2 WASHBURN L.J. 65, 94-109 (1962) (outlines churches established in several states).

132. *See* 4 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 194 (1836); W. KATZ, RELIGION AND AMERICAN CONSTITUTIONS 9 (1963); THE SUPREME COURT ON CHURCH AND STATE xiv (J. Tussman ed. 1962); *see also* Comment, *Government Aid to Church-Related Education: An Alternative Rationale,* 1978 B.Y.U. L. REV. 617, 652-53 (clause drafted to prevent federal government from establishing religion or interfering with state churches).

133. *Cf.* Borden, *Federalists, Antifederalists, and Religious Freedom,* 21 J. CHURCH & ST. 469, 469 (1979) (framers committed to religious liberty); Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict,* 41 U. PITT. L. REV. 673, 677 (1980) (paramount purpose was to protect religious liberty); Hudspeth, *Separation of Church and State in America,* 33 TEXAS L. REV. 1035, 1046 (1955) (clauses not meant to keep Congress from protecting religion); Whitehead & Conlan, *The Establishment of the Religion of Secular Humanism and Its First Amendment Implications,* 10 TEX. TECH L. REV. 1, 25-26 (1978) (greatest influence on founders of American legal system was Blackstone, whose theory was that God was source of all laws).

134. *See* Sherbert v. Verner, 374 U.S. 398, 414 (1968) (Stewart, J., concurring); R. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION 113 (1982) (historical records of early America make Court's interpretation untenable); Howard, *Up Against the Wall: The Uneasy Separation of Church and State,* in CHURCH, STATE AND POLITICS 5, 33 (J. Hensel ed. 1981) (justices' reliance on their analysis of history is " 'illusion born of oversimplification' ").

135. *See* Borden, *Federalists, Antifederalists, and Religious Freedom,* 21 J. CHURCH & ST. 469, 469 (1979).

136. *See, e.g.,* W. KATZ, RELIGION AND AMERICAN CONSTITUTIONS 8 (1964) (all advocate clear support for their position in the Constitution, yet they are merely attempting to fortify their position); R. MILLER & R. FLOWERS, TOWARD BENEVOLENT NEUTRALITY: CHURCH, STATE, AND THE SUPREME COURT 297 (1982) (no one can be sure of framers'

tutional as well as statutory construction[137] and can furnish legitimate guideposts for achieving a sound interpretation of the clauses.[138] Indeed, the Supreme Court has on several occasions approved government action on the basis of historical considerations when such action would otherwise appear to be unconstitutional according to its present expansive interpretation of the establishment clause. For example, in *Walz v. Tax Commissioner,*[139] *McGowan v. Maryland,*[140] and the recent case of *Marsh v. Chambers,*[141] the Court upheld tax exemptions for religious property, laws requiring the closing of businesses on Sunday, and the payment of legislative chaplains with public funds respectively, all largely on the basis that our people historically have viewed such action as non-violative of the first amendment.

At the beginning of the American Revolution some kind of establishment existed in all thirteen colonies.[142] Three of the original states had official, established churches when the first amendment was adopted,[143] and they continued for many years thereafter. In fact, Massachusetts did not disestablish her official church until 1833, forty-six years after the Constitutional Convention.[144] Several of the states practiced official discrimination and persecution against some religious faiths and adherents until well into the nineteenth

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exact intentions); C. PRITCHETT, THE AMERICAN CONSTITUTION 32 (1968) (states that "much of rhetoric of public debate has been in terms of invoking support of document for proposals favored, and throwing doubt on constitutional legitimacy of actions opposed").

137. *See* Walz v. Tax Comm'r, 397 U.S. 644, 681 (1970) (Brennan, J., concurring) (Court's interpretation is properly influenced by history and precedent).

138. *See id.* at 681 (Brennan, J., concurring) ("a page of history is worth a volume of logic") (quoting New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1929)). *See generally* Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict,* 41 U. PITT. L. REV. 673, 676 (1980) (appropriate to turn to historical intent when interpreting Constitution); Howard, *Up Against the Wall: The Uneasy Separation of Church and State,* in CHURCH, STATE AND POLITICS 5, 33 (J. Hensel ed. 1981) (although sometimes criticized, justices often base decisions on historical interpretation).

139. 397 U.S. 664 (1970).

140. 366 U.S. 420 (1961).

141. __ U.S. __, 103 S. Ct. 3330, 77 L. Ed. 2d 1019 (1983).

142. *See* H. BROWN, THE RECONSTRUCTION OF THE REPUBLIC 25-26 (1977); L. PFEFFER, CHURCH, STATE AND FREEDOM 92 (1967).

143. *See* H. ABRAHAM, FREEDOM AND THE COURT 210 (1972); THE SUPREME COURT ON CHURCH AND STATE xiv (J. Tussman ed. 1962).

144. *See* R. MILLER & R. FLOWERS, TOWARD BENEVOLENT NEUTRALITY: CHURCH, STATE, AND THE SUPREME COURT 4 (1982).

century.[145] The congress that proposed the first amendment also began the congressional chaplain system.[146] The Continental Congress opened with a prayer, set aside a national day of fasting and prayer, provided for chaplains in the army, and employed a minister to instruct the Congress in Christianity.[147] Contrary to modern belief, Benjamin Franklin's motion to open the Constitutional Convention sessions with prayer and to engage a chaplain was adopted.[148] As a general rule, the colonists believed there was a God, and that the inalienable rights of man which they sought to secure were rooted in Him.[149] Their political documents were replete with references to a Supreme Being and with prayers for the blessings of his Divine Providence.[150]

American law was no less theistic in its philosophy. Blackstone, by far the greatest influence on the foundations of American law, taught that "God was the source of all laws, whether they were found in 'the Holy Scriptures' or were observable as they operated in nature."[151] All of the movements designed to achieve religious liberty in the new nation, culminating in Madison's *Memorial and Remonstrance,*[152] sought not to achieve separation but only equality among the sects, nonpreferential treatment by the federal government, and freedom from coercion.[153] To assert that the historical

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145. *See id.* at 2-4; L. PFEFFER, CHURCH, STATE AND FREEDOM 71-72 (1967); *cf.* Borden, *Federalists, Antifederalists, and Religious Freedom,* 21 J. CHURCH & ST. 469, 470 (1979).

146. *See* Murchison, *How We've Changed,* DALLAS MORNING NEWS, Jan. 13, 1983, at 18, col. 3.

147. *See* L. PFEFFER, CHURCH, STATE AND FREEDOM 120 (1967).

148. *See id.* at 122 (1967); 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1877, at 450-52 (Farrand ed. 1911); Hudspeth, *Separation of Church and State in America,* 33 TEXAS L. REV. 1035, 1041-42 (1955).

149. *See* H. BROWN, THE RECONSTRUCTION OF THE REPUBLIC 25 (1977).

150. *See* School Dist. of Abington Township v. Schempp, 374 U.S. 203, 213 (1963) (evidence of framers' beliefs easily seen in their writings); Whitehead & Conlan, *The Establishment of the Religion of Secular Humanism and Its First Amendment Implications,* 10 TEX. TECH L. REV. 1, 25 (1978) (colonists readily recognized belief in supreme being).

151. *See* W. BLACKSTONE, COMMENTARIES *40-41; Whitehead & Conlan, *The Establishment of the Religion of Secular Humanism and Its First Amendment Implications,* 10 TEX. TECH L. REV. 1, 25-26 (1978).

152. According to one commentator, Madison's writing is "one of the great documents in the history of human liberty." *See* L. PFEFFER, CHURCH, STATE AND FREEDOM 111-13 (1967) (also gives summary of "memorial").

153. *See* D. HUTCHISON, THE FOUNDATIONS OF THE CONSTITUTION 187-88 (1975); Borden, *Federalists, Antifederalists, and Religious Freedom,* 21 J. CHURCH & ST. 469, 477 (1979); Comment, *Jefferson and the Church-State Wall: A Historical Examination of the Man and the Metaphor,* 1978 B.Y.U. L. REV. 645, 661-63.

purpose of the religion clauses was to effect a total separation of church and state or to render government religion blind, is to ignore the historical realities.[154]

C. *Intention of the Framers*

Despite much rhetoric to the contrary, the historical evidence also reveals that the framers' intent was to provide equality, nonpreferential treatment, and freedom from coercion as regards religion and religious organizations—not absolute separation or religion blind government.[155] It is, of course, impossible to determine the exact subjective intent of the framers, but their backgrounds, actions, and writings do reveal some facts from which much can be learned about their intent.[156]

James Madison and Thomas Jefferson are often cited to prove that absolute separation was the intent, but their writings, statements, and actions demonstrate otherwise.[157] Madison's *Memorial and Remonstrance,* for example, considered the precursor of the religion clauses, emphasized equality of religions. It said: "The bill [Patrick Henry's bill establishing a provision for teachers of the Christian religion] violates that equality which ought to be the basis of every law . . . , the bill violates equality by subjecting some to peculiar burdens, [and] . . . by granting to others peculiar exemptions."[158] In 1785, Madison joined Jefferson in introducing a bill in

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154. *See* H. BROWN, THE RECONSTRUCTION OF THE REPUBLIC 103-06 (1977); Toscano, *A Dubious Neutrality: The Establishment of Secularism in the Public Schools,* 1979 B.Y.U. L. REV. 177, 190 (religion clauses do not require wall of separation); Comment, *Jefferson and the Church-State Wall: A Historical Examination of the Man and the Metaphor,* 1978 B.Y.U. L. REV. 645, 665 (to conclude that it was meant to create total separation ignores historical reality).

155. *See* Whitehead & Conlan, *The Establishment of the Religion of Secular Humanism and Its First Amendment Implications,* 10 TEX. TECH L. REV. 1, 1-4 (1978); Comment, *Toward a Constitutional Definition of Religion,* 91 HARV. L. REV. 1056, 1057 (1978).

156. *See* L. HAND, THE BILL OF RIGHTS 73 (1958); Kurland, *Of Church and State and the Supreme Court,* 29 U. CHI. L. REV. 1, 2-6 (1961).

157. *See* P. FONER, BASIC WRITINGS OF THOMAS JEFFERSON 360 (1950); J. WHITEHEAD, THE SEPARATION ILLUSION 45-94 (1977); Comment, *Jefferson and the Church-State Wall: A Historical Examination of the Man and the Metaphor,* 1978 B.Y.U. L. REV. 645, 672 (Jefferson looked for peace and harmony between church and state).

158. *See* 1 LETTERS AND OTHER WRITINGS OF JAMES MADISON 162 (1865); *see also* Comment, *Jefferson and the Church-State Wall: A Historical Examination of the Man and the Metaphor,* 1978 B.Y.U. L. REV. 645, 663 (the *Memorial* is proof that Madison believed one religion should not be favored above another).

the Virginia House of Burgesses appointing an official day of fasting and thanksgiving, and which also provided that preachers who failed to conduct religious services on the prescribed day would be fined.[159] Madison, as a member of the Board of Visitors of the University of Virginia, a state institution, approved the report and the suggestions of its rector, Thomas Jefferson, that the students "will be . . . expected to attend religious worship at the establishment of their respective sects, in the morning, and in time to meet their school in the university at its stated hour."[160] Madison himself stated that the religion clauses were prompted because "the people feared one sect might obtain a preeminence, or two combine together, and establish a religion to which they would compel others to conform."[161] Madison designated several days of fasting and thanksgiving while he was President.[162]

Jefferson, whose name and famous metaphor are most often invoked to support absolute separation, really advocated an impartial accommodation standard. While some of Jefferson's statements appear to support absolute separation, a careful examination of them in context demonstrates that the position he articulated in them was one of federalism rather than separation, and was directed only toward the federal government.[163] This is illustrated by his letter to the Reverend Samuel Miller:

> Certainly, no power to prescribe any religious exercise, or to assume authority in religious discipline, has been delegated to the General [federal] Government. It must then rest with the States, as far as it can be in any human authority . . . . I do not believe it is for the interest of religion to invite the civil magistrate to direct its exercises,

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159. *See* 1 THE PAPERS OF THOMAS JEFFERSON 556 (J. Boyd ed. 1950); Comment, *Jefferson and the Church-State Wall: A Historical Examination of the Man and the Metaphor,* 1978 B.Y.U. L. REV. 645, 657 (general and brief discussion of bill).

160. *See* Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203, 246 (1948) (Reed, J., dissenting)(quoting 19 THE WRITINGS OF THOMAS JEFFERSON 449 (Memorial ed. 1904)).

161. *See* Corwin, *The Supreme Court as National School Board,* 14 LAW & CONTEMP. PROBS. 3, 11 (1949); Whitehead & Conlan, *The Establishment of the Religion of Secular Humanism and Its First Amendment Implications,* 10 TEX. TECH L. REV. 1, 3 (1978) (Madison's fear was that one sect might dominate another).

162. *See* A. STOKES & L. PFEFFER, CHURCH AND STATE IN THE UNITED STATES 88-89 (1964).

163. *See* THE KENTUCKY-VIRGINIA RESOLUTIONS AND MR. MADISON'S REPORT OF 1799, at 15-82 (1960); Comment, *Jefferson and the Church-State Wall: A Historical Examination of the Man and the Metaphor,* 1978 B.Y.U. L. REV. 645, 645 (Jefferson establishment clause was study in federalism).

> its discipline, or its doctrines; nor of the religious societies, that the General Government should be invested with the power of effecting any uniformity of time or matter among them.[164]

His position with reference to *state action* was one of equal, nonpreferential, and noncoercive treatment, with any state assistance to religion being equally available to all.[165] In almost all of his writings and public utterances, Jefferson spoke not of separation of church and state, but of "religious freedom."[166] He thought of an establishment of religion in terms of preferential, unequal treatment:

> I have a view of the subject which ought to displease neither the rational Christian nor Deists, and would reconcile many to a character they have too hastily rejected. . . . The delusion into which the X.Y.Z. plot showed it possible to push to the people; the successful experiment made under the prevalence of that delusion on the clause of the Constitution, which, while it secured the freedom of the press, covered also the freedom of religion, had given to the clergy a very favorite hope of obtaining an establishment of a particular form of Christianity through the United States; and as every sect believes its own form the true one, every one perhaps hoped for his own, but especially the Episcopalians and Congregationalists. The returning good sense of our country threatens abortion to their hopes, and they believe that any portion of power confided to me, will be exerted in opposition to their schemes. And they believe rightly; for I have sworn upon the alter of God, eternal hostility against every form of tyranny over the mind of man. But this is all they have to fear from me: and enough too in their opinion.[167]

Jefferson was a Theist and he believed there was a common core of religious and moral belief to which all men could subscribe, and which was essential to good citizenship and good government.[168]

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164. JEFFERSON'S LETTERS 241 (Arr. W. Whitman) (letter to Rev. Samuel Miller, Jan. 23, 1808).

165. *See* Comment, *Jefferson and the Church-State Wall: A Historical Examination of the Man and the Metaphor,* 1978 B.Y.U. L. REV. 645, 661-62, 666-71.

166. *See* JEFFERSON'S LETTERS 153 (Arr. W. Whitman) (letter to the President, Sept. 9, 1792); *see also id.* at 84 (letter to James Madison, Dec. 20, 1787).

167. *See id.* at 198 (letter to Dr. Benjamin Rush, Sept. 23, 1800).

168. *See* Derr, *The First Amendment as a Guide to Church-State Relations: Theological Illusions, Cultural Fantasies, and Legal Practicalities,* in CHURCH, STATE AND POLITICS 75, 78-80 (J. Hensel ed. 1981) (religion was essential to smooth running of country; people with religious natures tend to be good citizens).

Far from advocating an absence of religious influence from public affairs, he believed it was an essential requirement of good government. It was the ecclesiastical dogma and hierarchy he disapproved of and distrusted; he wanted to avoid the oppression and coercion which might result if one sect became dominate over others.[169]

One of Jefferson's first public acts in Virginia on the subject of religion came in 1776 when he authored the *Resolution for Disestablishing the Church of England and for Repealing Laws Interfering with Freedom of Worship.*[170] The resolution proposed that no "preeminence may be allowed to any one religious sect over another" and that coercive levies to support the Church of England be abolished.[171] Jefferson himself wrote that his resolution was written for the purpose of taking away the privilege and preeminence of one religious sect over another and to establish equal rights among all.[172] His *Virginia Bill for Establishing Religious Freedom*[173] is sometimes offered as proof that he advocated a philosophy of strict separation, but neither the language of that bill nor Jefferson's other writings and actions support that view.[174] The bill shows that its purpose was to eliminate taxes to support one preferred religion and prohibit general levies to support ministers and build sectarian edifices — in other words, to avoid preferential treatment and coercion in the form of direct taxes to support religion.[175] Nothing in the text or the history of that bill lends support to the conclusion that Jefferson envisioned or intended a complete separation between church and state in the modern sense of the phrase.[176]

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169. *See* H. BROWN, THE RECONSTRUCTION OF THE REPUBLIC 25, 26 (1977); Derr, *The First Amendment as a Guide to Church-State Relations: Theological Illusions, Cultural Fantasies, and Legal Practicalities,* in CHURCH, STATE AND POLITICS 75, 78-80 (J. Hensel ed. 1981).

170. *See* 1 THE PAPERS OF THOMAS JEFFERSON 530 (J. Boyd ed. 1950).

171. *See id.* at 530.

172. *See id.* at 531.

173. *See* 2 THE PAPERS OF THOMAS JEFFERSON 545 (J. Boyd ed. 1950).

174. *See* Comment, *Jefferson and the Church-State Wall: A Historical Examination of the Man and the Metaphor,* 1978 B.Y.U. L. REV. 645, 664-66.

175. *See id.* at 664 (bill designed to prevent both taxation to support one preferred religion and taxation "to pay ministerial salaries and build sectarian edifices for all religions").

176. *See* J. KIK, THE SUPREME COURT AND PRAYER IN THE PUBLIC SCHOOLS 24 (1963); *cf.* Whitehead & Conlan, *The Establishment of the Religion of Secular Humanism and Its First Amendment Implications,* 10 TEX. TECH L. REV. 1, 3-4 (1978).

The religion bill itself began with language which would be offensive to strict separationists:

> Almighty God hath created the mind free, . . . that all attempts to influence it by temporal punishments . . . or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy author of our religion, who being Lord both of body and mind, yet chose not to propagate it by coercions on either, as was in his Almighty power to do . . . .[177]

The *Virginia Bill for Religious Freedom* was the first of a group of five bills authored and introduced by Jefferson dealing with religion.[178] The second was the *Bill for Saving the Property of the Church Heretofore by Law Established.*[179] It was designed to protect the property of the disestablished Anglican Church.[180] The third was his *Bill for Punishing Disturbers of Religious Worship and Sabbath Breakers.*[181] The fourth bill was the *Bill for Appointing Days of Public Fasting and Thanksgiving,* which Madison joined in proposing.[182] It set aside official days for fasting and worship and even compelled ministers of the gospel to perform religious services on prescribed days on pain of fines for violation.[183] The fifth bill was the *Bill Annulling Marriages Prohibited by the Levitical Law,*[184] and, as its title implies, it declared all marriages prohibited by the Levitical Law of the Bible to be void. Incredibly, by the standards of the modern Wall of Separation or Religion Blind theories, *the last four of these bills by Jefferson would be unconstitutional.* They also would violate one or more of the Supreme Court's three prongs. They were all designed to aid, and each one had the primary effect of advancing religion; the fourth, which mandated the holding of religious services with fines for violations, would also create an excessive entanglement between government and religion, according to the Court's present view. It seems clear that Jefferson, like Madison,

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177. *See* 2 THE PAPERS OF THOMAS JEFFERSON 545 (J. Boyd ed. 1950); *see also* Comment, *Jefferson and the Church-State Wall: A Historical Examination of the Man and the Metaphor,* 1978 B.Y.U. L. REV. 645, 665 (language offensive to separationists).

178. *See* 2 THE PAPERS OF THOMAS JEFFERSON 545 (J. Boyd ed. 1950).

179. *See id.* at 553.

180. *See* Comment, *Jefferson and the Church-State Wall: A Historical Examination of the Man and the Metaphor,* 1978 B.Y.U. L. REV. 645, 665.

181. *See* 2 THE PAPERS OF THOMAS JEFFERSON 555 (J. Boyd ed. 1950).

182. *See id.* at 556.

183. *See id.* at 556.

184. *See id.* at 556.

wanted to prevent only inequality and coercion, and that he believed government interaction and cooperation with religious institutions was both permissible and necessary.[185]

Jefferson took great pains to ensure that religious training and worship were accommodated at his beloved University of Virginia.[186] He took pride in the fact that all four religious denominations in his hometown of Charlottesville used the tax supported county courthouse on alternate Sundays as their "common temple" of worship.[187] One may legitimately join with Joel Hanson in asking the question: "Where is the wall of separation between church and state when the courthouse is used as the common temple of all the religious sects of a village?"[188]

Jefferson's use of the wall of separation metaphor in his letter to the Danbury Baptist Association[189] does not support a conclusion that he advocated the separationist view. Those who rely on the metaphor fail to recognize the context of federalism in which it was used and the subsequent attempts Jefferson made to explain it.[190] The wall Jefferson tried to erect was between the federal government and the states, which under both the first and the tenth amendments retained all authority in church-state matters.[191] His refusal to declare a national day of thanksgiving while President was based on a desire not to usurp the authority of the states, not as a gesture to religion blind government.[192] Indeed, he urged such a day at the

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185. *See* Comment, *Jefferson and the Church-State Wall: A Historical Examination of the Man and the Metaphor,* 1978 B.Y.U. L. REV. 645, 654-55 (quoting THE KENTUCKY-VIRGINIA RESOLUTIONS AND MR. MADISON'S REPORT OF 1799, at 2-3 (1960)).

186. *See id.* at 669; *see also* A. STOKES & L. PFEFFER, CHURCH AND STATE IN THE UNITED STATES 54 (1964) (Jefferson's respect for religion shown by scheme for University of Virginia).

187. *See* WORKS OF THOMAS JEFFERSON 346 (P. Ford ed. 1905) (letter from Jefferson to Dr. Thomas Cooper).

188. *See* Comment, *Jefferson and the Church-State Wall: A Historical Examination of the Man and the Metaphor,* 1978 B.Y.U. L. REV. 645, 668.

189. *See* 16 WRITINGS OF THOMAS JEFFERSON 281-82 (Monticello ed. 1904).

190. *See* 11 THE WRITINGS OF THOMAS JEFFERSON 428-29 (A. Lipscomb ed. 1904) (letter to Rev. Samuel Miller, Jan. 23, 1808); Comment, *Jefferson and the Church-State Wall: A Historical Examination of the Man and the Metaphor,* 1978 B.Y.U. L. REV. 645, 658 (discusses Jefferson's attempts to explain the wall created in the "Danbury letter" both in his second inaugural speech and letter to Rev. Miller).

191. *See* Comment, *Jefferson and the Church-State Wall: A Historical Examination of the Man and the Metaphor,* 1978 B.Y.U. L. REV. 645, 654-55, 659.

192. *See id.* at 658-59.

state level in Virginia.[193] It seems obvious that Jefferson's idea was not separation but religious liberty and tolerance.

Lest it be argued that Jefferson's ideas of nonpreferential and noncoercive cooperation changed after the adoption of the first amendment, it is well to consider his postadoption actions and writings. His second inaugural address, as well as his later writings, confirms that his goal was to avoid any usurpation by the federal government of the state's authority in religious matters.[194]

Other leaders who influenced the adoption of the Bill of Rights held the same general view, and their statements and writings which sound separationist are really expressions of federalism. Alexander Hamilton, for example, opposed the religion clauses because he saw them only as restrictions on the power of the federal government, and he felt they were unnecessary for that purpose because the Constitution was already clear on that point.[195] Samuel Livermore, of New Hampshire, one of those most influential in framing the religion clauses, desired the broader language "Congress shall make no law touching religion," rather than the first draft's "[n]o national religion shall be established by law," because he wanted to make it clear that Congress not only was prohibited from establishing a national church, but would also be powerless to interfere with the state established churches then existing, including his own state of New Hampshire.[196] Benjamin Franklin's ideal was to ensure religious freedom, and his motion to begin the convention sessions with a prayer for divine guidance confirms that he did not favor strict separation as that term is understood today.[197] The Continental Con-

193. *See* 1 THE PAPERS OF THOMAS JEFFERSON 556 (J. Boyd ed. 1950); *see also* Comment, *Jefferson and the Church-State Wall: A Historical Examination of the Man and the Metaphor,* 1978 B.Y.U. L. REV. 645, 645 (as a legislator in Virginia, Jefferson proposed a bill which would have allowed the Governor to set days of fasting and thanksgiving).

194. *See* Comment, *Jefferson and the Church-State Wall: A Historical Examination of the Man and the Metaphor,* 1978 B.Y.U. L. REV. 645, 666, 668.

195. *See* THE FEDERALIST No. 84, at 263 (A. Hamilton) (R. Fairfield ed. 1981) (Bill of Rights unnecessary and could be dangerous); *see also* R. MILLER & R. FLOWERS, TOWARD BENEVOLENT NEUTRALITY: CHURCH, STATE, AND THE SUPREME COURT 5 (1982) (including Bill of Rights not necessary and posed problem of inadvertantly omitting some rights).

196. *See* W. KATZ, RELIGION AND AMERICAN CONSTITUTIONS 9 (1964) (original language sought indicates desire to protect states from federal interference); A. STOKES & L. PFEFFER, CHURCH AND STATE IN THE UNITED STATES 47 (1964) (language used by Livermore indicates his state favored religious freedom and did not want to be governed by federal government).

197. *Cf.* A. STOKES & L. PFEFFER, CHURCH AND STATE IN THE UNITED STATES 40-41

gress instituted several fast days, and John Adams in approving that action wrote his wife, Abigail: "We have appointed a Continental fast. Millions will be upon their knees at once before their great Creator, imploring His forgiveness and blessing; His smiles on American Councils and arms."[198]

By joint resolution of Congress, a religious service was made an official part of the inauguration of George Washington.[199] James Monroe, John Quincy Adams, and Thomas Jefferson all spent federal money to Christianize the Indians.[200] Are those the actions of men who believed government could not take cognizance of religion or do anything to aid it? The overwhelming weight of historical evidence teaches that the colonists in general, and the framers in particular, intended only to bar the federal government from establishing a national church and from interfering with state authority in religious matters, and that the religious liberty they sought to secure was one of equality and noncoercion.[201] Their views cannot be reconciled with the tenets of the Wall of Separation or the Strict Neutrality theories. They come closer to the Accommodation theory, but differ from its pure form in that most of the framers would not approve of direct financial aid to sectarian religion, primarily because that involves coercing taxpayers to support a religion not of their choosing.

X. UNWORKABILITY OF THE THEORIES

The three main theories are also practically unworkable and produce unreasonable results. The absolute separation and religion

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(1964) (Franklin supportive of both religion and freedom of religion); Hudspeth, *Separation of Church and State in America,* 33 TEXAS L. REV. 1035, 1041-42 (1955) (Franklin made motion to begin session with prayer).

198. *See* A. STOKES & L. PFEFFER, CHURCH AND STATE IN THE UNITED STATES 83 (1964) (quoting letter of John Adams).

199. *See* JOURNAL OF THE FIRST SESSIONS OF THE SENATE OF THE UNITED STATES OF AMERICA (Washington, Cales & Seaton eds. 1820).

200. *See* Murchison, *How We've Changed,* DALLAS MORNING NEWS, Jan. 13, 1983, at 18, col. 3.

201. *See* School Dist. of Abington Township v. Schempp, 374 U.S. 203, 309-10 (1963) (Stewart, J., dissenting); Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203, 244-49 (1940) (Reed, J., dissenting); H. BROWN, THE RECONSTRUCTION OF THE REPUBLIC 25-26 (1977); Clark, *Comments on Some Policies Underlying the Constitutional Law of Religious Freedom,* 64 MINN. L. REV. 453, 458 (1980); Whitehead & Conlan, *The Establishment of the Religion of Secular Humanism and Its First Amendment Implications,* 10 TEX. TECH L. REV. 1, 3 (1978).

blind approaches are impossible to apply consistently. There are too many instances when circumstances require an interaction between government and religion.[202] When the Court attempts to allow that interaction by "moving the wall" or by redefining the term "neutrality," it produces confusion, bizarre results, and a lack of faith in the integrity of the judicial system.[203] The Supreme Court has recognized that total separation between church and state is neither required nor possible.[204] Yet it continues to pay homage to the principle of separation, prompting one justice to observe that the "wall of separation between church and state [has become] as winding as the famous serpentine wall designed by Mr. Jefferson for the University he founded,"[205] and another justice to observe that the wall of separation has now become a vague and indistinct barrier.[206] Dallen Oaks well expressed the Separation theory's lack of legitimacy and efficacy when he said: "[t]here is something anomalous about a wall which will admit a bus without the slightest breach, but is impermeable to a prayer."[207]

Likewise, strict neutrality or religion blind government is impossible of consistent application in a manner faithful to the Constitution.[208] A literal application of that concept would promote government hostility to religion, a result which is universally condemned in word,[209] but often promoted in fact.[210] For when the

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202. *See* School Dist. of Abington Township v. Schempp, 374 U.S. 203, 309 (1963) (Stewart, J., dissenting) (religion and government must interact in numerous ways); Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203, 239 (1940) (Reed, J., dissenting) (government and religion must constantly interact).

203. *See* H. ABRAHAM, FREEDOM AND THE COURT 252 (1972); Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict,* 41 U. PITT. L. REV. 673, 674 (1980) (Court's tests have provided no clear guidance, nor have they explained problems involved).

204. *See* Lemon v. Kurtzman, 403 U.S. 602, 614 (1971); School Dist. of Abington Township v. Schempp, 374 U.S. 203, 309 (1963) (Stewart, J., dissenting); Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203, 239 (1940) (Reed, J., dissenting).

205. *See* Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203, 238 (1948) (Jackson, J., concurring).

206. *See* Lemon v. Kurtzman, 403 U.S. 602, 614 (1971).

207. *See* D. OAKS, THE WALL BETWEEN CHURCH AND STATE 2-3 (1963).

208. *See, e.g.,* Howard, *Up Against the Wall: The Uneasy Separation of Church and State,* in CHURCH, STATE AND POLITICS 5, 25 (J. Hensel ed. 1981) (neutrality has been elusive guideline and difficult to apply); Kurland, *Of Church and State and the Supreme Court,* 29 U. CHI. L. REV. 1, 5 (1961) (neutrality not "entirely satisfactory criterion"); Whitehead & Conlan, *The Establishment of the Religion of Secular Humanism and Its First Amendment Implications,* 10 TEX. TECH L. REV. 1, 21-22 (1978) (neutrality is at best a wishful illusion).

209. *See* School Dist. of Abington Township v. Schempp, 374 U.S. 203, 225 (1963)

government requires that, in the name of neutrality, all state action have a purely secular purpose as well as a primary effect which does not advance religion, it takes sides with secularism and against theistic religion.[211] The result is not only a government hostility to theistic religion, but ironically the *establishment* of the religion of Secular Humanism.[212] The Supreme Court has accepted the fact that all sincerely held beliefs concerning ultimate values qualify as religion in terms of constitutional protection[213] and has expressly held that Secular Humanism is such a religion.[214] By requiring that all government action have both a secular purpose and a secular primary effect, government promotes secularism, which is a religion.[215] This is not so with other anti-religious movements or philosophies, such as Marxism. Government does not promote Marxism by a secular commitment, but it does promote secularism by such a commitment. In the words of Justice Potter Stewart, the denial of a religious emphasis in public life is not merely the realization of neutrality, "but rather . . . the establishment of a religion of secularism."[216] In its commendable attempts to avoid hostility to theistic religion and accommodate the religious attitudes and traditions of our people, the Court has made the term "strict neutrality" meaningless.[217]

Accommodation, if followed in its pure form, would fare no better. In our pluralistic society with our proliferation of religious sects, direct financial aid to religion on an equal basis would be im-

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(Court may not affirmatively oppose religion); Zorach v. Clauson, 343 U.S. 306, 314 (1952) (no constitutional requirement that there be hostility towards religion).

210. *See* H. BROWN, THE RECONSTRUCTION OF THE REPUBLIC 26 (1972); Toscano, *A Dubious Neutrality: The Establishment of Secularism in the Public Schools,* 1979 B.Y.U. L. REV. 177, 184, 187 (while Court claims neutrality, it is actually favoring secular humanism over theism).

211. *See* Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict,* 41 U. PITT. L. REV. 673, 688 (1980).

212. *See* Toscano, *A Dubious Neutrality: The Establishment of Secularism in the Public Schools,* 1979 B.Y.U. L. REV. 177, 187-88.

213. *See* Welsh v. United States, 398 U.S. 333, 340 (1970); *see also* Note, *The Sacred and the Profane: A First Amendment Definition of Religion,* 61 TEXAS L. REV. 139, 149 (1982) (Supreme Court attempts definition of religious belief).

214. *See* Torcaso v. Watkins, 367 U.S. 488, 495 n.11 (1961).

215. *See id.* at 495 n.11.

216. *See* School Dist. of Abington Township v. Schempp, 374 U.S. 203, 313 (1963) (Stewart, J., dissenting).

217. *See* Walz v. Tax Comm'r, 397 U.S. 664, 669 (1970); Sherbert v. Verner, 374 U.S. 398, 422 (1963) (Harlan, J., dissenting) (neutrality is not strict).

possible, and if attempted would likely result in the establishment of a multitude of churches in violation of the literal text of the establishment clause.[218]

XI. A New Approach — Benign Neutrality

It is submitted that accepted canons of constitutional interpretation and the great weight of historical evidence, not to mention common sense and reason, confirm that the attitude of government toward religion mandated by the Constitution is that of Benign Neutrality. The word "benign" is used to indicate a harmless and favorable disposition.[219] Benign Neutrality, of course, is not a term which was used by the framers or by the average American citizen at the time of the adoption of the first amendment. They thought and wrote simply in terms of religious freedom, and at that time the government's relationship to religion had not yet been placed in a context which required it to be characterized in such a way. The concept, however, is essentially the same, because they sought to affirmatively promote religious freedom while avoiding compulsion and preferential treatment.[220] To do that, the state must have an attitude that is not hostile toward religion, but at the same time is neutral and noncoercive, i.e., an attitude of friendly and harmless neutrality. Chief Justice Burger's term "benevolent neutrality" was not chosen to describe this approach because, while he states that government may have a benevolent neutrality toward religion, he would still require a secular purpose for any government action.[221]

The Benign Neutrality concept is that the religion clauses should be read together as stating a single principle of religious liberty, and in securing that liberty, government (1) is neither required nor permitted to be pro-secular or religion blind, (2) it may permit and indirectly support action which benefits religion if it is nonpreferential between all religions and nonreligion and is not coercive, (3) it may aid religion incidentally and indirectly if the action has a secular

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218. *Cf.* U.S. Const. amend I.

219. *See* Webster's Third New International Dictionary 204 (1968).

220. *See* L. Pfeffer, Church, State and Freedom 127 (1967) (author states that "independence of religion and government was the alpha and omega of democracy and freedom").

221. *See* Walz v. Tax Comm'r, 397 U.S. 664, 669 (1970) (government may be benevolent towards religion but may not sponsor religion).

purpose; or if it has a religious purpose, it is nonpreferential, but (4) it may not financially aid or subsidize religion directly.

A. *Faithful to Constitutional Text, History, and Concept of Religious Liberty*

Benign Neutrality is faithful to the text, history, and concept of the religion clauses because they were designed to protect religious freedom; that can only be accomplished if government has a kind or generous neutrality toward religion. As has been demonstrated, the first amendment sought to secure religious liberty, not by isolating government from religion or by excising from our public life and institutions all religious emphasis, but by ensuring equality among religions and prohibiting coercion of all forms.[222] Furthermore, as pointed out earlier, to prohibit all government recognition or accommodation in matters of religion actually places government on the side of secularism and establishes the religion of Secular Humanism.[223]

The Supreme Court takes great pains to insist that its three-prong test promotes neutrality, but, in fact, the government is not neutral when, at the instance of one already protected from compulsion, it lends its power to the suppression of religion and thereby champions the cause of freedom from religion.[224] So, government cannot be truly neutral in religious matters unless it recognizes and reasonably accommodates the religious traditions and practices of our people short of establishing an official church and short of infringing on the free exercise of religion.[225] This cooperation and accommodation may constitutionally extend to action which indirectly benefits or advances religion if it has a secular purpose or has a religious purpose and is nonpreferential.

There is nothing in the text or history of the Constitution to indi-

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222. *Cf.* H. BROWN, THE RECONSTRUCTION OF THE REPUBLIC 247 (1977); Whitehead & Conlan, *The Establishment of the Religion of Secular Humanism and Its First Amendment Implications,* 10 TEX. TECH L. REV. 1, 2-4 (1978); Comment, *Jefferson and the Church-State Wall: A Historical Examination of the Man and the Metaphor,* 1978 B.Y.U. L. REV. 645, 673.

223. *See* Whitehead & Conlan, *The Establishment of the Religion of Secular Humanism and Its First Amendment Implications,* 10 TEX. TECH L. REV. 1, 23 (1978).

224. *See* Kirven, *Freedom of Religion or Freedom from Religion?,* 48 A.B.A. J. 816, 818 (1962).

225. *See* P. KAUPER, CIVIL LIBERTIES AND THE CONSTITUTION 10 (1962); Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict,* 41 U. PITT. L. REV. 673, 687, 694 (1980).

cate that it intended government actions to have only secular purposes. The secular purpose doctrine is simply a creature of the Supreme Court designed to aid in determining when state action constitutes an establishment of religion,[226] but it has been ineffective in attempting to accomplish that purpose. The secular purpose requirement should be abandoned for a nonpreferential requirement. Nonbelievers, however, should also be protected, as noted by Madison: "Whilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us."[227] Jefferson also made it clear that his concept of religious freedom protected the believers of all sects, as well as the infidel.[228] Benign Neutrality's requirement of noncoercion and nonpreferential treatment between religions and nonreligion would provide that protection.

The concept of Benign Neutrality would prohibit direct financial aid or subsidies to religion because such funding would violate the literal text of the establishment clause and would entail coercion in the form of forced tax levies used to promote a creed not of the taxpayers' choosing, a practice the framers especially abhorred.[229]

B. *Consistent and Workable*

The Benign Neutrality theory would not only be constitutionally correct, it would also be consistent and workable. By candidly allowing nonpreferential government cooperation with religion, it would avoid conflicting decisions by removing the need for courts to move the "wall" or redefine the terms whenever an interplay between government and religion is necessary or desirable. Consistency and predictability would inevitably result. It would do away with any need to define religion or to determine what is a religious or secular purpose and effect, problems which have greatly perplexed the courts.[230] The courts would be freed from the struggle to

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226. *See* School Dist. of Abington Township v. Schempp, 374 U.S. 203, 222-23 (1963); Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict,* 41 U. PITT. L. REV. 673, 686-87 (1980).

227. *See* THE COMPLETE MADISON 301 (S. Padover ed. 1953).

228. *See* L. PFEFFER, CHURCH, STATE AND FREEDOM 114 (1967).

229. *See* W. KATZ, RELIGION AND AMERICAN CONSTITUTIONS 26 (1963).

230. *See* Comment, *Toward the Logical and Consistent Adjudication of Establishment Clause Cases,* 5 W. ST. U.L. REV. 117, 131 (1977).

decide if there will be an excessive entanglement with religion. With nonpreferential and noncoercive support of religion permitted under the Constitution, any entanglement between government and religion would be simply a policy concern rather than a judicial one.

C. *Harmonious With the Free Exercise Clause*

More importantly, Benign Neutrality would greatly reduce, if not remove entirely, those conflicts between the establishment clause and the free exercise clause which have given the Supreme Court and constitutional scholars so much difficulty.[231] Benign Neutrality would leave the free exercise clause largely unfettered and ready to be applied whenever government action tends to restrict or coerce religious beliefs or practices. The establishment clause would come into play only when there is coercion, preferential treatment, or direct financial aid. Most of the tension between the clauses arises when the present expansive interpretation of the establishment clause requires the courts to invalidate indirect and incidental benefits to religion arising from state action, which in turn infringes on the free exercise rights of the citizens involved.[232] This dilemma has caused the courts to attempt a balancing act between the establishment and the free exercise clauses which has largely been unsuccessful.[233] When indirect, nonpreferential aid to religion is freely permitted, the likelihood of a legitimate establishment prohibition conflicting with the free exercise clause will be slight.

Concededly, nonpreferential treatment would be difficult to ensure legislatively and administratively if programs or practices are expansive, but that would simply be part of the policy decision to be made. If administering the program in a nonpreferential way would be too difficult, the policy decision might well be to abandon the program. But the difficulty of administering government programs is not a legitimate basis for a determination of constitutionality.[234]

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231. *See* Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict,* 41 U. PITT. L. REV. 673, 673 (1980); Clark, *Comments on Some Policies Underlying the Constitutional Law of Religious Freedom,* 64 MINN. L. REV. 453, 455-56 (1980).

232. *See* Walz v. Tax Comm'r, 397 U.S. 664, 668-69 (1970); Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict,* 41 U. PITT. L. REV. 673, 674 (1980).

233. *See* Wisconsin v. Yoder, 406 U.S. 205, 214 (1972); Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict,* 41 U. PITT. L. REV. 673, 674 (1980).

234. *Cf.* Walz v. Tax Comm'r, 397 U.S. 664, 700 (1970) (Harlan, J., concurring) (pros-

It is or should be a legislative or executive decision, not a judicial one.

XII. CONCLUSION

Justice Reed stated in *Illinois ex rel. McCollum v. Board of Education:*[235]

> The prohibition of enactments respecting the establishment of religion does not bar every friendly gesture between church and state. It is not an absolute prohibition against every conceivable situation where the two may work together any more than the other prohibitions of the First Amendment — free speech, free press — are absolutes. . . . Devotion to the great principle of religious liberty should not lead us into a rigid interpretation of the constitutional guarantee that conflicts with accepted habits of our people.[236]

Additionally, as observed by Justice Harlan in *Sherbert v. Verner,*[237] a rigid interpretation of the establishment clause may defeat the very purpose of the religion clauses, which was drafted to ensure that no religion be sponsored or favored, none commanded, and none inhibited.[238]

Considering the difficulty now being experienced in adjudicating church-state matters, as well as the incredible morass of conflicting and unprincipled decisions, the relative simplicity of the Benign Neutrality theory should appeal to all. Its faithfulness to the principles of constitutional interpretation and to the ideal of religious liberty envisioned by our forefathers, and included by them in the Bill of Rights, should command the support of all.

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pect of hard constitutional questions not basis for forbidding action which is constitutionally permissible); School Dist. of Abington Township v. Schempp, 374 U.S. 203, 320 (1963) (Stewart, J., dissenting) (conceivable that constitutional standard may not be met but not reason enough to deny opportunity).

235. 333 U.S. 203 (1948).

236. *Id.* at 255-56 (Reed, J., dissenting).

237. 374 U.S. 398 (1963).

238. *See id.* at 421 (Harlan, J., dissenting).