Appendices

CONSTITUTIONS, COURTS AND THE STUDY OF RELIGION

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"A page of history is worth a volume of logic."[1]

At first blush, it might appear that constitutions and courts have little to do with the study of religion. Surely it is the scholars in the field and not nine elderly black-robed gentlemen in Washington who determine the contents and canons of its study. Still, it can be plausibly argued that in the absence of an established church in America, the opinions of the courts, and especially the United States Supreme Court, tend to become definitive for a certain kind of orthodoxy in public policy, or, at least, for public orthopraxy, and that this definitive role may even touch the study of religion. In the nation's most august tribunal, as Chief Justice Warren Burger has recently said, "a whisper becomes a shout" which may echo across the land. A look at the record will disclose, then, that court opinions may have considerable bearing on our subject. (It will also disclose that the academic study of religion has had some effect upon court opinions, although the influence this way is considerably more modest.)

First, in a relatively obvious but often overlooked way, court opinions are excellent primary sources for the study of certain aspects of religion and especially of religion in America. They afford, e.g., considerable detail about controversies between various forms of religion and the larger society--from the Mormon cases of a century ago to more recent cases involving Jehovah's Witnesses, Black Muslims, Scientology, the League for Spiritual Discovery (LSD), and the Neo-American Church, and including also cases involving such specific issues as aid to parochial (chiefly Catholic) schools and public policy on abortion.[2]

Court materials also contain significant primary material for tracing prevailing American understandings of the nature and significance of religion. Since both the Federal Constitution and state constitutions contain specific references to "religion" courts, willy-nilly, have had on occasion to recognize, summarize and state their understanding of the meaning of that word. As early as 1803 the New Hampshire Supreme Court defined "religion" in a way which is clearly reminiscent of prevailing eighteenth-century undestandings:

> Religion is that sense of Deity, that reverence for the Creator, which is implanted in the minds of rational beings. It is seated in the heart and is conversant with the inward principles and temper of the mind. It must be the result of personal conviction. It is the concern between every man and his Maker.[3]

Nearly a century later, the United States Supreme Court stated in somewhat similar terms what became the classic definition:

> The term "religion" has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will. It is often confounded with the cultus or forms of worship of a particular sect, but it is distinguishable from the latter.[4]

Putting these two definitions side by side, it is clear that judicial understanding of "religion" had not changed much in the nineteenth century. Judicial stress upon the centrality to "religion" of individual belief in God continued well into the twentieth century. It was not until 1961 that the United States Supreme Court formally recognized that there are religions in which belief in God plays little or no role.[5] Then, in the mid sixties, that Court gave a rather elastic interpretation to the meaning of belief in God. In effect, the Court allowed functional equivalents to orthodox belief in God as sufficient grounds for achieving conscientious objector status under the Selective Service Act then in effect.[6] Even before 1961, two lower courts had acknowledged that certain organizations qualify for tax exemption as religions even though they disavow belief in God.[7] As of this writing, the question of definition is crucial in a pending case in New Jersey which hinges on the question of whether Transcendental Meditation (as practiced in connection with the high-school course on the Science of Creative

Intelligence) is a religion. The opinion of recognized scholars in the study of religion may play an important role in the court's understanding of "religion" in this case.

Finally, insofar as the systematic study of religion goes on in publicly financed and controlled institutions, constitutional provisions relative to religion may have a very direct application to that study. To put the matter most directly: Under recent judicial interpretation, it is possible that any taxpayer in Ann Arbor or Berkeley or Missoula may bring suit under the establishment clause of the First Amendment, and cognate or analogous provisions of the relevant state constitutions, to put a stop to what goes on under the heading of religion or religious studies at the state university located in each of those cities.[9] The liklihood of such a suit is relatively remote, however, not only because of the relative "purity" of the academic practices of these institutions, but also and more importantly perhaps because of the amount of money and expertise required to launch such a suit and to keep it afloat. Few individual taxpayers even in Ann Arbor or Berkeley, let alone Missoula, could command that kind of support, and fortunately for those of us in the field, perhaps, the academic study of religion in state universities is not a primary target for the most active separationist litigating groups--i.e., the American Jewish Congress, the American Civil Liberties Union, and Americans and Others Organized for the Separation of Church and State.[10] Nonetheless,

about a decade ago, two Bible Presbyterian clergymen from the Seattle area, both taxpaying citizens, did bring such a suit against the University of Washington to force discontinuation of the course "The Bible as Literature" at that institution. They charged that that course violated the sections on religion in both the state and federal constitutions, that it, among other things, constituted "an establishment of religion."[11] They carried their suit all the way to the United States Supreme Court, but they did not succeed. Still, the case does illustrate the fact that courses in or about religion are constitutionally in a class by themselves in the curricula of publicly supported colleges and universitites.

To my knowledge, the Washington Bible as Literature case is the only instance in which a curricular program or course in the study of religion at a public university has been challenged in the courts.[12] Even though it is relatively obscure as church-state cases go, it is still worth study for what it might indicate about both the constitutional and what might be called, in the broadest sense, the political aspects of our subject. The Reverends Miller and Webb, the two fundamentalist ministers who spearheaded the challenge, failed on both the constitutional and the political fronts. In the former instance they were unable to convince the courts that the contested course, either in its contents or in the manner in which it was taught, was in violation

of the specified provisions of the constitution of the State of Washington and the United States. Another way of putting it is that they were unable to mount a persuasive case under the relatively clear specifications of that body of "doctrine" which the U.S. Supreme Court had developed in religion and the state in the preceding two decades. Miller and Webb also did not (or could not) enlist the support of any one of the three most successful separationist litigational groups mentioned above. In fact, the state affiliate of one of these groups, the American Civil Liberties Union, actually supported the university and its interpretation of academic freedom.[13] With this case as a point of departure, I propose now to examine supreme court "doctrine" in this area, and to conclude with some observations about the political aspects of our subject.

Supreme Court "Doctrine" on Religion and the State

The law of the land, stated at the beginning of the First Amendment, is that "Congress shall make no law respecting an establishing of religion or prohibiting the free exercise thereof. . . " That is the controlling doctrine. All U.S. Supreme Court decisions in this area revolve around it.[14]

By virtue of U.S. Supreme Court decisions within the last thirty years or so "Congress" has come to mean any public agency--

federal, state, and all the way down to local public school boards. The first case in which the establishment clause was applied to state and local practices and which also had to do with education was Everson vs. Board of Education, decided in 1947. This case involved a challenge to public subsidy of the transportation by bus of parochial (Catholic) school children in a community in New Jersey. While the practice survived by a narrow majority, the case is of landmark significance because of its wide ranging and stringent definition of doctrine. Writing for the majority, Justice Hugo Black said:

> 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. . . . 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. . . .

This sweeping language was succinctly encapsulated in the metaphor of "a wall of separation between Church and State."[15]

Everson doctrine was applied a year later in McCollum vs. Board of Education, a case involving a challenge of a released time religious education program in the public schools of Champaign, Illinois, under which students (or their parents acting for them) could elect to take courses in religious education taught by representatives of religious bodies on school time and in school buildings. The Court found this program to be "a

utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith" and hence in violation of the "establishment of religion" clause.[16] The "wall of separation" was maintained or made even more evident.[17]

Everson doctrine was reaffirmed again sixteen years later in a pair of cases having to do with devotional Bible reading and recitation of the Lord's Prayer in the public schools in the Abington School District in Pennsylvania and in Baltimore.[18] Neither a state nor the Federal Government, the Court said, "can pass laws which aid one religion, aid all religions, or prefer one religion over another." And the Court went on to suggest a refinement of doctrine by formulating a more precise text: "What are the purpose and primary effect of the enactment [or practice]? If either is the advancement or the inhibition of religion" it exceeds constitutional limits. To fall within the limits of the "establishment of religion" clause "there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." Devotional Bible reading and prayer, as "religious ceremony" and "religious exercise," have more than a merely secular purpose, and, in the nature of the case, seek to have an effect which "advances. . . religion."[19]

The Schempp refinement has been generally followed and also refined further in a series of cases in the 1970's having

to do with various forms of public aid to religious schools and colleges. The Court has added a third test to secular purpose and neutral primary effect--that is, avoidance of undue "entanglement" between the state and its agencies, on the one hand, and religious bodies, on the other.[20] And recently "primary effect" has become "direct and immediate effect" of advancing or inhibiting religion.[21] In sum, to be constitutional a "secular purpose" must be identified, the program must be tailored so as to avoid a "direct and immediate effect" of advancing or inhibiting religion, and undue "entanglement" must be avoided.

Supreme Court "Doctrine" and the Study of Religion

Perhaps it is evident that none of the cases referred to in the section above has dealt directly with religious studies in a public university. As far as decisions of the Supreme Court of the United States are concerned, we can rely only on inference. However, there is a fair amount that can be reasonably inferred. Close or organic connection between institutional and/or confessional religion and the study of religion is problematic, as is the study of religion with the primary intention of promoting it. On the other hand, study of religion in a secular program and for scholarly or academic purposes appears to be fully acceptable.

The court language which has become quite authoritative for subsequent court decisions as well as for some scholars in the profession is that uttered by Justice Clark, writing for the Court in Schempp:

> Nothing we have said here indicates that. . . study of the Bible or of a religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment.[22]

Before "unpacking" this language, we should note the context in which it appears--namely, the Court's response to the charge that unless prayer and Bible reading are permitted a "religion of secularism" will be "established in the schools." The Court denied the charge, and went on to point out that "it might well be said that one's education is not complete without a study of comparative religion or of the history of religion and its relationship to the advancement of civilization." Furthermore, "It certainly may be said that the Bible is worthy of study for its literary and historic qualities."[23] Hence the schools are not required to remove all mention of religion from their curricula; on the contrary, they may include the study of religion as part of the normal context of their educational programs.

In a concurring opinion in Schempp, Justice Goldberg went even further than the majority opinion. He suggested that the First Amendment may even "require that. . . . Government. . . .

take cognizance of the existence of religion. . . "[24] That is, in accordance with establishment clause doctrine, the government must also avoid the obvious hindrance of religion. It must, in fact, be neutral in its relations with religion; it is not required to be in an adversary relationship. To ignore completely the nature, history, and significance of religion would appear to be less (or more) than neutrality; that indeed would be giving over to what Goldberg called "a pervasive and brooding devotion to the secular." The middle ground between advocacy and an adversary relationship is neutral ground. In the study of religion that means, in the language of the Court, teaching "objectively as part of a secular program of education," or, in Goldberg's words, "teaching about" as against the "teaching of" religion.[25]

About ten years ago, at the height of the Berkeley Free Speech Movement, I quoted the court's language--"objectively as part of a secular program in education"--in an address to a group of Danforth and Kent fellows, all graduate students. Their reaction was stormy. Objectivity had become by then a very bad word and a totally unacceptable notion. The whole concept was about to be taken apart limb by limb by Theodore Roszak in his much sold (and presumably much read) THE MAKING OF A COUNTER-CULTURE. Behind the concept lurked the machinations of "the establishment" and the self-deceptions of the liberal academics.

Objectivity was, and is, no doubt, an idea to be handled gingerly and with a modicum of practical reason. But it ought not be dismissed out of hand. As language of the Court, at least, it needs to be taken seriously--not as a hard and fast rule but as a constitutional indicator. We should note, however, that the Court used the adverbial form, not the noun. What is suggested is a manner, a style, an approach and not some kind of ontological reality. Furthermore, some of the justices, in their more reflective moods, have been aware of the difficulties in understanding objectivity in terms of a completely detached, mechanistic, and inhuman stance. For example, Justice Jackson, in his concurring opinion in McCollum, suggested that it was "too much to expect mortals to teach. . . with. . . detachment" controversial areas which arouse the passions of their contemporaries. Hence, he concluded, "when instruction turns to proselyting and imparting knowledge becomes evangelism is, except in the crudest sense, a subtle inquiry."[26]

The Court's use of "objectively" and "teaching about" as against "teaching of" should be seen in the context of the court's understanding of the notion of governmental neutrality in relationship to religion. In fact this sort of language may be understood as the court's effort to translate "neutrality" into language somewhat more appropriate to the academic realm. Furthermore, the

court's use of "neutrality" must be seen in the context of that long and bitter history of religious controversy which was uppermost in the minds of the framers of the First Amendment and is still of considerable significance to the court in its interpretation of that amendment.

"Neutrality" may be a serviceable judicial doctrine, although the historical and sociological realities of the relationships between religion and the state in the United States hardly correspond to it. Indeed, the court itself has indirectly recognized this through the various adjectives it has used to modify "neutrality"--from "strict and lofty" in Everson to "wholesome" in Schempp. Still, the notion may have some usefulness in interpreting the "establishment of religion" clause. It is, however, hardly adaquate as a primary guide for scholars in religious studies. As put by the court, the notion of "neutrality" and its analogues in the academic realm have at least a minimal usefulness in suggesting the impropriety of gross propagandizing in the academy. Beyond that, we may expect a greater degree of subtlety in our evolving understanding of what we are doing. Perhaps we may prefer to think in terms of what one scholar has called "disciplined intersubjectivity"[27] or what our own colleague, Raimundo Panikkar, calls "dialogical dialogue."[28]

Another common court usage--"secular"--is also a notion of some complexity, although it may be more easily handled than "neutrality" and "objectivity". By common usage, it means that

which is not regarded as religious, spiritual, or sacred or which is not connected with religion. Hence "a secular program of education" is most obviously one which is not controlled by a religious institution. The usage might also be applied, however, to a program which, while controlled in some way by a religious institution, declares its primary goal to be secular or education in so-called secular subjects for secular ends. (More of this below in connection with recent cases dealing with aid to colleges and universities affiliated with or controlled by religious institutions.)

Since 1963, the Supreme Court has applied Schempp directly to public school practices in only one case. In this case an Arkansas law which prohibited the teaching of evolution in the public schools or the use therein of textbooks which applied this hypothesis, was found to be unconstitutional. Since this law was obviously based on the notion that the theory of evolution conflicts with the Biblical account of creation, it was understood by the court to constitute an aid to religion and was seen as having been designed by the Arkansas Legislature to advance religion or a religion. Hence, it was an instance of "an establishment of religion."[29]

Schempp was repeatedly appealed to by both the trial court and the Supreme Court of the State of Washington in "The Bible as Literature" case alluded to above. The key question in that

case was: Has the course been taught "objectively as a part of a secular program of education"? After preliminary hearings the trial court declared that the plaintiffs had the burden to prove that the course, as actually taught,

> is slanted in a religious direction, or designed to induce a particular religious belief, or to advance particular religious interests, or whether the course amounts to a religious indoctrination by teaching from a fixed theological position to promote a particular theology. . . . "[30]

The prime mover in the case, the Reverend Thomas W. Miller of the Bible Presbyterian Church of Seattle, maintained on the stand that the Bible "cannot be taught objectively as a part of a secular program of education."[31] Counsel for the plaintiffs attempted to establish that those who taught "The Bible as Literature" had accepted the "modernist or documentary hypothesis" with regard to the Bible, that that position was obviously associated with a particular religious point of view, and hence that those teachers had taught the course in a religiously slanted fashion. The plaintiffs could secure testimony from only one student who had taken the course. She maintained on the stand that the course was "slanted toward the liberal views of theology, specifically higher criticism, variously known, I believe, as documentary hypothesis." When asked in cross-examination if her particular religious beliefs had adversely affected her grade, she replied "No." (She received an A in the course.) And when asked if

she felt that the instructor was attempting to indoctrinate her in a particular religion, she responded: "It would have been very difficult to indoctrinate me." Finally, in response to a question about whether the course had had "any effect" on her religious beliefs "one way or another. . ." so as to "reinforce or destroy" those beliefs, she replied that the course had "reinforced" her beliefs.[32]

Several students testified for the defendant. All maintained that the course was presented "objectively" or in a scholarly and fair manner.

The trial court found for the defendant. On the federal constitutional question that court appealed to Schempp:

> Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment.[33]

In elaborating on this finding, the court said that the course presents a literary and historical study, that it is "offered as part of a secular program of education to advance the knowledge of students and the learning of mankind," that "it is taught by . . . competent literary scholars, qualified in their respective fields of specialization" and is "not taught by theologians." Finally the court found that the course

> does not promote a particular theology for purposes of religious indoctrination, nor is it slanted in a religious direction, nor does it induce any particular religious belief, nor does it advance any particular religious interest or theology.[34]

On appeal, the Supreme Court of the State of Washington sustained the findings of the trial court. That court also concluded that the language of the Washington State Constitution, which prohibits the use of public money or property for "religious worship, exercise or instruction" does not proscribe "open, free, critical, and scholarly examination of the literature, experience, and knowledge of mankind."[35]

If "open, free, critical, and scholarly" can be taken as legitimate extensions into the academic relam of "objectively," "neutral" and "secular" from the judicial, and I think they can, then scholars in religious studies should have nothing to fear from court decisions in this area.[36]

The impact of the Schempp language is also evident in a case which had to do with a released-time religious education program which had been in operation in Martinville, Virginia school district since 1942 and which, in structure at least, resembled the Champaign, Illinois, released-time program which the Supreme Court struck down in McCollum. The defenders of the Martinville program used Schempp language in their defense, declaring that that program "is an attempt to teach the students about religion rather than to indoctrinate them thereto." The District Court, appealing primarily to McCollum, found this practice unconstitutional because of its use of teachers who were appointed and paid by religious groups, its use of materials

which could be understood as having the intention to indoctrinate, and because it involved the separation or segregation of students on other than educational grounds. The court also reiterated the conditions laid out in Schempp and indicated that a program carried out under those conditions would be constitutional.[37]

I come finally, in this discussion of court "doctrine," to several recent cases involving challenges to various kinds of public subsidy of private (mostly religious) colleges and universities in which the manner and purpose of the teaching of courses in religious studies and in theology have been or are at issue. One of these cases, which was decided in 1971, involved a challenge of the use of federal funds, made available under the Higher Education Facilities Act to four Catholic colleges in Connecticut. The act itself excludes use of the funds for "any facility used or to be used for sectarian instruction or as a place of religious worship or. . . primarily in connection with any part of a school or department of divinity." In upholding the use of funds for the colleges in litigation, the U.S. Supreme Court held, among other things, that even though those schools were religious in sponsorship the evidence showed that academic standards prevailed in the manner in which the courses in religion and theology were taught and in the purposes for which they were offered. The institutions involved adhered to the principle of academic freedom. The "academic requirements of the subject matter and the teacher's concept of professional standards" were

the controlling factors in the courses. Furthermore, the "courses covered a range of human religious experiences" and were not limited to "courses about the Roman Catholic religion." Finally, "the schools introduced evidence that they made no attempt to indoctrinate students or to proselytize." Indeed, the court was especially impressed that at two of the institutions involved, courses were taught by rabbis. "In short," the court concluded, "the evidence shows institutions with admittedly religious functions but whose predominant higher education mission is to provide their students with a secular education"--even in religion.[38]

The evidence was not found to be quite so clear in a somewhat similar case in Maryland, decided some five years later. This case--Roemer vs. Board of Public Works--involved the challenge of a Maryland Act which provides public aid in the form of non-categorical grants to eligible colleges, including several religious colleges in that state. The act specifies that none of the public funds "shall be utilized. . . for sectarian purposes."

While the Federal District Court upheld the constitutionality of the grants, it ruled that none of the money should be used to support courses in religion and theology. The court found that even though academic freedom prevailed at each defendant school and there was no indication that religious indoctrination was a goal of these schools, a possibility existed that the courses

in religion and theology "could be devoted to deepening religious experience in a particular faith rather than to teaching theology as an academic discipline." Noting that "theology or its equivalent is a required course at each school and in each case is taught by a cleric of the affiliated church . . . " the court required "the clearest indication" that the faculty is "interested in the study of the religious phenomenon or experience, rather than in experiencing religion. . . ." Without that clear evidence that theology is taught as "an academic discipline" at these institutions, the court concluded, "state aid to such programs cannot be justified. . . " and may, in effect, constitute a "law respecting an establishment of religion."[39]

The ambigious status of the courses in religion and theology at the appellee colleges was not changed by the decision of the United States Supreme Court in this case. In a footnote to its decision in Roemer the Supreme Court noted the lower court's uncertainty regarding the constitutionality of public aid to the curricular programs in religion and theology but expressed no opinion on that aspect of the case.[40]

Among the currently pending cases in the area of religion, there are two which have to do with public aid to religious colleges or to students attending such institutions. In at least one of these, required courses in religion or theology may be at issue. The act in question provides that seven colleges in Louisiana

--six of them religiously affiliated, four Roman Catholic--are to receive $125 for each semester of attendance of each full-time student who is a resident of the state. The only restriction in the act as initially passed by the Louisiana Legislature was that funds were not to be paid "for students majoring in theology or divinity." Nothing was stated about courses in those areas as such.

The colleges concerned are uniform in insisting that religion and/or theology courses are integral to a liberal arts curriculum and are even justifiably required. It is also the position of the four Catholic colleges among them that these courses, including the courses in theology, are offered in a strictly academic fashion.[41]

In sum, it is clear that court "doctrine" permits public support of the academic, scholarly study of religion whether that occurs at a public or a church-related institution which happens to be receiving some form of public aid. In reaching this conclusion, courts have tended to accept generally-held canons regarding scholarly and academic activity in colleges and universities--such as academic freedom, objectivity and a clear secular purpose.

Theology as an Academic Discipline?

Roemer and the pending case in Louisiana raise, in a direct way, the question of how courses in religion and especially

in theology qualify under the academic canons mentioned above. On this question, even the scholars in religion are not in agreement. With respect to theology, there appear to be at least two basic questions at issue: 1) the nature of the relationship between theology and a particular religious confession; and 2) the somewhat more subtle question of whether the object of theology is empirically veriable--i.e., whether it passes one of the standard tests of academia.[42]

Historically, in America, theology came to be understood as a discipline that was associated with religious communities. If accorded a place in the university, it was assigned to a separate faculty of divinity or theology, which was usually understood also to have some sort of confessional complexion. Typically, one of the focal points of faculty and student body alike was the chapel and worship services therein. (This confessional pattern has undergone considerable change in the past fifteen years or so. Divinity faculties and student bodies in some universities have become less narrowly confessional.)

Historically, in most American universities, theology has not been formally and systematically afforded a place in the curriculum, and it still is not today. In the past century or so, however, there has also developed within universities--even publicaly supported ones--formal and systematic attention to the scientific and scholarly study of religion. This enterprise has

generally been associated with faculties in letters and science or liberal arts. Quite clearly, there has been a certain amount of cross-fertilization--in recent years especially--between theological studies and the scholarly study of religion.

The question of whether the primary object of theology--i.e., God--is an objectifiable or empirically verifiable entity has long been debated; it is not a question I intend to develop here. Suffice it to suggest in this context that courses with titles such as "God in Human Experience," which is described as "a study of the experience of God in the various stages of human history," and "Church Teaching," which is described as "An examination of one's encounter with God through His definitive spoken word: Christ"[43] could stimulate the raising of this question in a court of law.[44]

The courts have tended to perceive theology as confessional or even "sectarian" in nature and to understand theologians as being engaged in an essentially confessional or even faith-promotional task. Recall the stress in the Washington "Bible as Literature" case upon the fact that that course was not taught by theologians. Note also the District Court's statement in Roemer that "obviously, the departments of theology," in the church affiliated colleges involved in the case "have been quickened into a significant sectarian area of education." While experienced

religious educators might greet with a mixture of skepticism and faint hope that court's perception that "religious teaching might quite readily permeate and pervade the college,"[45] it is, nevertheless, a perception that has to be regarded with some degree of seriousness.

Defendants in Roemer sought to establish that theology and religious studies are twins (whether identical or fraternal is not clear) and that any self-respecting liberal arts college will offer and perhaps may even require courses in these disciplines. Citing the Welch study of RELIGION IN THE UNDERGRADUATE CURRICULUM, 1971, they pointed out that sixty-seven percent of the 1,300 plus institutions surveyed by that study offered courses in religion--including, in many instances, courses in theology--and that it was fairly common practice to require one or more courses in this area. They also stressed that that study found that "the higher the quality of institution involved, the greater the likelihood of there being such a program" in religious studies. Testifying as an expert witness for the defendants, Samuel Hays Magill, Exectuive Associate of the Association of American Colleges, declared that the approach taken in the courses in religion and theology at the defendant Maryland colleges represented "the kind of approach to the study of religion that one would find in any self-respecting quality institution."[46]

Counsel for the plaintiffs in Roemer, also citing the Welch

study, endeavored to establish that "the nourishment of student's commitment to a particular religious tradition" is a significant reason for teaching courses in both religion and theology in church related colleges. And he urged that that overall objective could not help but influence the content and manner of teaching courses in those areas at the institutions involved. Teaching religion or theology as a academic discipline would mean, on the contrary, according to counsel, "the teaching about Religion, as opposed to the attempt to teach greater faith in a particular religion." In response, Dr. Magill indicated that the category "academic discipline" did not limit one merely to conveying "knowledge about religion" but also involved the objective of "understanding." That means "Entering into, empathetically, perception of and appreciation of . . . religious experience."[47] The line between appreciation and participation is a thin one, but, even more to the point, so also is the line between empathy and inducement. Nevertheless, it is clear that when dealing with public support of courses in religion and theology, this line must be drawn.

Some further light might be thrown on this question by drawing upon the distinction made by sociologists of religion between churchly and sectarian approaches to religion. The churchly approach is inclusive; the sectarian exclusive. The churchly approach embraces only that which presumably all can embrace, which is, so to speak, in the public domain; the

sectarian limits the circle of understanding. Catholic scholars who argue for the legitimacy of theology as an academic discipline even as taught in Catholic colleges, take the churchly approach. They seem to be saying, in effect, that any reasonable person can, without accepting at the very outset any particular religious point of view, follow a theology course to its logical conclusion. No special act of faith is required or expected. The sectarian would argue, on the other hand, that such courses tend to assume a faith-stance and hence to appeal to a limited group which is discernable only on other than academic grounds. The radical sectarian, like the Reverend Mr. Miller, argues, in fact, that the Bible cannot possibly be taught objectively and hence that the study of the Bible has no place in the public domain. Surely Mr. Miller would also object strenously to courses in theology being taught at public expense.

In American religious history, Catholic colleges, like Methodist and Baptist colleges, have been regarded, by and large, as sectarian institutions. And it has been more or less expected that they would seek to plant and especially cultivate the faith of the Roman Catholic Church. That process has been understood to be perfectly legitimate so long as it was not done at public expense. From this commonly accepted point of view, it is puzzling when such institutions seem to maintain that they are <u>not</u> attempting to encourage the faith through their courses in

theology. That seeming change in stance almost appears like the price exacted for getting public support. That, however, may be the uncharitable and even inaccurate view. Perhaps what has really happened is that theology as well as religious studies has reached a new level of academic maturity in our pluralistic society.

However that may be, those of us who are journeymen scholars in the field, and especially those of us who are on the public payrolls, are fortunate that the views of the radical sectarians such as the Reverend Mr. Miller have not prevailed. Similarly, we may be grateful that the enterprise of which we are a part has not become a target for the most active separationist groups. We are, of course, not only relatively "pure" but also relatively insignificant in the larger church/state scene. Still, if for some reason a radical sectarian like Mr. Miller should attract the support of one or more of the separationist organizations, we might be in for some uncomfortable times.

While the Reverends Miller and Webb were completely sincere in pursuing their case against the University of Washington, they were neither very seasoned nor very shrewd. As a result, they not only failed to enlist seasoned and expert legal help, they also failed to enlist significant public support. Indeed, there was almost a circus atmosphere about the trial, and, unfortunately for the plaintiffs, the press prominently played up

the seeming analogy with the famous "monkey trial" of 1925. At the same time, the very sectarian mentality of the plaintiffs undercut, in the judgement of this amateur constitutionalist, the effectiveness of their case. Their witnesses, both student and "expert," were drawn almost exclusively from their own religious group. And they seemed to want to follow in the court the same sort of flambouyant and bitter attack upon the liberal Protestant establishment which their leader, Carl MacIntyre, had long pursued. Indeed, the leader himself was brought to Seattle where he waited impatiently for three days before finally getting his chance on the witness stand. Then, much to his dismay and that of the counsel for the plaintiffs, the range of his testimony was severely circumscribed by the court. This veteran warrior was perhaps even more deflated when counsel for the defense shrewdly refrained from cross-examining him.

Some Concluding Thoughts

All of this leads me to conclude that it still makes good sense both educationally and constitutionally for scholars in the field to continue to maintain that distinction which the faculty committee which played a critical role in the founding of the Department of Religion at Princeton made in 1935 between "the study of religion and the practice of it." That committee had in mind, no doubt, the practice of such obvious and old-time

religious faiths as Judaism, Catholicism and various forms of Protestantism. We have since become more subtle and more comprehensive in our understanding of religion, and hence the distinction may not be an easy one to make today. Indeed, it would not surprise me if at this conference which is concerned with the influence of religious studies on religion we are told that religious studies has itself become a kind of religion. But to make religious studies into a religion would appear to me to be poor policy not only constitutionally and educationally but also pragmatically. We are and can be at most only "modest messiahs," as Robert A. Spivey once suggested. And if we end up advertising and worshipping only ourselves, the result is likely to become rather barren. In the meantime, on a much more obvious level, it is probably prudent to avoid stirring up local groups by taking on the fundamentalists on evolution or praying at football games on Yom Kippur or celebrating the Mass on the steps of the administrative building on the campus of a public university in North Carolina or New York CIty.

NOTES:

1. Justice Oliver Wendell Holmes in New York v. Eisner, 256 U.S. 345, 349 (1921). (In legal citations of this sort, the title of the case appears first followed by the volume number, the source --in this case U.S. meaning United States Reports, which contains all of the decisions of the Supreme Court of the United States-- number the pages on which the opinion begins, number of the page from which the citation is taken, and the year in which the case was decided.) Holmes' pragmatic view, which dominated American jurisprudence for at least half a century, was first systematically developed by him in The Common Law in 1881. That book opens with the statement that "the life of law has not been logic: it has been experience." This view is also quite consonant with the common law tradition in which American constitutional law has developed.

2. See, e.g., Leo Pfeffer, "The Legitimation of Marginal Religions in the United States," and John Richard Burkholder, "'The Law Knows No Heresy': Marginal Religious Movements and the Courts," in RELIGIOUS MOVEMENTS IN CONTEMPORARY AMERICA, Irving I. Zaretsky and Mark P. Leone (eds.) Princeton: Princeton University Press, 1974, pp. 9-26 and 27-50 respectively.

3. As quoted in Anson Phelps Stokes and Leo Pfeffer, CHURCH AND STATE IN THE UNITED STATES, revised one-volume edition (New York: Harper and Row, 1964), p. 559

4. Davis v. Beason, 133 U.S. 333, (1890). This was one of the Mormon cases, in which the court refused to recognize that Mormon practice of polygamy was based on religion.

5. Torcaso v. Watkins, 367 U.S. 488 (1961)

6. United States v. Seeger, 380 U.S. 163 (1965) and Welsh v. United States (1970)

7. Washington Ethical Society v. District of Columbia, 249 F. 2d 127 and Fellowship of Humanity v. County of Alameda, 315 P. 2d 394

8. Malnak v. Maharishi Mahesh Yogi

9. The subject of standing to sue on constitutional grounds is an involved one. However, in recent years, the U.S. Supreme Court decisions have moved toward increasing openness on this question, especially in cases involving the establishment clause. While demonstrated significant adverse effect of an enactment or practice

on an individual (a school child, e.g., or a taxpayer) had been required in earlier cases, the Court has steadily moved toward accepting cases in which such an effect has not been clear. One obvious example is the case of the public use by school officials of the board of Regents prayer in certain New York schools. The prayer itself was relatively innocuous: "Almighty God, we acknowledge our dependence on Thee, and we beg Thy blessings upon us, our parents, our teachers, and our country." Provision was made for excusing those who wished to be excused from reciting the prayer. And the amount of any taxpayer's money involved in supporting the practice was infinitesimal. Nevertheless, the Court not only heard the taxpayer's complaint that the practice constituted "an establishment of religion," the court agreed with it. (Engel v. Vitale, (1962)) One of the most perceptive analyses of the import of this case is that by the late Arthur E. Sutherland, Jr., "Establishment According to Engel," Harvard Law Review, volume 76 (November, 1962), pp. 25-52: Sutherland points out that after Engel "a classroom exercise, if once found to be an "establishment of religion,' becomes enjoinable. . . even if no schoolchild is subject to 'coercion,' and even if no plaintiff demonstrates any unconstitutional expenditure of taxpayer's money." (p. 26)

The definitive case on "standing" is Flast v. Cohen, 392 U.S. 83 (1968)

10. See Frank J. Sorauf, THE WALL OF SEPARATION: THE CONSTITUTIONAL POLITICS OF CHURCH AND STATE (Princeton: Princeton University Press, 1976). Sorauf points out that in the past quarter of a century the involvement of these three organizations in church-state cases far exceeds that of any other groups. Between them, they have a remarkable record of success, and the American Jewish COmmittee has the most impressive record.

11. Calvary Bible Presbyterian Church v. Board of Regents, 436 P2d 189 (1967); 393 U.S. 960 (1968) Cert. denied. The ministers were joined in their suit by their congregations but the court of record dismissed the congregations on the ground that as religious organizations, they did not have standing to sue.

12. The use of tax monies and public buildings for religious activities and noncredit courses in religion at the University of Minnesota was challenged by a Minnesota taxpayer in the early 1950's. The Supreme Court dismissed the case on the ground that the plaintiff had not exhausted other feasible courses of action, such as direct appeal to the Board of Regents, State ex. rel. Sholes v. University of Minnesota, 236 Minn. 452, 54 N.W. 2d 112 (1952).

13. Sorauf, cited in note 10, singles this case out, along with one other, as a "sport" in the history of the litigational activities of the three major separationist groups. See pp. 8, 32, 184, 212, and 283-84.

14. In addition, of course, state court decisions may also be based on state constitutions. The Constitution of the State of California states, e.g., that "Neither the Legislature, nor any county, city and county, township, school district, or municipal corporation shall ever make an appropriation or pay from the public fund whatever, or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose. . . " (Article IV, section 30), and that "No public money shall ever be appropriated for the support of any sectarian or denominational school, or any school not under the exclusive control of officers of the public schools; nor shall any sectarian or denominational doctrine be taught, or instruction thereon be permitted, directly or indirectly, in any of the common schools of the State" (Article IX, section 8). In addition, Article IX, section 9 establishes the University of California as a constitutional body, and requires it to be free from all political or sectarian influence, and "kept free therefrom in the appointment of its regents and in the administration of its affairs. . . . "

15. 330 U.S. 1, 15-16

16. 333 U.S. 203, 210

17. Four years later, the Court, in a split decision, upheld a released time religious education program in which the courses were offered during school time but off school grounds. In that case, Zorach v. Clauson, the Court relaxed somewhat the stringency of its doctrine of separation (343 U.S. 306, 312-315).

18. School District v. Schempp and Murray v. Curlett, 374 U.S., 203 (1963).

19. Ibid., at 217 and 222.

20. Walz v. Tax Commission, 397 U.S. 664 (1970) and Lemon v. Kurtzman, 403 U.S. 672 (1971). Also "Constitutional Law--First Amendment--Establishment of Religion" in the Tennessee Law Review, volume 43 (Fall 1975), pp. 147-151.

21. Commission for Public Education v. Nyquist, 413 U.S. 756 (1973), footnote 39, at 783-784. Also, Paul G. Kauper, "The Supreme Court and the Establishment Clause: Back to Everson?" In the Case Western Reserve Law Review, Volume 25 (1974/1975), pp. 107-129.

22. 374 U.S. 203, 225

23. Ibid.

24. Ibid., at 306, emphasis added.

25. Ibid., at 225 and 306, emphasis in original.

26. 333 U.S. 203, 236

27. Philip Phenix, "Religion in Public Education: Principles and Issues," in Religious Education, volume 67 (July-August, 1972), Part II, p. 19.

28. Cf. also Robert Michaelsen, "The Engaged Observor: Portrait of a Professor of Religion," Journal of the American Academy of Religion, volume 40 (December 1972), pp. 419-424.

29. Epperson v. Arkansas, 393 U.S. 97 (1968).

30. Bible Presbyterian Church of Seattle v. Regents of the University of Washington, 426 P.2d 189 (1967), at 191

31. Mimeographed copy of the Statement of Facts (or trial record), volume II, p. 304, emphasis added.

32. Ibid., volume II, pp. 257-259

33. 374 U.S. 203, 225.

34. 436 P.2d 189, 191.

35. Ibid., at 193-194. The one dissenting judge in the Washington Supreme Court, relying on an earlier decision of that court, argued that that constitutional provision proscribed "any religious instruction. . . even though it be neither sectarian, doctrinal, nor denominational." (436 P.2d 189, 196, my emphasis)

36. The Washington "Bible as Literature" case was taken by the complaintants all the way to the Supreme Court of the United States but was refused review by that court. 393 U.S. 960 (1968)

37. Vaughn v. Reed, 313 F. Supp. 431 (1970).

38. Tilton v. Richardson, 403 U.S. 672, 686-87. See John E. Nowack, "The Supreme Court, the Religion Clauses and the Nationalization of Education," Northwestern University Law Review, volume 70 (Jan.-Feb.

1976), pp. 883-909, especially p. 886.

39. Roemer v. Board of Public Works of the State of Maryland, 387 F. Supp. 1282 (1974), 1288, 1296, 1299; emphasis in original.

40. No. 74-730, fn. 20, p. 18, June 21, 1976 (slip sheet).

41. Citizens for the Advancement of Public Education v. Board of Regents, State of Louisiana; Litigation Docket of Pending Cases Affecting Freedom of Religion and Separation of Church and State, Commission on Law, Social Action and Urban Affairs of the American Jewish Congress, September 1976, No. 19, p. 19; and correspondence with Mr. Charles H. Wilson of Williams, Connolly and Califano, attorneys for the four Catholic colleges involved in the case.

42. Among the discussions which I have found helpful in examining these and related issues are : "Theology" by Helmut Muclicke in The Encyclopaedia Britannica, volume 18, pp. 274-276; "Religion, Study of," by Ninian Smart in The Encyclopaedia Britannica, volume 15, pp. 613-628, and also Professor Ninian Smart's The Science of Religion and the Sociology of Knowledge (Princeton: Princeton University Press, 1973), especially chapters 1 and 2; A.D. Galloway, "Theology and Religious Studies--The Unity of Our Discipline," Religious Studies, volume 11 (June 1975), pp. 157-165; and Charles Davis, "The Reconvergence of Theology and Religious Studies," with several responses, in Sciences Religieuses/Studies in Religion, volume 4 (1974-75), pp. 203-236.

43. Taken from the catalogues of two of the Catholic institutions involved in litigation in Louisiana.

44. Professor Smart's distinction between "objects which are real and objects which exist" may be helpful in dealing with this issue. "God," he points out, "is real for Christians whether or not he exists." (The Science of Religion, p. 54) Presumably the primary focus or object of constitutionally acceptable approach to theology as an academic discipline would be the Christians, not God as such. But would that then be theology?

45. 387 F. Supp. 1282, 1299.

46. Statement of Facts (trial record), pp. 1627 ff.

47. Ibid., pp. 1650-1655