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One Problem Concerning the Principle of Separation of Religion and Politics Under Article 20 of the Constitution of Japan*

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I. Introduction

The principle of separation of church and state in the United States of America has been accepted since colonial days and has continued to the present. Needless to say, the people of the United States of America added the famous article, that is, the First Amendment to the Constitution of the United States of America, in 1791. It provides:

“Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof ;.....”

On the other hand, we had a religious article in the Constitution of the Empire of Japan in 1889. Article 28 of the Constitution provides ;

“Japanese subjects shall, within limits not prejudicial to peace and order, and not antagonistic to their duties as subjects, enjoy freedom of religious belief.**”

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** The Constitution of the United States of America : with the Magna Carta and Japanese Constitution, Masakatsu Kodama, (Yuhikaku, 1926), p. 200.

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At the same time, however, the government under the Constitution had not dealt with the religion,.....which enshrines the ancestors of the emperor as gods, namely, State Shintoism, equal to another religions ; the shrines of State Shintoism were given the status of public corporation and the priests of the shrines were given the status of the public officer, though other religions such as Buddhism and Christianity or others except State Shintoism were granted the freedom of religious activity by the government. Moreover, though the administration on the religions except the shrines was treated by the Ministry of Education, on the contrary, the administration on the shrines, in particular, was governed by the Bureau on Shrines of the Ministry of Home Affairs, and later by the Bureau of Shrine Affairs. Under such an administration of religious affairs, the people were, in fact, forced to worship the shrines. The public officers were, especially given obligation to attend the religious ceremonies in the shrines which were taken place as official functions.

In 1945, Potsdam Declaration requires the establishment of "religious freedom" in Article 10. In obedience to the Article, the General Headquarters abolished the status of the shrine as the establishment of religion by the order concerning prohibition of State Shintoism in December 15, 1945. According to the order, State Shintoism became a private religion such as Buddhism or Christianity.

In the Imperial edict of January 1, 1946, the Emperor denied the status of Emperor as Living God.

After such a historical transition, the Constitution of Japan provides in Article 20 and Article 89 as follows ;

Article 20. "Freedom of religion is guaranteed to all.

No religious organization shall receive any privileges from

the State, nor exercise any political authority.

No person shall be compelled to take part in any religious act, celebration, rite or practice.

The State and its organs shall refrain from religious education or any other religious activity."

Article 89. "No public money or other public property shall be expended or appropriated for the use, benefit or maintenance of any religious institution or association, or for any charitable, educational or benevolent enterprises not under the control of public authority."

Now, in 1956, the Investigation Committee on the Constitution of Japan (Kempo Chosakai) was organized, based on the Act of Investigation Committee, which provides that the Committee is to research the problems of the Constitution of Japan and that the report of investigation is to be submitted to the Cabinet and to the Diet through the Cabinet. On February 3, 1960 in the 41st general assembly of the Committee, it referred to the First Sub-committee on Civil Rights Articles, the problems of the practical use of these articles, based on the report made to the general committee. Classifying the statements and materials presented to the general committee by the members and hearing the explanations by those referred to below, the First Sub-committee made a report in what is considered to be the origin of Article 20, which guarantees freedom of religion and the separation of religion and politics.

This short dissertation will be devoted to one of the problems of the principle of separation of religion and politics of the Constitution of Japan.

II. ARGUMENT IN THE FIRST SUB-COMMITTEE

One of the statements supported by the members was : "Is there

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not a need to amend the provisions of the latter part of Article 20, I (No religious organization shall receive any privileges), and the third part of the same article (The State and its organs shall refrain from religious education or any other religious activity)?” This question, needless to say, raises the problem of whether the Ise Shrine and the Yasukuni Shrine*** could be secularized, because the article in force keeps the state from granting official privileges to the shrines. In order to grant them state aid, they must be secularized. Accordingly, this statement¹ assumes that the shrines (the Ise Shrine, the Yasukuni Shrine and other shrines) are not religious institutions, but are national institutions² peculiar to the spiritual foundation of the State,³ based on the traditional and historical character of the Japanese people.

Opposing this is the statement that “If we assume that Shinto is a religion, we can not permit shrines under the authority of the State.”⁴

*** The Ise Shrine has been dedicated to the ancestors of the Emperor, and the Yasukuni Shrine has been sacred to the persons, who devoted their lives to the State. It was originated from the Shokonsha Shrine in which the fallen in battle at the period of the Meiji Restoration of 1868 were sacred. In 1879, the Shokonsha Shrine was entitled the Yasukuni Shrine.

¹ Ashibe*, Nobuyoshi, *Jurist*, No. 241, p. 46 (January 1, 1961). *Professor of Constitutional Law of Tokyo University.

² Mr. Issei Iinuma, consultant, and Mr. Hisatada, Hirose, commentator insist “As Japanese shrines are peculiar to Japan, is it impossible to separate the shrines from the State, even if the shrines are religious institutions?” The Report of the 38th general assembly of the Investigation Committee on the Constitution of Japan. pp. 36-37.

³ Ouishi*, Yoshio, *Nihonkoku Kempo Gairon* (An Outline of the Japanese Constitution), pp. 163-170. He states that “The Ise Shrine is essentially a moral institution for the people, the enshrined deities are the Emperor’s forefathers, who is the symbol of the State. Not only the Ise Shrine, but ordinary shrines have a universal character as moral institutions for the people.” *Professor of Constitutional Law of Kyoto University.

⁴ Kishimoto*, Hideo, consultant to the Committee, The Report of the 38th general assembly, p. 28, p. 38. *Professor of the study of religion of Tokyo

In addition to these two statements, another member of the Sub-committee said "We will be able to admit the Yasukuni Shrine as an institution common to all religions or religious sects, similar to a memorial hall."⁵

These arguments stem from the question whether the shrines are religious institutions or not. Namely, the first viewpoint is based on the statement at the general assembly; "Now that the institutions which have close relation with the spiritual foundation of the State such as the Ise Shrine and the Yasukuni Shrine, stand on, by nature, the national character which means traditional and historical national essence of our country, we do not think that

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Professor Toshiyoshi Miyazawa of Tokyo University (Constitutional Law), holding the same point of view, states "It is clear that the Ise Shrine is a religious institution. So to make it a non-religious institution revives nothing but the theory that shrines were not religious institutions during the period of the former Imperial Constitution (1887-1947), and therefore it is very clearly against the new constitution." *Kempo II* (The Constitution II) (1959), p. 353.

⁵ Mr. Shigeru Fukuda, advisor to the Committee, states "The authorities of the MacArthur's Headquarters also were planning that the shrines would be able to remain in the future on the condition of having no Shinto ceremonies in the shrines." The 14th Report of the Third Committee, p. 15.

Professor Joji Tagami,* agreeing, asserts "The Ise Shrine and the Yasukuni Shrine are inseparable from the Imperial Family, so it is difficult to define them as it is to define Shinto priests and believers. And at the shrines, they do not pray for mere spiritual peace and enlightenment as individuals, the Shinto ceremonies are in the marginal field of religious phenomena, so there is room for making a distinction between shrines and ordinary religious societies, if they change the form of religious ceremonies.....Under the constitution, it is possible to make the Yasukuni Shrine a national institution, not a religious institution, on the condition that the form of ceremonies of the Yasukuni Shrine is changed, making it a memorial institution for the fallen soldiers. *Kempo Koza*, (The Constitution Series) Vol. II, ed. by Shiro Kiyomiya** and Isao Sato,*** p. 136. *Professor of Hitotsubashi College. **Professor of Tohoku University. ***Professor of Seikei University.

Professor Kishimoto, consultant to the Committee, criticizing this opinion, states "Though it is out of the question to celebrate religious ceremonies for

they are religions as referred to in the constitution.⁶

The second viewpoint is based on the argument that "Shinto"⁷ is after all nothing but a religion, even though it stresses the celebrating of gods and does not concern itself with human problems, and the above mentioned meaning is a special one." In the general assembly, in addition to these two arguments, there were other arguments, one of which is based on the third mentioned statement. That is "The celebrations at Shinto shrines are not for the individual's spiritual peace and enlightenment, but can be distinguished from religion as national celebrations."⁸

I will introduce here the basic thinking behind the first statement of these arguments.

III. CHARACTER OF THE SHRINES

The starting point⁹ of the theory that the Ise or the Yasukuni Shrines are non-religious institutions, which I will call *the non-religious theory of shrines*, is based on the former constitution, whose basic attitude was the divine right of the Imperial system.

the repose of the souls of the people whose lives were devoted to the State at State expense, it will be difficult to glorify them through the ceremonies of one particular religion." The 14th Report of the Third Committee. p. 38.

⁶ Professor Ouishi, commentator, the Report of the 38th general assembly, pp. 31, 32.

⁷ Professor Kishimoto, classifies religion into three groups "(I) that which concerns the relation between God and human beings, (II) that which finds a holiness in the emotional sphere of human beings as a feature of religion and (III) that which aims at solving ultimately the problems of human beings." The Report of the 38th general assembly, the 14th meeting of the Third Committee, pp. 31, 32.

⁸ For example, Mr. Sadakichi Hitotsumatsu, consultant, says "The Ise Shrine is the place in which the ancestors of the Imperial Family are devoted and the Yasukuni Shrine is the place in which those persons, who devoted their lives to the State are memorialized, so we must not confuse them with a religion."

⁹ Miyazawa, T., *Kempo II*. p. 341.

To strengthen the spiritual foundations of Emperor worship, which was the principal doctrine of the former constitution, it was necessary for the state to give a religious character to the shrines as the foundation of the divinity of the Emperor. So the shrines were granted an official character and given the position of a public corporation and the priests of the shrines were given official positions. At this point, the shrines, under the former constitution, were placed in a special position different from the other religious groups, such as Buddhist sects and Christian denominations.

This was, however, clearly inconsistent with the religious freedom granted by Article 28 of the Constitution of the Empire of Japan which provides: (Japanese subjects shall, within limits not prejudicial to peace and order, and not antagonistic to their duties as subjects, enjoy freedom of religious belief.) An important question was how to explain this contradiction. This is the reason why they had to insist on *the non-religious theory of shrines*. Namely, with the establishment of the Bureau for Shrines in the Ministry of Home Affairs, the government was successful in according the shrines official status, on the ground that the shrines were not religious institutions.

Under Article 28 of the former constitution since shrines and Shinto doctrine were made *non-religious institutions* by the constitution, there was no conflict with the freedom of the religion proved for in the constitution, even if the government had forced people to worship at the shrines.

Now, under the present Japanese constitution, professor Yoshio Ouishi, who subscribes to *the non-religious theory of shrines*, insists: "The essential character of the shrines depends on the method of revering the souls of those persons who upheld the state, that is, the community to which they belonged. There-

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fore, the universal character of the shrines consists not in character as the object of individual worship, but rather in character as the object of individual reverence as members of community. As this is the essential and universal character of the shrines, it makes no difference what kind of religious doctrine the person who worships at the shrines has. Because whatever his religious thinking, he can not forego his moral obligation as a person to the state¹⁰."

According to the above logic, the result is that the Japanese people have a moral obligation to worship at the shrines, because they are Japanese people, even if they have other religious beliefs. This argument comes from the professor's *non-religious theory of shrines*; "The gods of the shrines are the Emperor's ancestors, the successive Emperors, the Imperial families, the persons who have given distinguished service to the state when they took up arms for our country, the persons who showed good examples as Japanese people, and the persons who fell as a martyrs in a national crisis, so the shrines are the institutions to permit people to admire and emulate them¹¹."

Granting this viewpoint, it is very easy to introduce the argument that it is the obligation of the Japanese people to go to the shrines and worship regardless of their religious beliefs.

However, are the shrines the institutions for moral education

¹⁰ Ouishi, Y. "Kokka to Shukyo" (The State and the Religion) 61 *Hogaku Ronso* (Kyoto University Law Review) 3, 1955.

¹¹ Ouishi, Y. *Nihonkoku Kempo Gairon*, p. 169. Concerning this statement, however, it is necessary for us to look to the history of the former constitution in which all the people had to attend the celebration of *Genshisai* (New Year's Day), *Kigensetsu* (Anniversary Day of Emperor Jinmu's accession to the throne) and so forth, regardless of their religious beliefs. Toshio Fujitani*, "Kokkashinto no Seiritsu" (The Establishment of Shinto) in *Nihon Shukyo Shi Koza* (The Japanese Religious History Series), Vol. I, p. 277. (1959) *Lecturer of Ritsumeikan University.

for all the people? Should the morality of the people be established through the gods of shrines of this sort?

In this argument, the most important question is who the gods of the shrines are and how we make them gods. Given our history, I can not agree with the notion that all¹² the gods of the shrines are moral example for contemporary people; and under the present constitution, which grants sovereign power to the people, we permitted the Emperor to be the symbol of the State. However, it does not mean that we admitted also the obligation to worship the ancestors of the Emperor, who is the symbol of the State, and that they are the gods of all the people.

After evaluating, critically, one by one, the real value of gods of the shrines, can we not decide what would be a proper moral example for the people? It is improper then, from such a standpoint, to accept *the non-religious theory of shrines*. Still if we look back the history of Shinto shrines, which produced such thinking as "Japan is the land of the gods," "The land of the gods is immortal," and encouraged militarism during the World War II, we will not be able to think of them as institutions for the moral education without considerable conflict in our minds.¹³

¹² For example, in the established shrines, they celebrated *Ninigi-no-mikoto* (the oldest ancestor of the Emperor in a mythological history of *the Kirishima Shrine*, *Jinmu-tenno* (the oldest Emperor in mythological history of *the Miyazaki Shrine*, and at *the Kashiwara Shrine*, and so forth.)

And in other specially established shrines, for example, they memorialized *Kusunoki Masashige* at *the Minatogawa Shrine*, *Oda Nobunaga* at *the Kenkun Shrine*, and *Toyotomi Hideyoshi* at *the Hokoku Shrine*, generals who had served to the successive Emperors.

¹³ Lecturer Fujitani points out, for example, the contribution of Shintoism to militarism from the dawn of Fascism in Japan until the end of World War II. He sees a direct relationship between the war by the government and the establishment of Shintoism.

This thesis concludes that the separation of Shintoism from the State, the

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The second aspect of the problem is that in refusing to admit the theory that the shrines are non-religious institutions, we are obliged to admit they are purely religions. "It, as in the following statement, does not mean that the gods of the shrines cannot be the objects of an individual's religious belief. But because the objects of the religious belief can be related in a thousand different ways to the believer, the gods of a particular shrine can be the objects of one's religious belief. In such a case, the gods of the shrine are the object of the religious belief¹⁴."

According to this statement, Shintoism is no doubt a religion, and thus, we cannot say that the notion; "Shintoism is not one of the religions discussed in the constitution¹⁵." Even if we admit that the shrines have some special characteristics (that is, to celebrate the ancestors as moral examples for the people, or the Emperors, or their families), we can find such characteristics not only in the shrines, but in the temples throughout our long history. So is it not natural to consider Shintoism, like Buddhism, a religion in the constitutional sense?¹⁶

obliteration of militaristic and ultranationalistic thoughts from the doctrine of Shintoism, and the exclusion of Shintoism from school education by the order of the Occupation Authorities on December 15, 1945, were natural reforms of the State Shinto.

¹⁴ Ouishi Y., *Kokka to Shukyo*, p. 3.

¹⁵ On this point, professor Ouishi explains that he makes a distinction between the shrines as institutions, and Shinto as the religious doctrine in which they, worshippers, can call upon the gods for help by praying to the gods of the shrines. *Kokka to Shukyo*, p. 11. Namely, he states, that shrines are structures and that the Shinto is a religious doctrine giving them their contents. This natural distinction does not directly relate to the argument that shrines are religious institutions in the constitution. Because Shinto can, in the final analysis, function as a religion using the shrines as a physical medium, and shrines also have a right to be by virtue of Shinto as a religion.

¹⁶ *The Asahi Shimbun* (The Asahi Newspaper), February 27, 1959.

IV. THE CASE OF THE REMOVAL OF A SHRINE FROM A NATIONAL SECURITY FORCE CAMP.

In 1954, some National Security Force (later Self-Defense Force) volunteers in Niigata Prefecture built a shrine of *the Shobu Shrine* celebrating the god of *the Yasukuni Shrine* and the god of *the Kotaijingu Shrine*, through their own labour and contributions with the approval of a captain. They later held a service to enshrine the gods, inviting a shinto priest. Upon finding this shrine, the Inspector General of the First District of the National Security Force required the removal of the shrine from the camp and it was withdrawn by volunteers.

There are two interpretations of this case. One is the opinion that this action is natural under the constitution which prescribes separation of religion and politics. This opinion holds that the Constitution of Japan forbids the State offering land to a shrine because the State must secure the freedom of religion.¹⁷

The other opinion holds that "Because the National Security Force members are also guaranteed freedom of religion as citizens, the shrine should be permitted just as the sanctuary for an individual's crucifix, Buddhist statue or a shrine charm are permitted."

If so, a part of freedom of religion is to erect shrines voluntarily by individual members. Therefore, the above mentioned action taken by the First District of the National Security

¹⁷ Miyazawa, T., *Kempo II*. p. 353. In January 1955, the Bureau of Self-Defense Force decided a line that it is not recognized to establish religious accommodations just like shrines, Buddhist temples or so in camps and vessels of the Force, because of constitutional problems. In March, a deputy chief of the Bureau issued circular notices that it is clearly contrary to the related laws and regulations to erect permanent structures..... in the area, even if it depends on volunteer's contributions.

Force, by reason of religious activities, is "rather contradictory to the constitution."¹⁸ The statement continues as follows; "The above statement, however, depends upon the viewpoint from only the religious aspect of shrines. But the constitutional issue does not occur from the beginning if seen from the moral aspect of shrines. Not as the object of the religious faith of individuals, but as institutions indicating the aim of the morality for the people, it is justifiable to establish the shrines, legally without conflicting with freedom of religion." This statement is based on the point of view that shrines are not religious institutions but moral ones. Moreover, there is an opinion that "the shrines are not religious institutions because there is no definition admitting the shrines as a religious group in the constitution" which agrees with the above statement. This opinion continues "There has been an established unwritten constitutional provision from olden times concerning the shrines. Even though the shrines were essentially religious institutions, in the public life of the state they have served to exalt the national spirit of repaying kindness and thanksgiving, and with payment of respect to our ancestors above and beyond the differences of religions and religious sects."¹⁹

These arguments holding that shrines are non-religious institutions seem to suggest that it is natural to admit a special status, different from ordinary religions, to the shrines and to give them a state or local subsidy. It is reported that this opinion is influential in a part of the conservative party.²⁰

The view that shrines are non-religious institutions, or beyond religion, asks "Did the United States and Britain, which

¹⁸ Ouishi, Y., *op. cit. supra.*, p. 3.

¹⁹ Satomi, Kishio, *Kempo to Jinja* (The Constitution and the Shrines), p. 52.

²⁰ *The Yomiuri Shimbun* (The Yomiuri Newspaper), Feb. 1, 1959.

required Japan to separate religion and politics, exclude completely religious activities from public affairs of the state?" and concludes, "It is impossible to discover the reason why Japan alone must banish Shintoism and separate religion and politics."²¹

If this statement is admitted by the people, though people who support this opinion are a few, it will give a way to subsidy or further establish the Shinto shrines.

However, as I pointed out in Paragraph II, the non-religious theory of shrines is not only primarily questionable, but also involves the risk of giving a preferential status to the shrines.

V. THE CASES OF SEPARATION OF RELIGION AND POLITICS

There are many problems as to the meaning of the separation of religion and politics as stated in the Constitution of Japan. One of them, for example, is the theory of establishing as state institution *the Yasukuni Shrine* and of subsidizing *the Ise Shrine* based on the non-religious theory of shrines. This is forbidden by Article 20 and Article 89 of the Constitution of Japan.

The statement that shrines are not meant to be included in the meaning of these articles, as there are no direct provisions in Article 20, is worth little consideration.

But the statement that there are religious practices contained in the public ceremonies, for example, opening ceremony in the Congress, Thanksgiving message by the President and so forth, will strongly be quoted and insisted by the conservative people henceforth.²²

Will, however, religious practices be continued in of the

²¹ Satomi, K. op. cit. supra., p. 48.

²² Satomi, Ibid..

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United State public affairs in the future? There are, surely, some traditional public events in the United States and some of them are based on religious faith ; for example, the opening prayer in Congress, oaths in the courts, the motto “ In God We Trust ” on coins, some words related to God in the national anthem, and a chaplain for troops, and so forth. But can the future line of the relation between church and state in the United States be pointed out only by these events ?

Some judicial decisions based on the First Amendment to the Constitution of the United States were fundamental legal theory for the drafting of Article 20 of the Constitution of Japan. A recent decision which discussed the separation of church and state under the First Amendment was a decision against the action of a Board of Education which stated that it is desirable to have a prayer to “ the Almighty ” at state schools. In this case the Supreme Court of the United States ruled that such prayers were unconstitutional. The majority opinion delivered by Justice Black, stated that the meaning of that section of the First Amendment forbidding the establishment of the religion prohibits not only prescribe the imposing of a religion on the people but also the establishment of an official religion. This opinion was concurred in by Chief Justice Warren, Justice Clark, Justice Brennan, Justice Douglas. A dissenting opinion was delivered by Justice Stewart.²³

In 1963, the Supreme Court affirmed more clearly the principle of the above case in a case in which constitutionality of a law and a rule requiring the recitation of the Lord’s Prayer and Bible reading in the public schools was challenged.²⁴ In this case,

²³ *Christianity Today*, Vol. VI, No. 20, July 20, 1962.

²⁴ *Abington School District v. Schempp*, and *Murray v. Curlett*. 31 L. W.

the opinion of the Court was that the prohibition against the establishment of an official religion prohibits not only giving preferential treatment to any religion as an official religion but also denies any religion any assistance even if it is without discrimination.²⁵

Through these cases, Bible reading and recitation of the Lord's Prayer in the United States public schools were ruled unconstitutional, and I think we can say that the principle of separation of church and state has become clear.

VI. SOME PRINCIPLES OF SEPARATION OF CHURCH AND STATES IN THE UNITED STATES OF AMERICA.

Now concerning the essential meaning of the separation principle, there are four discernible attitudes;²⁶ (I) the State should be required to cooperate with the true religion, (II) the State should be friendly to all of the religions equally, (III) the State should be completely unconcerned and display neutral attitude to religion, and (IV) the State should be hostile to religions generally.

The three of them except (IV) are admitted in the United States of America. I should like to explain these three attitudes.

4683, June 19, 1963.

²⁵ Ibid. pp. 4690-4695.

²⁶ Miyazawa, T., "*Kokka to Shukyo*" (The State and the Religion), 202 *The Sekai* 59 (1962). Professor Miyazawa clearly classifies the latter three attitudes on the separation principle. In this paper, I should like to add the first one, namely the "Not Separation, but Distinction and Cooperation Doctrine" which was insisted by the Catholic groups in the United States. See, Wilfrid Parsons, *The First Freedom*, (1948), and James M. O'Neill, *Religion and Education under the Constitution*. (1949), *Catholicism and American Freedom* (1952).

There is no opinion for the fourth enumerated above in the United States.

des in brief before stating my opinion.

(I) The first of these statements is "Not Separation, but Distinction and Cooperation which was asserted chiefly by Father Parsons and professor O'Neill. Father Parsons says,

"Distinction and cooperation are correctives ; they must exist together. They necessarily mean peace..... Distinction and cooperation."²⁷

In his book, *The First Freedom*, he says : the Catholic Church is not a voluntary society in the United States ; it is not of human origin ; all religions are not of equal value in the sight of God ; each of the religions does not offer to a man an equally good way to eternal salvation ; the state has no right to be equally indifferent to all religions.²⁸

Opposing to these statements, professor Konvitz, summarizes the difference between "separation" and "distinction" as follows:

The difference between "separation" and "distinction" is meant, obviously, to point to more than a merely semantic difference ; the rejection of "separation" and the use of "distinction" is intended to point out certain practical objectives, and this opinion is found in the emphatic linking of "distinction" with "cooperation." The doctrine of separation implies no cooperation between church and state ; at the heart of the "distinction" doctrine there must

As one of attitudes for the fourth enumerated above, we can easily point out Article 124 of the Constitution of the Union of Soviet Socialistic Republics. It provides, "In order to ensure to citizens freedom of conscience, the church in the U. S. S. R. is separated from the state, and the school from the church. Freedom of religious worship and freedom of anti-religious propaganda is recognized for all citizens."

Still Professor Hazard states that the criminal code forbade the teaching of religious beliefs to children in private schools. John N. Hazard, *The Soviet System of Government*, p. 129. (1963).

²⁷ Parsons, Wilfrid, *The First Freedom ; Considerations on Church and State in the United States*. 93 (1948). ²⁸ *Ibid.*, 139.

be cooperation : the state is required to have a friendly interest in the ends which the church seeks to achieve, and has the duty to assist in seeking their achievement.²⁹

Professor Konvitz criticizes that the basis of this doctrine is to be found in the belief that while there may be freedom of religion, there is no freedom from religion.³⁰

Another criticism is done by professor Pfeffer against professor O'Neil's opinion.³¹

(II) The second of the above four is "No Preference Doctrine," which stands on the tradition and the history of the United States of America having close connection with the Christianity since the foundation of the country.

Joseph Story asserted on the term "respecting an establishment," taking the place of the original sweeping ban against any law "establishing religion," as follows ;

The purpose of the Amendment was not to discredit the then existing State establishments of religion, but rather "to exclude from the National Government all power to act on the subject." He wrote, moreover,

"The situation , of the different states equally proclaimed the policy as well as the necessity of such an exclusion It was impossible that there should not arise perpetual strife and perpetual jealousy on the subject of ecclesiastical ascendancy, if the national government were left free to create a religious establishment. The only security was in extirpating the power. But this alone would have been an imperfect security, if it had not been followed up by a declaration of the right of the free exercise of religion, and a prohibition of all religious tests. This, the

²⁹ Konvitz, Milton R., *Separation of Church and State ; The First Freedom*, 14 L. & Cont. Prob. 47 (1949).

³⁰ *Ibid.*, 47.

³¹ Pfeffer, Leo, *Church and State ; Something Less Than Separation*, 19 Univ. Chi. L. Rev. 1 (1951).

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whole power over the subject of religion is left exclusively to the State governments, to be acted upon according to their own sense of justice and the State constitutions.³².....”

According to Story, it seems that the governmental activities should be forbidden to give a preference to any religious sect by the First Amendment, and that the Amendment mean nothing more than above mentioned. Namely, he contended, the no establishment clause, while it inhibited Congress from giving preference to any denomination of the Christian faith, was not intended to withdraw the Christian religion as a whole from the protection of Congress. He said ;

“Probably at the time of the adoption of the Constitution, and of the amendment to it now under consideration, the general if not the universal sentiment in America was, that Christianity ought to receive encouragement from the state so far as was not incompatible with the private rights of conscience and the freedom of religious worship. An attempt to levell all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation.”³³

According to professor Lynford A. Lardner, Story’s assertion above means that the establishment clause of the First Amendment requires *a rather extensive severance* between church and state as an advice to the Federal Government and the state government. In other words, he does not mean that church and state should be completely separated, but that he relies on the historical background of the foundation of the United States of America having close connection with the Christianity. From such a viewpoint, we can admit that the government should not give special protection to a certain denomination or sect of the

³² Joseph Story, *Commentaries on the Constitution*, § 1879 (1833).

³³ *Ibid.*, § 1874.

Christianity in preference to another denominations or sects, but that the government is able to show favor to these every denominations or sects on equal treatments. Such a position is also taken by Joseph Cooley. Until 1898, Cooley expounded the no establishment clause as follows :

“By establishment of religion is meant the setting up or recognition of a state church, or at least the conferring upon one church of special favors and advantages which are denied to others. It was never intended by the Constitution that the government should be prohibited from recognizing religion, where it might be done without drawing any invidious distinction between different religious beliefs, organizations, or sects.”³⁴

Later, “The No Preference Doctrine” which was based on the tradition and history of the United States of America was advocated by professor Edward S. Corwin,³⁵ professor Paul G. Kauper,³⁶ Justice Reed and Justice Douglas.

Justice Douglas,³⁷ for example, says that State should not be forbidden to give some conveniences to the religious activities of church, but that government must be neutral as between competing religious claims. It may not prefer one religion to another.

(III) The third one is “The Wall of Separation” Doctrine, which means that there is unoversteppable wall between church and state. Needless to say, this principle stems from a letter by President Jefferson in 1802 to a group of Baptists in Dan-

³⁴ Cooley, J., *Principles of Constitutional Law* 224-225 (3rd ed. 1898).

³⁵ Corwin, Edward S., *The Constitution and what it means today* (12ed, 1958). *The Supreme Court as National School Board*, 14 L. & Cont. Prob. 3 (1949).

³⁶ Kauper, Paul G., *Civil Liberties and the Constitution* 60 Mich. L. Rev. 1 (1961). *Prayer, Public School and the Supreme Court*, 61 Mich. L. Rev. 1030 (1963).

³⁷ *Zorach v. Clauson*, 343 U. S. 306 (1952).

ury, Connecticut, in which he declared that it was the purpose of the First Amendment to build "a wall of separation between Church and State."

The principle was supported later by professor Milton R. Konvitz, professor Wilber G. Katz, professor Leo Pfeffer, Justice Black and Justice Frankfurter. For example, professor Konvitz stated clearly that "no deviation from the principle of separation, no substitution for it of the doctrine of 'distinction and cooperation' or any other doctrine, may be tolerated, after criticizing the 'Distinction and Cooperation Doctrine' taken by professor O'Neil.³⁸ And professor Katz says in relation to a rule: "no state aid" to religious activity. To the criticism that it means the hostility to religion to apply the rule of "no state aid" to religious activity, he argues as follows; Nor is a rule of "no state aid" in any sense hostile to religion if one views religion as man's free response to God.³⁹

Professor Pfeffer insists as follows, in light of the discussion on the First Amendment in the Senate and Professor O'Neil's opinion; the purpose of the First Amendment means not only to forbid to give any assistance to any religious sect or denomination is preference to another, but also to forbid to give any assistance to religion indiscriminately.⁴⁰

This "Wall of Separation" principle appears in some of the Court opinions. For example, Justice Black says; the First Amendment requires neutrality not only among religious groups but also believers and non-believers. And it forbid not only

³⁸ O'Neill, James M., *Religion and Education under the Constitution* (1949). *Catholicism and American Freedom*, (1952).

³⁹ Katz, *Religion and State Neutrality*, 20 Univ. Chi. L. Rev. 433. (1953).

⁴⁰ Pfeffer, *Church and State; Something Less Than Separation*, 19 Univ. Chi. L. Rev. 15 (1951).

preference to any sect or denomination in preference to another, but also any assistance to all religions. The First Amendment had built the Wall of Separation between church and state.

This wall must be kept high enough to prevent from overstepping.

We are not able to tolerate any slight infringement.⁴¹

Moreover, Justice Frankfurter stands on this principle in the concurring opinion of *McCullum v. Board of Education*, 1948.

“Separation means separation, not something less. Jefferson’s metaphor in describing the relation between Church and State speaks of a ‘wall of separation,’ not of a fine line easily overstepped.”⁴²

VII. THE FUTURE DIRECTION OF THE PRINCIPLE OF SEPARATION

As above statements concerning of the principle of separation show us, it is sure that there is a statement that the State should be required to cooperate with a religion in the United States of America.

Accordingly, we can say, it is natural that they insist, “It is impossible to discover the reason why Japan alone must banish Shintoism and separate religion and politics.” From this standpoint of view, it is natural that they say that it is unfair to require Japan alone to banish Shintoism and separate religion and politics. Moreover, it must be natural to doubt whether the United States, which required Japan to separate religion and politics, excludes religious activities completely from public affairs of the State, for they have the inscription of “In God We Trust” on their currency or upon the fact that it has become

⁴¹ *Everson v. Board of Education*, 330 U. S. 18 (1947).

⁴² *McCullum v. Board of Education*, 333 U. S. 231 (1948).

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customary to add "So help me God" at the end of an official oath.

However, do they, the first statement concerning the principle of separation and some actual customs like an oath, inscriptions, the opening prayer and so forth, point out the future relation of church and state in the United States of America? Do they also lead the future direction of the principle of separation of religion and politics in Japan?

As for such actual customs, it seems to me that many of these practices are only vestiges of the extreme intervention in religious affairs by the Continental Congress which evidenced no hesitation in legislating on a great variety of religious matters, as Professor Pfeffer points out.⁴³

According to Professor Pfeffer, many of these practices have never been, and as a practical matter can not be, subjected to judicial scrutiny in legislation. He points out;

"I think there is a great danger in assuming constitutional everything that the courts do not and can not expressly adjudicate to be unconstitutional."⁴⁴

Thus, it seems to me that such practices, adhered to their history since the colonial days, do not direct the future relation of church and state, and not lead our principle of separation as previous instances.

As for the first statement, in the next place, it seems to me that it has intensely been criticized especially from the third

⁴³ Pfeffer, Leo, *The Case for Separation*, in *Religion in America*, edited by John Cogley, p. 80 (1958).

⁴⁴ *Ibid.*, p. 80.

point of view, namely, by Professor Konvitz⁴⁵ and Professor Pfeffer⁴⁶.

Moreover, there has been no case decided upon the first statement. So, we can say that the most advocating opinions are the second and third statements in the United States.

Therefore, it is difficult to say that the first statement directs the future attitude concerning the principle of separation.

Now, there has been some cases decided on the second attitude ; the state should be friendly to religions generally. In *Zorach v. Clauson*⁴⁷ in 1952, for example, in which a public school in New York State granted an hour for religious exercises, Justice Douglas who delivered the opinion of the Court said that the First Amendment does not mean that in every and all respects there shall be a separation of Church and State⁴⁸.

Moreover, thinking of the history of the United States, which have close connection with Christianity since the establishment of the colonies, we can find many excellent opinions⁴⁹ which base on the second attitude of the principle.

However, even if we agree with the second statement, we can not support preferential treatment to a particular religion.⁵⁰

The statement does not mean that the State should be friendly to *a religion*.

⁴⁵ Konvitz, Milton R. *Separation of Church and State : The First Freedom*. 1 L. & Cont. Prob. pp. 59-60. (1949).

⁴⁶ Pfeffer, Leo, *Church and State : Something Less Than Separation* 19 Univ. of Chi. L. Rev. 27-28.

⁴⁷ 348 U. S. 308 (1952).

⁴⁸ 348 U. S. 312.

⁴⁹ For example, one of them is Professor Kauper's *Civil Liberties and the Constitution*. 60 Mich. L. Rev. (1961)., *Prayer, Public School and the Supreme Court*, 61 Mich. L. Rev. 1031-1068, (1963).

⁵⁰ Professor Pfeffer concludes his article as "Church and State have been

The cases of 1962 and 1963 on the Bible Reading and Lord's Prayer in public school support the third theory of the principle of separation of church and state. These cases will lead the direction of the principle of church and state in future. The State should be completely unconcerned and display neutral attitude to religion as a principle of separation, not only of church and state in the United States of America, but also of religion and politics of Article 20 of the Constitution of Japan.

Surely, there is an example in the cases of the United States Supreme Court in which the statement that ;

"We are religious people and our system assumes a Supreme Being" governed the opinion of the Court.⁵¹

From this fact, however, we cannot argue by analogy that ;

"We (Japanese people) are also a religious people and our system assumes *all the gods of heaven and earth* (Yaoyorozu no kamigami)."⁵²

kept separate and religious freedom has been preserved." *The Case for Separation*, in *Religion in America*, p. 92.

⁵¹ *Zorach v. Clauson*, 348 U. S. 308 (1952), As I stated in this article, a public school in New York State granted an hour for religious exercises. The Court upheld the law because the location of the religious exercises was not on school property.

In *McCullum* case, however, the arrangement of granting an hour for religious exercises in the school and requiring those students who did not attend the religious exercises to continue with their usual studies was unconstitutional.

⁵² Yaoyorozu no kamigami means all the gods of heaven and earth which created and supported the land of our country according to the mythology on the creation period of Japan.