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Religion, Theology, and Public Higher Education[†]

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INTRODUCTION

THE CASE FOR RELIGIOUS COURSES IN THE STATE UNIVERSITY

[T]he relations which exist between man and his Maker, and the duties resulting from those relations, are the most interesting and important to every human being, and the most incumbent on his study and investigation. The want of instruction in the various creeds of religious faith existing among our citizens presents, therefore, a chasm in a general institution of the useful sciences.

—Thomas Jefferson¹

† This article grows out of a study on "Religion in Public Higher Education in California" undertaken by Professor David W. Louisell, formerly of the University of Minnesota, under the following circumstances. The need for this study was expressed at a series of conferences on Religion in State Universities held at the University of Minnesota between 1949 and 1955. The later conferences in 1954 and 1955 were jointly sponsored by the Religious Education Association and the University of Minnesota. A commission of faculty members and administrators from the participating universities was given the responsibility of encouraging study and research into specific aspects of the subject. Funds to underwrite these investigations were contributed by a number of private donors in the Minneapolis and St. Paul area and placed in an account authorized by the Regents of the University of Minnesota and administered by the Office of the Dean of Students. Executives for the work of the commission were Herman E. Wornom, General Secretary of the Religious Education Association, and Henry E. Allen, Co-ordinator of Students' Religious Activities, University of Minnesota. The authors wish to express their appreciation to Don B. Allen, formerly a Boalt Hall student and now of the Utah Bar, for valuable assistance in basic research in California law and practice. They also thank Stanley T. Skinner, a second year student at Boalt, for help in checking the documentation.

Throughout this article the words "religion" and "theology" are used. In some contexts the more precise word seems to be "theology" in the sense of religious knowledge methodically formulated, e.g., "the science which treats of God, his attributes, and his relations to the universe." Thus "theology" has the advantage of more accurately designating the purely intellectual aspects of religion susceptible of analysis and hence appropriate for academic pursuit in state universities, as distinguished, for example, from such aspects as proselytism.

Further, in the context of legal norms, questions about the legality of courses such as typical ones in comparative religion or religion courses essentially historical, descriptive, or literary seem insubstantial to the point of being frivolous; whereas more real questions may be presented respecting certain courses in theology.

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¹ 19 THE WRITINGS OF THOMAS JEFFERSON 414 (library ed. 1903), quoted in *McCollum v. Board of Educ.*, 333 U.S. 238, 245 n.11 (1948) (Reed, J., dissenting).

UNIVERSITIES originated within the fold of the established church in the Middle Ages as an extension of the medieval church school. The traditional university generally had four faculties: theology, law (canon, civil, or both), medicine, and the arts.² Despite this historical origin, many universities today have no theology or religion faculty and few if any courses that teach theology.³ Recently, however, there has been a growing trend to bring theology back into the curricula of institutions of higher education.⁴ Departments of religion have been organized in universities,⁵ thus reversing the idea of separation of theology from the universities which occurred when theological schools were dropped or when new institutions were founded without them. More courses are being given on religious topics, and surveys indicate that educators feel that a need for religious instruction exists which is not being fulfilled.⁶

Unless the university is to be relegated to the position of a training school for technicians, it must bear the responsibility of provoking the individual to think fundamentally about his role in life and about ultimate questions. Like Socrates, the university should be the inquiring conscience of society, presenting for the thinking student a variety of values so that he may intelligently choose from among the clamor of alternative principles that may shape his life. Although it is not the duty of the university to force a particular choice on a student, or even to force him at this stage to choose, it would seem to be the duty of the university to see that the student has the opportunity to learn about all reasonably possible choices. Indeed, unless knowledge of all such choices is available to the student, the university has to some extent *forced* a choice upon him.

Religion forms an essential part of the western tradition; to understand that tradition one must understand its religious elements. Is it not one function of an American university to teach students to understand the

² DAWSON, *THE CRISIS OF WESTERN EDUCATION* 16 (1961); *RELIGIOUS EDUCATION: A COMPREHENSIVE SURVEY* 14 (Taylor ed. 1960).

³ This includes not only technical schools and universities concentrating in the natural sciences, but also universities that include liberal arts as part of the curriculum. The Berkeley campus of the University of California is one illustration.

⁴ Bean, *Historical Developments Affecting the Place of Religion in the Curricula of State Universities*, 50 *RELIGIOUS EDUCATION* 275 (1955); Crouch, *Religious Activities in Tax Supported Colleges and Universities* (1962) (reprint of portions of last two chapters of doctoral dissertation, Arizona State University, Tempe); McLean & Kimber, *The Teaching of Religion in State Universities* (1958) (a paper prepared for the First National Consultative Conference on Religion and the State University, University of Michigan); cf. AUSTIN, *A CENTURY OF RELIGION AT THE UNIVERSITY OF MICHIGAN* 72 (1957); MORRILL, *THE ONGOING STATE UNIVERSITY* 60 (1960); SMITH, *RELIGIOUS COOPERATION IN STATE UNIVERSITIES* 77 (1957).

⁵ Bean, *supra* note 4; McLean & Kimber, *supra* note 4.

⁶ Dierenfield, *The Extent of Religious Influence in American Public Schools*, 56 *RELIGIOUS EDUCATION* 174 (1961).

western tradition as part of their culture? If the universities do not undertake religious education, then other institutions will—and these may not do as good a job.⁷

When American higher education is state supported there is often expressed the countervailing argument that religious courses in state universities and colleges violate, as a *legal* matter, the principle popularly called "separation of church and state." It is the purpose of this article to present an analysis of this *legal* principle in the context of California law and practice. The thesis here presented is that neither the constitutions nor laws of the United States or California prevent the nondiscriminatory establishment of religion and theology courses in state supported institutions of higher education. The article begins with a discussion of federal law in part I. Part II inquires broadly into various phases of the state-religion relationship in California, as reflected in problems of taxation, public schools at lower levels, and miscellaneous practices, in an attempt to glean therefrom whatever significance for our problem, expressly or impliedly, may be revealed. This is necessary because of the paucity of cases directly relevant; in the absence of controlling authorities, one must seek out the ethos of the people—a norm of legality in a democracy—in remoter sources. Part III deals specifically with the three systems of public higher education in California: the university, the state colleges, and the junior colleges. Part IV suggests some conclusions.

I

FEDERAL LIMITATIONS ON CALIFORNIA STATE-RELIGION RELATIONSHIP IN HIGHER EDUCATION—THE UNITED STATES SUPREME COURT

The starting point of federal restrictions upon religion in education is the first amendment to the Constitution, which in part provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."⁸

The first amendment originally was designed as part of the restrictions operative solely against the federal government.⁹ After the Civil War the fourteenth amendment was enacted, stating in part: "Nor shall any State deprive any person of life, liberty, or property, without due process of law;

⁷ Cf. RELIGION AND AMERICAN SOCIETY 62 *passim* (Fund for the Republic 1961).

⁸ Adopted in 1791.

⁹ CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 153 (10th ed. 1948); see Address by Patrick Henry in the Virginia Convention, in 3 ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION 445, 448 (2d ed. 1881); Address by Mr. Spencer in the North Carolina Convention, in 4 *id.* at 168. See also THE FEDERALIST No. 84 (Hamilton).

nor deny to any person within its jurisdiction the equal protection of the laws."¹⁰ This guarantee of "due process of law" has been held by the United States Supreme Court to prohibit certain kinds of state action that are prohibited to the federal government by portions of the Bill of Rights.¹¹ Specifically, the first amendment clauses prohibiting both "establishment of religion"¹² and restrictions on the "free exercise thereof"¹³ have been held to apply to states through the fourteenth amendment.

The question then becomes, what limitations do the words proscribing "establishment of religion" and those forbidding laws "prohibiting the free exercise thereof" impose upon a state government and its subdivisions with respect to its activities in *education*? On this question the United States Supreme Court has decided eight cases.¹⁴

A. The Supreme Court Cases on Religion and Education

*Pierce v. Society of Sisters*¹⁵ is the first case in the education field that is generally considered to bear on the religious question, although it was decided on other grounds. The case concerned an Oregon law which, in effect, abolished private and parochial schools by compelling students between ages eight and sixteen to attend the public schools. A private academy and a parochial school sued for an injunction to restrain enforcement of the law. The Court, affirming the injunction, held the law unconstitutional because it "unreasonably interferes with the liberty of parents . . . to direct the upbringing and education of children. . . ."¹⁶

The only case that directly concerns *higher* education is *Hamilton v.*

¹⁰ Adopted in 1868.

¹¹ The history of the "Nationalization of the First Amendment" whereby the fourteenth amendment was held to include within its due process clause the rights of the first amendment is outlined in MASON & BEANEY, *AMERICAN CONSTITUTIONAL LAW* 575-78 (2d ed. 1959). See also Howe, *The Constitutional Question*, in *RELIGION AND THE FREE SOCIETY* 49 (Fund for the Republic 1958).

¹² *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

¹³ *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

¹⁴ Since *Doremus v. Board of Educ.*, 342 U.S. 429 (1952), was dismissed, the merits concerning the religious establishment question were not discussed and the case is not considered here. The case of *Cochran v. Board of Educ.*, 281 U.S. 370 (1930), decided that Louisiana did not violate due process by spending state funds for school books in private (parochial) as well as public schools; the first amendment freedoms were not discussed. Among other Supreme Court "religious" cases not discussed in the text are those not decided on first amendment grounds, e.g., *Church of the Holy Trinity v. United States*, 143 U.S. 457, 471 (1892), containing the famous dictum, "this is a Christian nation." See Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1 (1961), for a thorough review of all the Supreme Court cases on religion.

¹⁵ 268 U.S. 510 (1925). See Louisell, *Constitutional Limitations and Supports for Dealing with Religion in Public Higher Education*, 50 RELIGIOUS EDUCATION 285, 288 (1955).

¹⁶ 268 U.S. at 534.

Regents of the Univ. of California.¹⁷ There the Court refused to compel the admission to the University of California of students who wished exemption from the compulsory ROTC program because of religious beliefs against military service. Observing that "California has not drafted or called them to attend the university,"¹⁸ the Court reasoned that if the students voluntarily chose to attend the university they must submit to its terms; it was not a denial of free exercise of religion to require compliance with the ROTC program.

Two later cases concern the question whether a state can compel a Jehovah's Witness child to salute the flag at school despite religious tenets to the contrary. In *Minersville School Dist. v. Gobitis*,¹⁹ the Court upheld such a state law, but overruled itself in the later case of *West Virginia Bd. of Educ. v. Barnette*,²⁰ holding that the law denied free exercise of religion. The Court stated that ". . . freedoms of speech and of press, of assembly, and of worship . . . are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect."²¹

Insofar as the two religion clauses of the first amendment can be separated, the foregoing cases concern the "free exercise" of religion. On the other hand, the following four cases were decided primarily on "the establishment of religion" theory.

In *Everson v. Board of Educ.*,²² the Court, by a five to four vote, upheld the constitutional validity of a New Jersey plan permitting its local units of government to reimburse parents for bus money spent by them for children attending nonprofit private and parochial schools. Speaking for the majority, Mr. Justice Black asserted that this program did not constitute a support of or contribution to such schools. The legislation, as applied, provided a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from school. This was deemed a proper public objective, similar to fire and police protection afforded all schools alike. Mr. Justice Black cautioned that the separation of church and state could not hamper the free exercise of religion, nor could it exclude believers or nonbelievers, because of their faith, or lack of it, from receiving the benefits of public welfare legislation. The opinion suggests that where a balance must be drawn between child welfare and the principle of separation, legislation to benefit the child will not be stricken down because it *incidentally* serves to aid religion. But

¹⁷ 293 U.S. 245 (1934).

¹⁸ *Id.* at 262.

¹⁹ 310 U.S. 586 (1940).

²⁰ 319 U.S. 624 (1943).

²¹ *Id.* at 639.

²² 330 U.S. 1 (1947).

even with the concession that state power can be used no more to handicap religions than to favor them, the Court stated that the "establishment of religion" clause means that:

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. . . . In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'²³

The opinion concludes: "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach. New Jersey has not breached it here."²⁴

The strength of this wall in the mind of the Court was demonstrated in *McCollum v. Board of Educ.*²⁵ In accordance with Illinois law, which also provided for compulsory elementary education, the Champaign, Illinois, school board adopted a program that permitted teachers representing various religious denominations to come to the school premises. The teachers were paid, not by the school system, but by the respective denominations. Pursuant to parental approval, the children who wanted the religious instruction were excused from other studies while the remaining children continued in their regular, secular pursuits. Terry McCollum was not allowed by his parents to attend the religion classes, and, as one of the few who remained behind or went to another room, allegedly suffered embarrassment. His parents brought mandamus to terminate the program, and the Supreme Court, by an eight to one vote (four opinions were written), condemned the Illinois plan, deeming it to be an unwarranted use of public property and the compulsory primary education laws for religious purposes. The Court held that this plan constituted "establishment of religion" which is prohibited by the Constitution.

Mr. Justice Reed, in dissent, based his opinion primarily on the history of past practices as authoritatively providing the meaning of "establishment of religion." He noted the extensive cooperation that government has always given religion in our country and concluded that "devotion to the great principle of religious liberty should not lead us into a rigid interpretation of the constitutional guarantee that conflicts with accepted habits of our people."²⁶

²³ *Id.* at 15.

²⁴ *Id.* at 18.

²⁵ 333 U.S. 203 (1948).

²⁶ *Id.* at 256.

Four years later, another "released time" case came to the Supreme Court. The Court, in *Zorach v. Clauson*,²⁷ upheld a New York public school plan by a six to three vote. Mr. Justice Douglas' opinion for the Court distinguished the *McCollum* case on the ground that there "classrooms were turned over to religious instructors," whereas in *Zorach*, the "released time" plan involved "neither religious instruction in public school classrooms nor the expenditure of public funds. . . ."²⁸

Douglas commented on the religion clauses of the first amendment in significant language, saying:

There cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated. . . . The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly. . . .²⁹

. . . .

We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. . . . When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. . . . To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence. . . .³⁰

The *Zorach* case was the last opinion from the Supreme Court concerning religion and state education until the *New York Regents' Prayer Case*, *Engel v. Vitale*,³¹ decided on June 25, 1962. Public reaction to this case has probably exceeded that given any other development in the religion-state area since *McCollum v. Board of Educ.*³² In *Engel*, a local New York board of education, acting in its official capacity under state law, had directed its school principal to cause the following prayer to be

²⁷ 343 U.S. 306 (1952).

²⁸ *Id.* at 308.

²⁹ *Id.* at 312.

³⁰ *Id.* at 313-14; see RELIGION AND AMERICAN SOCIETY 40 (Fund for the Republic 1961).

³¹ 370 U.S. 421 (1962).

³² 333 U.S. 203 (1948).

said aloud by each class in the presence of a teacher at the beginning of each school day:

Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country.

This procedure was adopted on the recommendation of the state board of regents, a governmental agency created by the state constitution, to which the New York Legislature has granted broad powers over the state's public school system. The regents composed the prayer which they published as a part of their "Statement on Moral and Spiritual Training in the Schools." Before the case reached the Supreme Court, the New York courts had found that those who objected to reciting the prayer were free of any compulsion to do so, including any embarrassments and pressures. The board of education had adopted a regulation which provided that "neither teachers nor any school authority shall comment upon participation or non-participation"³³ Provision was made for excusing children, upon written request of a parent or guardian, from the saying of the prayer or from the room in which the prayer was said. Children were free to stand or not stand, to recite or not recite, without fear of reprisal or comment by the teacher or any other school official. They could even leave the classroom.

At least on the basis of the New York courts' appraisal of the facts, therefore, no serious problem of the free exercise of religion by objectors to the prayer appeared to be involved. Arguably, a more meaningful question of free exercise of religion exists in respect of those who wish voluntarily to join in the prayer but are frustrated in that wish by the Court's decision on establishment of religion. For by a six to one vote (Justice Stewart dissenting and Justices Frankfurter and White not participating) the Court, in an opinion by Justice Black, held the New York program unconstitutional, apparently as violative of the "establishment" clause of the first amendment, applicable to the states and their political subdivisions by reason of the fourteenth amendment.

Insofar as it is based on the establishment rationale, we believe that the decision represents an extreme conception of "establishment of religion" which probably goes beyond the intention of the framers of that concept, is discordant with the dominant American tradition, and, accordingly, will not stand the test of time. Bearing in mind that the first amendment apparently bars the establishment of nontheistic as well as theistic religions,³⁴ it would logically follow from the *Engel* decision that official

³³ 370 U.S. at 438.

³⁴ *Torcaso v. Watkins*, 367 U.S. 488 (1961), discussed in text accompanying note 53 *infra*. See also note 138 *infra*.

prescription of secular humanism's tenet of Human Brotherhood is as much beyond the pale for the classroom as is the Fatherhood of God and Brotherhood of Man of the Jewish and Christian traditions.

Engel's apparent establishment rationale leaves the public schools without any philosophical basis for inculcating values. Sounder we believe than the *Engel* approach would be one that would adhere to the pre-*McColum* historical meaning of the prohibition against establishment—outlawry of preference for a particular denomination³⁵—and that would solve problems such as that of the *Engel* case in terms of the free exercise of religion. Under this approach, rights of the minority however small are protected by a sensible and realistic balancing of all relevant factors, without doing violence to the rights of other minorities, or the majority, by rigid application of ipse dixit notions of establishment. For example, if on a fair appraisal the school practice of prayer, or any religious exercise, in context, coerces overtly, psychologically, or otherwise a minority however small—indeed, even if the minority consists of only one child—to a religious expression violative of his or his parents' consciences, the guarantee of religious freedom would be held to preclude such coercion. This is true whatever the theological basis of the child's or parents' dissent. But if by practical accommodation the dissenting child's freedom can be protected, as New York tried to do, the freedom-of-religion approach, as contrasted with the nonestablishment approach of the *Engel* case, would permit the majority, too, to have its wishes recognized. As Justice Stewart put it, "I cannot see how an 'official religion' is established by letting those who want to say a prayer say it."³⁶ To hold that it incurs the risk of subordinating the guarantee of freedom of religion to a farfetched interpretation of establishment.

Still, since the prayer was formulated by state authorities for primary school children, the Court's precise holding may be justifiable. That is, it may be limitable to the proposition that on fair appraisal of all the facts the situation which confronted the dissenting child was inherently coercive, at least in the psychological sense, and hence violative of the constitutional guarantee of freedom of religion. Perhaps the words of Justice Jackson in *McColum*—" [It] may be doubted whether the Constitution which, of course, protects the right to dissent, can be construed also to protect one from the embarrassment that always attends nonconformity, whether in religion, politics, behavior or dress"³⁷—are not fairly applicable to primary

³⁵ See Corwin, *The Supreme Court as National School Board*, 14 LAW & CONTEMP. PROB. 3, 9-22 (1949). But see Cahn, *The "Establishment of Religion" Puzzle*, 36 N.Y.U.L. REV. 1273 (1961).

³⁶ 370 U.S. at 445.

³⁷ 333 U.S. at 233.

school children. In any event, if the holding is so limited, it would then avoid dependence on the weak reed of the establishment rationale.³⁸

The concern engendered by the case probably is more soundly based on the tenor of the opinion, and especially on Justice Douglas' concurrence, than on the result reached. Surprisingly, Justice Douglas apparently would now hold unconstitutional, as an establishment of religion, each of the ways in which our government, federal and state, is "honeycombed with . . . financing [of religious exercises]." ³⁹ Thus, the following would be banned, to mention only established federal activities: chaplains in both Houses of Congress and in the armed services; compulsory chapel at the service academies; religious proclamations by the President; use of the Bible for oaths; funds for the education of veterans at denominational schools, and for lunches for children in such schools; the reference to God made on coins and in the pledge of allegiance; Bible reading in the schools of the District of Columbia; taxation exemption for religious organizations; deductions for income tax purposes of contributions to religious organizations. This is only a partial federal list and of course there is a long list in each state.⁴⁰ Merely to recite the consequences of Justice Douglas' latest expression⁴¹ is to make evident its discordance with the dominant American tradition and its unacceptability in American society. The extremism of the views of Justice Douglas was probably perceived by Justice Black, who in a footnote observed, "There is of course nothing in the decision

³⁸ Conspicuous by its absence from the Court's opinion in *Engel* is certain language which appeared in the three preceding school cases, *Everson*, *McCullum*, and *Zorach*. This is the dictum, quoted in the text at note 23 *supra*, which contains the sentences: "Neither a state nor the Federal Government . . . 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" This statement first appeared in *Everson*, 330 U.S. at 15-16, was quoted in *McCullum*, 333 U.S. at 210, and part of it was paraphrased in *Zorach*, 343 U.S. at 314. Does its omission from the Court's opinion in *Engel* imply possibly that at root the Court *really* was moved by belief that a public school prayer for young children is inherently coercive and hence violative of free exercise of religion, rather than that a prayer in publicly financed education constitutes per se an establishment of religion? The question may take on enhanced pertinence in the context of the concurrence of Justice Douglas, which posed as the question for decision: "whether New York oversteps the bounds when it finances a religious exercise." 370 U.S. at 439. If our speculation has substance, the noted omission may indicate that the Court is moving to the realization—which would be a hopeful sign indeed—that the supreme value in this area is that of religious freedom; that the provision against establishment is essentially a corollary of that value and a means to its fulfillment; and that to push personal notions of establishment to doctrinaire extremes may produce conclusions satisfactory from the viewpoint of dry logic but historically unsupportable and practically inimical to religious freedom.

³⁹ 370 U.S. at 437.

⁴⁰ *Id.* at 437 n.1, quoting FELDMAN, *THE LIMITS OF FREEDOM* 40-41 (1959).

⁴¹ Compare *Zorach v. Clauson*, 343 U.S. 306 (1952) (Douglas, J.), discussed in text accompanying note 27 *supra*.

reached here that is inconsistent . . . with the fact that there are many manifestations in our public life of belief in God."⁴²

As a perceptive observer recently put it:

While our courts must always intercede to prevent infringements upon freedom of religion, the courts should guard against decisions which will identify the power of government with anti-religion. . . . The government is not neutral in the matter of religion when, at the instance of one already adequately protected from compulsion, it lends its power to the suppression of religion and thereby champions the cause of freedom from religion.⁴³

But whatever the significance, durability, or ephemerality of *Engel* in the area of primary education, it is hard to imagine even the most extreme separationist effectively wielding it as a tool to remove or prohibit theology from public higher education. The problems of the grammar school and the university are simply not comparable.

B. Other Supreme Court Cases

Other Supreme Court decisions concerning the religion clauses of the first amendment involve regulation of the expression of religious beliefs in public, a religious oath requirement, and Sunday "Blue Laws." We turn to these cases for further light as to the Court's attitude on the religion-state relationship.

Concerning regulation of religious expression, the Court held in *Cantwell v. Connecticut*⁴⁴ that protection of free exercise of religion prohibits a state from requiring a license as a condition to the solicitation of funds for religious purposes. In *Kunz v. New York*,⁴⁵ the requirement of securing a permit from the city police commissioner before conducting public worship meetings on streets was also held invalid as a prior restraint on the exercise of first amendment rights.

In *Niemotko v. Maryland*,⁴⁶ decided the same day as *Kunz*, the Court held that a state may not arbitrarily or discriminatorily deny the use of public parks for religious purposes. The defendants had been convicted of "disorderly conduct," which consisted of holding a meeting in the park after a permit had been refused by the park commissioner. In reversing the convictions, the Court reaffirmed the lack of state power to put a prior restraint on religious expression, and declared that use of public facilities must be regulated by proper standards.

⁴² 370 U.S. at 435 n.21.

⁴³ Kirven, *Freedom of Religion or Freedom from Religion?*, 48 A.B.A.J. 816, 819 (1962).

⁴⁴ 310 U.S. 296 (1940).

⁴⁵ 340 U.S. 290 (1951).

⁴⁶ 340 U.S. 268 (1951).

In 1953 the Court decided *Fowler v. Rhode Island*⁴⁷ and *Poulus v. New Hampshire*.⁴⁸ Both cases involved an alleged violation of municipal ordinances requiring licenses for the use of public parks. In *Fowler* the conviction was set aside by unanimous decision on the rationale that since the state conceded that church services would not be barred, the alleged violation by Jehovah's Witnesses indicated they were being treated differently from other sects. The court declared that under the first amendment it is not for the judiciary to determine that what is religious practice or activity for one group is not likewise for another.⁴⁹ The convictions were upheld in the *Poulus* case, however, on the ground that licensing requirements were reasonable and nondiscriminatory, and were used to preserve peace and order. The proper remedy for denial of a license would be a judicial proceeding, which, even though not a speedy remedy, was at least a valid one. Strong dissents argued that the laws were invalid prior restraints on speech under the *Cantwell* doctrine.⁵⁰

The most recent in this line of cases is *Staub v. City of Baxley*.⁵¹ A city ordinance made it an offense to "solicit" citizens of the city to become members of any "organization, union or society" without receiving from the mayor and council a "permit" which they might grant after reviewing the character of the application, the nature of the business of the organization, and its effect on the general welfare of the citizens. The ordinance was held invalid on its face because of a lack of objective standards governing the denial of permits.

Although these decisions are more concerned with the "free exercise of religion" than with the question of state support of religion, they nevertheless demonstrate that in some circumstances governments are *required* to allow the use of public facilities to religious groups.⁵²

A different problem, that of a religious oath requirement, was raised in *Torcaso v. Watkins*.⁵³ Pursuant to a state constitutional provision requiring a declaration of belief in God as a test for holding public office, Torcaso was refused a commission as a notary public when he refused to declare such a belief. Declaring the oath requirement to be unconstitutional, Mr. Justice Black stated for the Court that government cannot force a person

⁴⁷ 345 U.S. 67 (1953).

⁴⁸ 345 U.S. 395 (1953).

⁴⁹ See *Fulwood v. Clemmer*, 206 F. Supp. 370 (D.D.C. 1962) (imprisoned Negro Muslims entitled to certain constitutional protections because their faith is a "religion" under the first amendment).

⁵⁰ See text accompanying note 44 *supra*.

⁵¹ 355 U.S. 313 (1958).

⁵² Compare *Milwaukee County v. Carter*, 258 Wis. 139, 45 N.W.2d 90 (1950) (guarantee of free exercise of religion precludes ordinance prohibiting religious activity in public park).

⁵³ 367 U.S. 488 (1961).

to profess a belief or disbelief in God, or aid all religions as against non-believers. He reasoned that since freedom of nonreligion is implicitly protected by the first amendment, this Maryland "belief in God" test violated freedom of religion.

It is possible to read into this opinion a return to the extreme "separation" philosophy of the *McColum* case. Nevertheless, it is improbable that *Torcaso* could be used to strike down the teaching of theology in higher public education. In *Torcaso* the oath requirement was held to restrict unconstitutionally the "free exercise of religion" by in effect penalizing those who did not hold certain beliefs. To say that the mere availability of religious instruction penalizes nondeists would be to stretch *Torcaso* too far. Moreover, Justice Black's freedom of nonreligion test would also seem to be inapplicable here. The mere teaching of theology in no way forces anyone to profess any belief in anything.

Finally there are the opinions in the Sunday "Blue Law" cases⁵⁴ decided in 1961. In each of these four cases the Court refused to rule that the state statutory provisions prohibiting certain activity on Sunday were unconstitutional. In three cases the Court ruled on the merits that the law in question was not a law respecting an establishment of religion within the meaning of the first amendment. Perhaps the interpretation of one commentator adequately summarizes these cases:

The cases do not really turn on any new interpretation of establishment, since it was recognized by all nine Justices that Sunday closing laws would have to be condemned as an attempt to establish religion if they could be justified only by religious considerations. . . . The holding is parallel to that of the *Everson* case—spending public money to send children by bus to parochial schools serves a valid secular purpose even though it also advances and helps a program of religious education.⁵⁵

In any event since the cases upheld the Blue Laws, they certainly are not precedent for the invalidity of religious courses. The opinion of the Court (six Justices) in *McGowan v. Maryland*⁵⁶ is instructive because of the weight attached to the long history of Blue Laws. The Court stated, "we find the place of Sunday Closing Laws in the First Amendment's history both enlightening and persuasive."⁵⁷

In *Two Guys v. McGinley*,⁵⁸ the Court (again the same six Justices in the majority, with Justices Frankfurter, Harlan, and Douglas dissent-

⁵⁴ *McGowan v. Maryland*, 366 U.S. 420 (1961); *Two Guys From Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582 (1961); *Braunfeld v. Brown*, 366 U.S. 599 (1961); *Gallagher v. Crown Kasher Super Market, Inc.*, 366 U.S. 617 (1961).

⁵⁵ Kauper, *Church and State: Cooperative Separatism*, 60 MICH. L. REV. 1, 16 (1961).

⁵⁶ 366 U.S. 420 (1961).

⁵⁷ *Id.* at 440.

⁵⁸ 366 U.S. 582 (1961).

ing), investigating the purpose of the statute, found that a 1939 amendment permitting all healthful and recreational exercises and activities on Sunday (since it was not consistent with aiding church attendance) was evidence of the nonreligious purpose of the act. In *Gallagher v. Crown Kosher Super Market, Inc.*,⁵⁹ the Court (with a different alignment of six to three) again rejected the "request to hold these statutes invalid on the ground that the State may accomplish its secular purpose by alternative means that would not even remotely or incidentally aid religion."⁶⁰

C. The Practice

A consideration of federal constitutional limitations on the church-state relationship is not complete without some discussion of the many practices bearing on the question that have never been under scrutiny by the Supreme Court. The wealth of practice that has developed as to government-religion cooperation cannot be overlooked, if for no other reason than that it undoubtedly has an influence on the Court itself, as Justice Reed's dissent in *McCollum* indicates: "This Court cannot be too cautious in upsetting practices embedded in our society by many years of experience."⁶¹ As pointed out in that dissent, the practices of the federal government offer many examples of "aid" to religion, including chaplains for both houses of Congress, chaplains commissioned for the Armed Forces (utilizing federal property for services and paid with federal funds), federal funds for training of veterans for the ministry, Bible reading in District of Columbia schools, religious activities at the military academies, and tax benefits in respect of religious activities and purposes.⁶²

In addition, the school lunch program provides for the disbursement of federal funds without discrimination between public and nonprofit private schools, and ordinarily contemplates matching funds from the states.⁶³ The Hill-Burton Act⁶⁴ authorizes federal spending, in cooperation with the states, for the construction of public and other nonprofit hospitals, including church hospitals. The National Science Foundation is authorized and directed to award scholarships and graduate fellowships for scientific study at accredited nonprofit institutions of higher education, selections being made solely on the basis of ability.⁶⁵ "GI bill of rights"

⁵⁹ 366 U.S. 617 (1961).

⁶⁰ *Id.* at 630.

⁶¹ *McCollum v. Board of Educ.*, 333 U.S. 203, 256 (1948).

⁶² 333 U.S. at 253-55 (1948); see discussion of *Engel v. Vitale* in text accompanying notes 31-43 *supra*.

⁶³ 60 Stat. 230-34 (1946), 42 U.S.C. §§ 1751-60 (1958).

⁶⁴ 60 Stat. 1040 (1946) (codified in scattered sections of 5, 24, 31, 33, 42, 46, 48, 49 U.S.C.).

⁶⁵ 64 Stat. 149, 152 (1950), 42 U.S.C. §§ 1862, 1869 (1958).

benefits are available without distinction to students at public and private schools.⁶⁶ And more recently, the National Defense Education Act,⁶⁷ which establishes a program of loans to students without regard to private, public, or religious administration of their colleges, specifically provides for loans to nonprofit private schools.⁶⁸

The practices of states with respect to religion reveal that religion courses are included already in the curriculum of some state universities⁶⁹ and one, the State University of Iowa, has a separate school of religion.⁷⁰

D. Conclusion: Federal Limitations

It seems clear that the offering of elective courses in religion in a state's higher educational institutions does not in any way amount to a prohibition of the "free exercise" of religion.⁷¹ The question is therefore whether such offering is an "establishment of religion." The mere fact that state funds and facilities are used to support such course offerings should not be held by the Court to be unconstitutional. Both the extensive practice and the *Everson* case indicate that merely because funds spent happen to benefit religious purposes, such expenditures are not ipso facto unconstitutional.

There is language in *Everson*,⁷² *McCullum*,⁷³ and *Zorach*⁷⁴ (but not in *Engel*) that suggests that an expenditure of public funds for religious education is not reconcilable with the first amendment. The Court can, nevertheless, in line with its own broader theories of the religion-state relationship, hold the use of public funds for this purpose to be constitutional, without repudiating the language of those cases, if (1) there are good secular bases for such spending apart from religious reasons, and (2) the funds (and other resources) are not used in such a way as to "force or influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion."⁷⁵ The quotation from Jefferson and the discussion at the outset of this article indicate the important secular purpose of courses in religion.

⁶⁶ Serviceman's Readjustment Act of 1952, 38 U.S.C. § 1601 (1958).

⁶⁷ 72 Stat. 1581-605 (1958), 20 U.S.C. §§ 401-589 (1958).

⁶⁸ 72 Stat. 1590 (1958), 20 U.S.C. § 445 (1958).

⁶⁹ McLean & Kimber, *supra* note 4.

⁷⁰ *Id.* at 36.

⁷¹ In *Zorach v. Clauson*, *supra* note 27, at 311, Justice Douglas in his opinion for the Court states, "It takes obtuse reasoning to inject any issue of the 'free exercise' of religion into the present case."

⁷² See 330 U.S. at 15; quotation and discussion in text accompanying note 22 *supra*.

⁷³ 333 U.S. at 210.

⁷⁴ 343 U.S. at 314.

⁷⁵ *McCullum v. Board of Educ.*, *supra* note 61, at 210. In *McCullum* and *Engel*, both of which invalidated the state action, there was deemed present the danger of an element of social pressure coercing a grade school child to accept the religious instruction.

Therefore, so long as the courses are optional, and there exist no circumstances placing pressures on students to elect to take such courses, it seems clear that these two criteria are fulfilled, at least at the college level.

Furthermore, it must be remembered that in the *McCollum* case the Court was dealing with "religious education" in the specific context of denominational or sectarian *instruction* of elementary school children. In the nature of things, such instruction essentially is or may be indoctrination. Theological courses at the college level, however, with purely voluntary participation, conducted on an intellectual level compatible with the norms of higher education and accordant with the historical liberal arts tradition, present a problem wholly different from that of *McCollum*.⁷⁶ The *Engel* case is inapposite not only for similar reasons, but also because it deals with an act of religious worship rather than one of theological inquiry.

We find it impossible to believe that even the most extreme notions of separatism would hold federally unconstitutional a program of theological or other courses in religion in the college or university curricula.⁷⁷ We assume, of course, avoidance of discrimination and unfairness so that no problem of violation of the equal protection clause of the fourteenth amendment would be involved.

II

THE CALIFORNIA STATE-RELIGION RELATIONSHIP

We, the People of the State of California, Grateful to Almighty God for our freedom, in order to secure and perpetuate its blessing do establish this Constitution.

—Preamble to the Constitution of the State of California

A. *The Constitution of California*

With the above preamble, the constitution of California prefatorily pays obeisance to God. Consistently with the first amendment principles concerning religious freedom and nonestablishment, the state constitution contains several other pertinent provisions. Article I, section 4, states:

The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be guaranteed in this State;

⁷⁶ See Johnson, *A Problem of Culture*, in RELIGION AND THE SCHOOLS 64, 73 (1959).

⁷⁷ See Louisell, *Constitutional Limitations and Supports for Dealing with Religion in Public Higher Education*, 50 RELIGIOUS EDUCATION 285 (1955). It could be argued that so long as there was more than one religion treated in a course or group of courses, and so long as such courses were entirely optional, the religion curriculum would not violate the first amendment freedoms even though public funds were used and a teacher of one such course among many was an impassioned proselytizer.

and no person shall be rendered incompetent to be a witness or juror on account of his opinions on matters of religious belief; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State.⁷⁸

Article IV, section 30, states:

Neither the Legislature, nor any county, city and county, township, school district, or other municipal corporation shall ever make an appropriation, or pay from any public fund whatever, or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose, or help to support or sustain any school, college, university, hospital, or other institution controlled by any religious creed, church, or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the State, or any city, county, town, or other municipal corporation for any religious creed, church, or sectarian purpose whatever; provided, that nothing in this section shall prevent the Legislature granting aid pursuant to Section 22 of this article.

And article IX, section 8, states:

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 the 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 this State.⁷⁹

⁷⁸ The preamble to the constitution of 1879 is substantially the same as that to the constitution of 1849. Thus, continuously since prior to California's admission as a state in 1850, its people have formally acknowledged their gratitude to Almighty God. In 1879 citizens protested to the constitutional convention that recognition of God violated the principle of separation of church and state. 1 PROCEEDINGS CALIFORNIA CONSTITUTIONAL CONVENTION 178, 306, 376 (1878-1879). Article I, § 4, of the constitution of 1879 on free exercise of religion, quoted in the text, is the same as art. I, § 4, of the constitution of 1849.

⁷⁹ Section 22, referred to in art. IV, § 30, authorizes state aid for certain welfare purposes, including aid for hospital facilities of nonprofit corporations wherever federal funds are provided for such purposes.

Unlike the preamble and art. I, § 4, on free exercise of religion, which had their origin in the constitution of 1849 (see note 78 *supra*), art. IV, § 30, and art. IX, § 8, first appeared in the constitution of 1879. Apparently these sections were rooted in the thinking that had engendered the proposed school amendment of 1876 to the United States Constitution. The significance of this thinking to the issue of religion in education was acutely perceived by Taylor, *Equal Protection of Religion: Today's Public School Problem*, 38 A.B.A.J. 277, 335 (1952). The proposed constitutional change, popularly known as the Blaine amendment, as it emerged from the Senate Judiciary Committee, which substantially modified the House version, read as follows:

ARTICLE XVI

No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no religious test shall ever be required as a qualification to any office or public trust under any State. No public property, and no public revenue of, nor any loan of credit by or under the authority of, the United States, or any State, Territory, District, or municipal corporation, shall be appropri-

Also to be heeded respecting our problem is the clause in article IX, section 9, which directly concerns the University of California: "The university shall be entirely independent of all political or sectarian influence and kept free therefrom in the appointment of its regents and in the administration of its affairs. . . ." However, an interpretation that this clause precludes study of religion or theology would seem as farfetched as one that it forbids courses in Democratic or Republican political philosophy.

Although the state constitution does insure the "free exercise and enjoyment of religious profession and worship," similar to the "free exercise" clause of the Federal Constitution, it does *not* explicitly express the "laws respecting an establishment of religion" concept. It does, however, specifically prohibit certain uses of public funds. In evaluating the effect of these specific prohibitions, one must consider also other provisions of the California constitution which grant special tax exemptions to property used for religious purposes,⁸⁰ as well as a clause which reads: "A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement."⁸¹

The "free exercise" clause of the California constitution, like that of the federal constitution, would not seem violated by courses in religion in state-supported schools, so long as such courses are optional.⁸² Consequently, our investigation primarily concerns whether article IV, section

ated to, or made or used for, the support of any school, educational or other institution, under the control of any religious or anti-religious sect, organization, or denomination, or wherein the particular creed or tenets of any religious or anti-religious sect, organization, or denomination shall be taught; and no such particular creed or tenets shall be read or taught in any school or institution supported in whole or in part by such revenue or loan of credit; and no such appropriation or loan of credit shall be made to any religious or anti-religious sect, organization, or denomination, or to promote its interests or tenets. This article shall not be construed to prohibit the reading of the Bible in any school or institution; and it shall not have the effect to impair rights of property already vested.

Sec. 2. Congress shall have power, by appropriate legislation, to provide for the prevention and punishment of violations of this article.

4 CONG. REC. 5580 (1876) (44th Cong., 1st Sess.).

After extensive and heated discussion the proposal was defeated in the Senate for failure of the required two-thirds vote. 4 CONG. REC. 5595 (1876); see Ames, *The Proposed Amendments to the Constitution of the United States During the First Century of its History*, H.R. Doc. No. 353, 54th Cong., 2d Sess. 277 (1897). Although the Blaine amendment was defeated, the congressional act of 1889 providing for admission of North Dakota, South Dakota, Montana, and Washington required each of them to secure the perfect toleration of religious sentiment and to maintain public schools "free from sectarian control." Ch. 180, § 4, 25 Stat. 677 (1889) (50th Cong., 2d Sess.). See *McCullum v. Board of Educ.*, 333 U.S. 203, 212, 218-20 (Frankfurter, J.).

⁸⁰ See discussion in part II, C, following note 116 *infra*.

⁸¹ CAL. CONST. art. IX, § 1 (originating in the 1849 constitution).

⁸² See discussion in part I, A, following note 14 *supra*.

30, or article IX, section 8, prohibit such courses. Article IX, section 8, does not apply to state-supported and controlled higher education because (1) the first clause by its own terms only prohibits state funds for sectarian or denominational schools or for schools "not under the exclusive control of the officers of the public schools," and (2) the second clause prohibiting "sectarian or denominational" teaching applies by its terms only to "common schools of this State." "Common schools" has been held to mean in California solely primary and grammar schools.⁸³

For the purposes of this study, therefore, the crucial constitutional provision is article IV, section 30. The law and practice relating to the church-state relationship generally will be discussed first, leaving to part III the specific discussion relating to higher education.

B. The California Public School System

Most of the law concerning the California church-state relationship with respect to education concerns, as might be expected, the public school system beneath the college level. Obviously one vital distinction between that system and higher education is the level of experience and maturity of the students. Yet the religion-state relationship in the secondary and lower schools is evidence of the balancing points to which the problem gravitates and helps supply a picture of the overall relationship as it should or may apply to higher education.

Discussion in this area has focused on three problems: (1) the question of using religious books in schools; (2) the California released time program for religious instruction; and (3) requirements of student participation in activities that violate religious tenets.

Concerning the first, although statutes proscribe sectarian or denominational doctrine in the public schools,⁸⁴ school libraries are permitted to include denominational books unless the governing board of the district votes to exclude them.⁸⁵ Text books, on the other hand, may not contain sectarian doctrine.⁸⁶

A 1924 California Supreme Court case, *Evans v. Selma Union High School Dist.*,⁸⁷ was one of the earliest decided concerning books in California schools. This was a suit to enjoin the school district from purchasing for the school library twelve copies of the King James version of the Bible, on the ground that such purchase would violate provisions of the state constitution (article I, section 4; article IV, section 30; and article IX, section 8, as quoted above), and statutes of that time forbidding sectarian

⁸³ *Los Angeles County v. Kirk*, 148 Cal. 385, 83 Pac. 250 (1905).

⁸⁴ CAL. EDUC. CODE § 8453.

⁸⁵ *Ibid.*

⁸⁶ CAL. EDUC. CODE §§ 9958-59.

⁸⁷ 193 Cal. 54, 222 Pac. 801 (1924).

books in the schools.⁸⁸ The court unanimously held that this version of the Bible is not necessarily sectarian because it is not universally accepted as authoritative. The court noted that if this version were placed in a school library to the exclusion of all other versions and in circumstances that implied a declaration that this were the only true version, then some complaint might be justified, but:

For aught that appears in the instant case the library in question may already contain copies of the Douai version of the Bible as well as copies of the Talmud, Koran, and teachings of Confucius. If the Douai version and these other books are not already in the library, we have no right to assume that they will not be added thereto in the future. That such action would be legal and appropriate we have no doubt.⁸⁹

More recently, in 1955, the California attorney general had occasion to review similar problems in response to questions whether the Bible could be read without comment as part of the school program, whether it (the Gideon version) could be distributed through the public school system, and whether religious prayers could be part of the school program. The attorney general concluded in the negative to each question, on the basis of the federal and California constitutions.⁹⁰ From the opinion it is clear that the central principle leading to these conclusions was that "ours is the view that ideological differences should be decided ideologically not by government decree. Faith is important—it is at the very foundation of our cause—but it is faith dictated by the heart not faith dictated by the state. . . ."⁹¹ Even if attendance during a religious exercise in the public school were voluntary,

in the reading of the Bible there would be a preference in the fact that the school would be endorsing certain religious ideas to the exclusion of others. Children forced by conscience to leave the room during such exercises would be placed in a position inferior to that of students adhering to the State-endorsed religion.⁹²

Finally, the attorney general stated:

It must be clearly understood that the constitutional provisions herein discussed are in no way to be interpreted as opposed to religion or to religious education. . . . [T]he omission of religious services from the public school curriculum should never be allowed to assume the appearance of state hostility to religion.⁹³

⁸⁸ Cal. Stat. 1917, ch. 552, § 6, at 736 (CAL. POL. CODE §§ 1607, 1672, as they existed in 1924).

⁸⁹ *Evans v. Selma Union High School Dist.*, *supra* note 87, at 60.

⁹⁰ 25 OPS. CAL. ATT'Y GEN. 316 (1955).

⁹¹ *Id.* at 324.

⁹² *Id.* at 319.

⁹³ *Id.* at 325. See note 43 *supra* and accompanying text.

The attorney general has since ruled that school authorities can purchase books for school libraries that are sectarian or partisan, in accordance with statutory authority,⁹⁴ stating that the section of the constitution prohibiting sectarian doctrine in schools is not violated by the statute.

As to the second problem, the released time program of religious instruction, the attorney general has ruled that no religious instruction may be carried on in public schools.⁹⁵ A California statute, however, authorizes a program of released time for religious instruction, if a school district desires to have one.⁹⁶ It provides that pupils may be excused, with written consent of parents, to participate in religious exercises or to receive instruction at their places of worship.⁹⁷ It is understood that in many local districts the released time is limited to one hour per week, and where the participating churches are not located near the schools, the religious classes are held in church-owned buses parked adjacent to the school property.⁹⁸

The constitutionality of the released time statute was upheld by a district court of appeal in *Gordon v. Board of Educ.*⁹⁹ A taxpayer, objecting to the program and alleging school aid to religion, was denied a writ of mandamus to compel his local school board to discontinue the program. The court held there was no appropriation of public money in support of a sect or denomination and no religious teaching in the schools; consequently the constitution was not violated. It will be observed that a year after the *Gordon* case was decided the United States Supreme Court declared an Illinois plan unconstitutional in the *McColum* case.¹⁰⁰ Thereafter the California attorney general ruled the California plan as being valid even in the light of *McColum*, since the religious instruction did not take place on school property or receive the support of the school in any way except by excusing students from classwork.¹⁰¹ These distinctions were upheld in connection with the New York released time plan in the *Zorach* case¹⁰² four years later.¹⁰³

The third issue is the extent to which a school can require a student to participate in activities that violate his religious tenets. A California

⁹⁴ 35 OPS. CAL. ATT'Y GEN. 68 (1960); CAL. EDUC. CODE § 8453.

⁹⁵ 2 OPS. CAL. ATT'Y GEN. 371 (1943).

⁹⁶ CAL. EDUC. CODE § 8201.

⁹⁷ *Ibid.*

⁹⁸ Personal conference with Berkeley clergymen.

⁹⁹ 78 Cal. App. 2d 464, 178 P.2d 488 (1947).

¹⁰⁰ 333 U.S. 203 (1948). See discussion in text accompanying notes 25-26 *supra*.

¹⁰¹ 11 OPS. CAL. ATT'Y GEN. 184 (1948).

¹⁰² 343 U.S. 306 (1952). See discussion in text accompanying notes 27-30 *supra*.

¹⁰³ The attorney general has also advised that a school need not provide the safe transportation to and from released time instruction that is required to and from home, and consequently the school is not liable for injuries incurred during that time. 2 OPS. CAL. ATT'Y GEN. 160 (1943).

statute provides that although the required course of study in elementary schools must include instruction in "training for healthful living," when such training conflicts with religious convictions a student may be excused therefrom.¹⁰⁴ A further concession is given to religious beliefs of regular students, those of deaf schools, and those in child care centers, by exempting them from medical examinations if religious convictions are in conflict.¹⁰⁵

One California district court of appeal decision in 1921, *Hardwick v. Board of School Trustees*,¹⁰⁶ held that because of the constitutional guarantee of "free exercise and enjoyment of religious profession and worship, without discrimination or preference"¹⁰⁷ children cannot be dismissed from school for refusing, at their parents' insistence based on religious beliefs, to participate in dancing while at school. This privilege is limited, however, as indicated by an attorney general's opinion, which ruled that students could be suspended from school or denied graduation for refusal to participate in physical education courses.¹⁰⁸ Although the alleged religious beliefs would have been sufficient ground for excusing the participation, the objections were made regarding a course to which "no reasonable opposition on moral or religious grounds can be urged."¹⁰⁹ The school authorities had apparently been careful to accommodate the girls, allowing them to shower separately, wear their own kind of clothing rather than the normal gym suits which looked like men's clothing, and placing some distance between the boys and the girls on the playing field.¹¹⁰

An additional group of laws and decisions sheds further light on the state-religion relationship in the public schools. For instance, by statute, no instruction can reflect on students because of their creed.¹¹¹ Another statute permitting public transportation for students attending private schools was upheld in *Bowker v. Baker*,¹¹² on the rationale that broad police powers of the state allow it to promote the education welfare and

¹⁰⁴ CAL. EDUC. CODE § 7604.

¹⁰⁵ CAL. EDUC. CODE § 11905. Similar provisions appear in CAL. EDUC. CODE §§ 16624, 25654.

¹⁰⁶ 54 Cal. App. 696, 205 Pac. 49 (1921). Petition to transfer the case to the California Supreme Court was denied.

¹⁰⁷ CAL. CONST. art. I, § 4.

¹⁰⁸ 19 OPS. CAL. ATT'Y GEN. 230 (1952).

¹⁰⁹ *Ibid.*

¹¹⁰ The California Supreme Court has held that the expulsion of a student for refusing to salute and pledge allegiance to the flag was not a denial of constitutional freedoms. *Gabrielli v. Knickerbocker*, 12 Cal. 2d 85, 82 P.2d 391 (1938), *appeal dismissed*, 306 U.S. 621 (1939). This, of course, is no longer the law due to *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), discussed in text accompanying note 20 *supra*.

¹¹¹ CAL. EDUC. CODE §§ 8451-52.

¹¹² 73 Cal. App. 2d 653, 167 P.2d 256 (1946).

safety of its citizens, including little children. The mandate in the constitution obligating the legislature to encourage education¹¹³ was also invoked, the court stating that the children receive the direct benefit, the parochial school only slight benefit.

The attorney general has ruled that school boards have authority to grant leaves of absence with pay to employees attending religious services, so long as there is no discrimination between faiths;¹¹⁴ this practice is not deemed aid to the religions, but a necessary expenditure to promote the morale of the employees. He has ruled, however, that there is no authority to grant short-term leases of school real property for religious purposes for periods of a few hours each evening even though long-term leases of property no longer needed or used for school purposes would be permitted.¹¹⁵ Voluntary student religious associations may hold their meetings on a school campus provided there is no endorsement of the associations by the school, and no interference with the regular educational program of the school, but the state need not allow this if it gives the appearance of state endorsement of particular religious views or might excite religious controversy within the student body.¹¹⁶

The problem of religion and the public schools in California continues to be vital, and various competing claims continue to require judicial adjustment. What will be the exact balance between the need for moral and religious education felt by the citizens, and the need to preserve our traditional freedom of religion from the state and the state from sectarian domination, is of course not at this time predictable. It can be seen, however, that where activities fulfill purposes that are nonreligious, the mere fact that they also aid religion is not determinative of whether they violate relevant constitutional provisions. It can also be seen that the state, through its various official organs, seems to be striving to allow the individual as much freedom for his religious faith as possible, consistent with other needs of the community.

C. Taxation and Religion in California

Article XIII, section 1, of the California constitution provides that "all property in the State except as otherwise in this Constitution provided, not exempt under the laws of the United States, shall be taxed. . . ."

Two sections of article XIII establish exemptions that refer specifically to religious property. One is section 1½, initially adopted in 1900. In pro-

¹¹³CAL. CONST. art. IX, § 1. See text accompanying note 81 *supra*.

¹¹⁴ 28 OPS. CAL. ATT'Y GEN. 118 (1956).

¹¹⁵ 25 OPS. CAL. ATT'Y GEN. 309 (1955).

¹¹⁶ *Id.* at 315.

viding for exemption of real property used exclusively for religious worship (sometimes termed the "church exemption"), it now reads:

All buildings and equipment, and so much of the real property on which they are situated as may be required for the convenient use and occupation of said buildings, when the same are used solely and exclusively for religious worship, and any building and its equipment in the course of erection, together with the land on which it is located as may be required for the convenient use and occupation of the building, if such building, equipment and land are intended to be used solely and exclusively for religious worship, and, until the Legislature shall otherwise provide by law, that real property owned by the owner of the building which the owner is required by law to make available for, and which is necessarily and reasonably required and exclusively used for the parking of the automobiles of persons while attending or engaged in religious worship in said building whether or not said real property is contiguous to land on which said building is located, and which real property has not been rented or used for any commercial purpose at any other time during the preceding year, shall be free from taxation; provided, that no building so used or, if in the course of erection, intended to be so used, its equipment or the land on which it is located, which may be rented for religious purposes and rent received by the owner therefor, shall be exempt from taxation.

The second exemption is section 1c, which authorizes the legislature to exempt property used for religious and charitable purposes (sometimes termed the "welfare exemption") in the following terms:

In addition to such exemptions as are now provided in this Constitution, the Legislature may exempt from taxation all or any portion of property used exclusively for religious, hospital or charitable purposes and owned by community chests, funds, foundations or corporations organized and operated for religious, hospital or charitable purposes, not conducted for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual. As used in this section, "property used exclusively for religious, hospital or charitable purposes" shall include a building and its equipment in the course of construction on or after the first Monday of March, 1954, together with the land on which it is located as may be required for the use and occupation of the building, to be used exclusively for religious, hospital or charitable purposes.

Although litigation has delimited the meaning of these provisions, our interest is with the principles upon which the delineations have been made, since these principles shed further light on the church-state relationship.¹¹⁷

¹¹⁷ For the extent and limits of these exemptions see CAL. REV. & TAX. CODE §§ 203-04; 46 CAL. JUR. 2d *Taxation* § 86 (1959), and the annotations for the constitutional provisions cited in text. Consider article XIII, § 1a, of the constitution, which exempts "college" property, in connection with the question of what is exempt. State property, including university property, is exempt, of course, under the clause concerning state owned property in article XIII, § 1. Other colleges may come under § 1a or the special sections for particular institutions contained in article IX (regarding Stanford University and others). See also Keesing, *Property Taxation of Leases and Other Limited Interests*, 47 CALIF. L. REV. 470 (1959).

Separate arguments have been made that both the taxing and the tax exemption of religious property are violations of religious liberty and both arguments have been rejected.

In the 1947 case of *Watchtower Bible and Tract Soc'y v. County of Los Angeles*,¹¹⁸ the California Supreme Court ruled that personal property (books and literature of Jehovah's Witnesses) is not exempt under section 1½ and rejected the argument that a tax on such property violates religious liberty or freedom of speech and press, because:

While the power to tax may involve the power to destroy it is clear that no such result will be accomplished by the tax here imposed. The property involved is required to bear only its share of the burden of the maintenance of the government which is for its protection equally with other property in Los Angeles County. The very liberty involved is made realistic by the protection afforded by that government.¹¹⁹

The converse argument, that tax exemptions for religious property violate religious liberty, was rejected by the same court in *Lundberg v. County of Alameda*.¹²⁰ In this case a citizen taxpayer brought suit to challenge a provision of the Revenue and Taxation Code designed to implement the welfare exemption which, unlike the church exemption, is *not* self-executing. The critical words, which are contained in section 214 of the code, provide that property used for school purposes of less than collegiate¹²¹ grade owned by religious, hospital, or charitable organizations, is to be exempt under section 1c of the constitution.¹²²

¹¹⁸ 30 Cal. 2d 426, 182 P.2d 178 (1947).

¹¹⁹ *Id.* at 432, 182 P.2d at 182.

¹²⁰ 46 Cal. 2d 644, 298 P.2d 1 (1956).

¹²¹ Section 1a of article XIII of the constitution exempts most college property.

¹²² These words had been added by the legislature to section 214 in 1951 and approved by the voters of the state by referendum on November 4, 1952, after a hotly contested campaign. CAL. REV. & TAX. CODE § 214:

Property used exclusively for religious, hospital, scientific, or charitable purposes owned and operated by community chests, funds, foundations or corporations organized and operated for religious, hospital, scientific, or charitable purposes is exempt from taxation if:

- (1) The owner is not organized or operated for profit; . . .
- (2) No part of the net earnings of the owner inures to the benefit of any private shareholder or individual;
- (3) The property is used for the actual operation of the exempt activity;
- (4) The property is not used or operated by the owner or by any other person so as to benefit any officer, trustee, director, shareholder, member, employee, contributor, or bondholder of the owner or operator, or any other person, through the distribution of profits, payment of excessive charges or compensations or the more advantageous pursuit of their business or profession;
- (5) The property is not used by the owner or members thereof for fraternal or lodge purposes, or for social club purposes except where such use is clearly incidental to a primary religious, hospital, scientific, or charitable purpose;
- (6) The property is irrevocably dedicated to religious, charitable, scientific, or hospital purposes and upon the liquidation, dissolution or abandonment of the owner will not inure to the benefit of any private person except a fund, founda-

One issue was whether "charitable" purposes included "educational" purposes in this context, and the court held that it did. An additional issue was raised by the argument that the exemption violated the clause of the first amendment of the federal constitution forbidding establishment of religion. The court rejected this argument on two grounds. First:

it is apparent that the exemption was enacted to promote the general welfare through encouraging the education of the young and not to favor religion, since it is not limited to schools maintained by religious groups but applies also to those operated by other charitable organizations. Under the circumstances, any benefit received by religious denominations is merely incidental to the achievement of a public purpose.¹²³

Secondly, the court noted the long history of granting tax exemptions to religious groups, and concluded that the first amendment was not intended to prohibit such exemptions.

Once the validity of the exemptions is established, there remains the problem of interpreting the extent and limitations of the clauses concerned.

The normal rule concerning construction, as stated in the *Watchtower* case, is that "the tax exemption statutes are to be strictly construed against the taxpayer."¹²⁴ Since that case involved construction of the church exemption, the court applied the rule to constitutional tax exemptions. The only California cases previous to *Watchtower* concerning the church exemption or the welfare exemption¹²⁵ do not explicitly comment concerning principles of construction or interpretation.¹²⁶

tion or corporation organized and operated for religious, hospital, scientific, or charitable purposes;

(7) The property, if used exclusively for scientific purposes, is used by a foundation or institution which, in addition to complying with the foregoing requirements for the exemption of charitable organizations in general, has been chartered by the Congress of the United States, . . . and whose objects are the encouragement or conduct of scientific investigation, research and discovery for the benefit of the community at large.

The exemption provided for herein shall be known as the "welfare exemption." This exemption shall be in addition to any other exemption now provided by law. This section shall not be construed to enlarge the college exemption. Property used exclusively for school purposes of less than collegiate grade and owned and operated by religious, hospital or charitable funds, foundations or corporations, which property and funds, foundations or corporations meet all of the requirements of this section, shall be deemed to be within the exemption provided for in Section 1c of Article XIII of the Constitution of the State of California and this section.

¹²³ 46 Cal. 2d at 654, 298 P.2d at 7.

¹²⁴ 30 Cal. 2d 426, 428, 182 P.2d 178, 180 (1947).

¹²⁵ The legislature enacted § 214 in 1945 to carry out § 1c of article XIII of the constitution. This statute became operative in 1946-1947. See *Cedars of Lebanon Hosp. v. County of Los Angeles*, 35 Cal. 2d 729, 731, 221 P.2d 31, 33 (1950).

¹²⁶ These cases were: *Immanuel Presbyterian Church v. Payne*, 90 Cal. App. 176, 265 Pac. 547 (1928) (church-owned parking lot adjacent to the church held to be exempt); *Havens v. County of Alameda*, 30 Cal. App. 206, 147 Pac. 821 (1916) (property sold by a church under land contract but still occupied by it, where the church made payments comparable to rent,

In 1950 five cases were decided by the California Supreme Court concerning section 1c, the welfare exemption. The first of these is *Cedars of Lebanon Hosp. v. County of Los Angeles*,¹²⁷ which involved the exemption from property tax and assessments of the following hospital property: (1) property used for a nurses' training home; (2) housing facilities for hospital staff; (3) buildings under construction; (4) tennis courts; and (5) a "thrift shop." The court held that the exemption cannot apply to assessments, but as to property taxes, the nurses' home, tennis courts, and staff housing were exempt. However, buildings under construction were not "used" within the constitutional and statutory meaning, and the "thrift shop" was not exempt because it produced a profit within the meaning of the clause in the exemption limiting it to property for uses and operations "not conducted for profit."

In the opinion, the court reiterated the rule of strict construction, adding: "It is immaterial that the institutions in question may contribute to the public welfare and serve the interests of the state, for they, like other private owners of property, have the burden of showing that they clearly come within the terms of the exemption."¹²⁸ The court distinguished this rule from the principle of liberal construction that applies to determination of exemption qualifications under social security and unemployment compensation acts, where liberality is designed to effectuate the beneficent purposes of those acts. The court added, however, that a rule of strict construction "does not require . . . the narrowest possible meaning" and that a "fair and reasonable interpretation must be made of all laws, with due regard for . . . the object sought to be accomplished thereby."¹²⁹

Justice Shenk dissented on the issues of the building under construction and the "thrift shop," arguing that

the welfare exemption is designed to serve both social and economic ends. . . . Implicit in the legislation is the knowledge that the maintenance of the facilities and the dispensation of the services as a result of private contributions of funds and personal effort become less of a burden on the taxpaying public than would be the cost under public ownership and control.¹³⁰

held not exempt). Four other cases involved the question of requirement of affidavit as a condition precedent to obtaining the exemption: *First Congregational Church v. County of Los Angeles*, 9 Cal.2d 591, 71 P.2d 1106 (1937); *West Glendale Methodist Episcopal Church v. McClellan*, 204 Cal. 697, 267 Pac. 705 (1928); *First Methodist Episcopal Church v. County of Los Angeles*, 204 Cal. 201, 267 Pac. 703 (1928); *St. John's Church v. County of Los Angeles*, 5 Cal. App. 2d 235, 42 P.2d 1093 (1935). On the question of affidavits see *First Unitarian Church v. County of Los Angeles*, 357 U.S. 545 (1958); 4 Ops. CAL. ATT'Y GEN. 45 (1944).

¹²⁷ 35 Cal. 2d 729, 221 P.2d 31 (1950).

¹²⁸ *Id.* at 734, 221 P.2d at 34.

¹²⁹ *Id.* at 735, 221 P.2d at 35.

¹³⁰ *Id.* at 750-51, 221 P.2d at 44.

The other cases held that section 1c exempted from taxation a retreat house for priests and lay brothers of a religious institution,¹³¹ YMCA dormitories (but not space rented to independent contractors),¹³² and a home for elderly people (on life care contracts).¹³³ One case refused the exemption because the statutory requirement that the property be irrevocably dedicated to exempt purposes was not met.¹³⁴ In each of these cases the "strict but reasonable" rule of construction was expressed.

Possibly as a reaction to one holding of the *Cedars* case, or another lower court case,¹³⁵ the electorate amended the constitution so that buildings under construction would come under the exemption, the church exemption being amended in 1952 and the welfare exemption in 1954.

The first supreme court case to be decided on these exemptions after the amendments was *Lundberg v. County of Alameda*.¹³⁶ In considering the word "charitable," the court cited both the *YMCA* case and the *Fredericka Home for the Aged* case as authority for a *broad* rule of construction, despite "strict but reasonable" language in those cases, preferring apparently to look at what the court *did* as opposed to what it said, if there be a difference. *Lundberg* is the last significant pronouncement by the California court on these exemptions. It is impossible to extract from this series of cases any well defined attitude on the part of the court with respect to religious tax exemptions, since discussion of the exemptions occurs in the charity and hospital contexts also. It does seem, however, that one can now conclude that a somewhat special place has been carved out for these exemptions, at least to the extent that the strict rule of construction against the taxpayer will not apply with great vigor to deny these exemptions.

The next logical question might be, what is *religion* within the meaning of the exemptions? On this question an interesting 1957 district court of appeal case has been decided, one that is revealing as to the state-religion relationship and may have significant impact on the law of California.¹³⁷ This case is *Fellowship of Humanity v. County of Alameda*,¹³⁸ where the question was whether property used by an organization for a

¹³¹ *Serra Retreat v. County of Los Angeles*, 35 Cal. 2d 755, 221 P.2d 59 (1950).

¹³² *YMCA v. County of Los Angeles*, 35 Cal. 2d 760, 221 P.2d 47 (1950).

¹³³ *Fredericka Home For The Aged v. County of San Diego*, 35 Cal. 2d 789, 221 P.2d 68 (1950).

¹³⁴ *Pasadena Hosp. Ass'n v. County of Los Angeles*, 35 Cal. 2d 779, 221 P.2d 62 (1950).

¹³⁵ *First Baptist Church v. County of Los Angeles*, 113 Cal. App. 2d 392, 248 P.2d 101 (1952).

¹³⁶ 46 Cal. 2d 644, 298 P.2d 1 (1956); see text accompanying note 120 *supra*.

¹³⁷ The attorney general has cited this case with approval in a 1959 opinion. 34 OPS. CAL. ATT'Y GEN. 98, 109 (1959).

¹³⁸ 153 Cal. App. 2d 673, 315 P.2d 394 (1957).

"free fellowship for the study of human relationships from the viewpoint of religion, education and sociology," which did not require as a condition of membership a belief in God, was properly used "solely and exclusively for religious worship," within the church exemption. The court noted the rule of strict construction of an exemption against a taxpayer and said that the taxpayer had the burden of showing he was exempt (it apparently did not have the *Lundberg* opinion before it). But the court also referred to language of the supreme court indicating that the strict construction must be "fair and reasonable." Noting that "the definitions given are confused, uncertain and certainly not conclusive,"¹³⁹ the court added: "Drawing the dividing line between theistic and nontheistic beliefs would seem to be somewhat arbitrary. In a country where religious tolerance is accepted it would not seem that the limited definition is in accord with our traditions."¹⁴⁰ A controlling principle in the court's eyes was the first amendment to the federal constitution:

Under the constitutional provision the state has no power to decide the validity of the beliefs held by the group involved. The principal case establishing this concept is *United States v. Ballard*,¹⁴¹ . . . which holds that: "Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs."¹⁴² . . . If those concepts are sound, and it is submitted that they are well settled, then the only valid test a state may apply in determining the tax exemption is a purely objective one. Once the validity or content of the belief is considered, the test becomes subjective and invalid. Thus the only inquiry in such a case is the objective one of whether or not the belief occupies the same place in the lives of its holders that the orthodox beliefs occupy in the lives of believing majorities, and whether a given group that claims exemption conducts itself the way groups conceded to be religious conduct themselves. The content of the belief, under such test, is not a matter of governmental concern.¹⁴³

The court also discussed the question whether a tax exemption for religion is itself compatible with the first amendment, concluding that it is, partly because of the extensive history behind such exemptions, and partly because "it is sound public policy to encourage, by tax exemption as well as by direct subsidy, private undertakings in the fields that are properly within the realm of governmental responsibility,"¹⁴⁴ and "apart from religious considerations, churches are regarded as institutions established to inculcate principles of sound morality, leading citizens to a more

¹³⁹ *Id.* at 689, 315 P.2d at 404.

¹⁴⁰ *Id.* at 691, 315 P.2d at 405.

¹⁴¹ 322 U.S. 78, 86 (1944).

¹⁴² Citing Silving, *The Unknown and the Knowable*, 35 CALIF. L. REV. 352 (1947).

¹⁴³ 153 Cal. App. 2d at 692, 315 P.2d at 406.

¹⁴⁴ *Id.* at 696, 315 P.2d at 408-09.

ready obedience to the laws."¹⁴⁵ Finally, the court concluded: "We should interpret article XIII, section 1½, if possible, so as not to offend the Federal Constitution Our interpretation of the tax exemption provision must be as broad as is reasonably necessary to uphold it."¹⁴⁶ Thus the claimant organization was held entitled to exemption. In spite of a rule of strict construction, the court held that the underlying policies of the state with respect to religion must be taken into account.

The following relevant underlying principles can be drawn from the tax exemption cases: (1) the fact that religion is aided by the state is not necessarily a violation of either the federal or state constitutions where otherwise valid objects are pursued, such as education; (2) religion has a function to play in the state, and may therefore be encouraged by the state; (3) the state must be impartial as between religions; according to a court of appeal decision, it must define religion broadly so as to include sects that do not profess belief in God.

D. Other Practices

In addition to the special categories mentioned above, there are many other legislative and judicial actions which indicate California's state-religion relationship. Many of these practices are concerned with the protection of the free exercise of religion. For instance, state employees cannot be compelled to give their race or religion in filling out application blanks;¹⁴⁷ a non-Christian witness at trial may be sworn according to his peculiar ceremonies, if any;¹⁴⁸ regulations governing business and the professions may not interfere with religious practices;¹⁴⁹ and welfare assistance must be given without regard to race, religion, or political affiliation.¹⁵⁰

Other provisions, however, indicate the special position that the state accords to religion. For instance, marriages may be solemnized by duly ordained ministers over age twenty-one.¹⁵¹ Marriages are not invalidated for lack of conformity to requirements of a religious sect,¹⁵² but the ceremonies of a religious sect may constitute a valid marriage if all other legal requisites are fulfilled.¹⁵³

In addition, penal sanctions are imposed if certain religious privileges

¹⁴⁵ *Id.* at 697, 315 P.2d at 409.

¹⁴⁶ *Ibid.*

¹⁴⁷ CAL. GOV'T CODE § 8400.

¹⁴⁸ CAL. CODE CIV. PROC. § 2096.

¹⁴⁹ CAL. BUS. & PROF. CODE § 2146.

¹⁵⁰ CAL. WELFARE & INST'NS CODE §§ 19, 2010.

¹⁵¹ CAL. CIV. CODE § 70.

¹⁵² CAL. CONST. art. XX, § 7.

¹⁵³ CAL. CIV. CODE § 79a.

or properties are not respected.¹⁵⁴ Nonprofit religious organizations may incorporate as nonprofit corporations and thereby obtain many privileges of corporations.¹⁵⁵ A presiding officer of any religious group may hold property and administer affairs as the legal entity termed a corporation sole.¹⁵⁶ A religious group may likewise incorporate for charitable or eleemosynary purposes, if nonprofit.¹⁵⁷ Finally, common trust funds for the above corporations may be established to furnish investments to the group or any institution affiliated with it.¹⁵⁸

The care of the sick by established religious groups may be administered without registering the personnel as nurses.¹⁵⁹ Moreover, a training school for persons caring for the sick under the auspices of a church or denomination need not be a registered nursing school.¹⁶⁰

Churches, as well as hospitals, are protected from adjacent on-sale liquor sales by the Alcoholic Beverage Control Board's power to refuse licenses within the immediate vicinity.¹⁶¹

All wards of juvenile courts and other children placed in family homes must be placed with people of the same religious belief, if possible,¹⁶² and a child cannot remain in an institution if a proper home with the child's religious beliefs can be provided.¹⁶³ Persons cannot be committed to an institution unless dangerous or by consent, if he or she is being treated by prayer in the practice of religion.¹⁶⁴

Church records may be admitted into evidence at trial if properly proved and authenticated.¹⁶⁵ The libraries of ministers, and the pews in churches may be exempt from levy and execution.¹⁶⁶ The right of a seat in church may even become, by statute, a servitude upon land, though not attached to the land.¹⁶⁷ Confidentiality of religious confessions to clergymen is guaranteed.¹⁶⁸

¹⁵⁴ CAL. PEN. CODE §§ 302 (disorderly conduct at church service), 304 (sale of liquor, etc., near a camp meeting), 448a (burning a meeting house as an arsonist), 538b (unauthorized wearing of garb or insignia of religious order), 653i (eavesdropping on a privileged communication with a clergyman).

¹⁵⁵ CAL. CORP. CODE §§ 9000-802, specifically § 9200.

¹⁵⁶ CAL. CORP. CODE §§ 10000-15, specifically § 10002.

¹⁵⁷ CAL. CORP. CODE §§ 10200-08, specifically § 10200.

¹⁵⁸ CAL. CORP. CODE § 10250.

¹⁵⁹ CAL. BUS. & PROF. CODE § 2731.

¹⁶⁰ CAL. BUS. & PROF. CODE § 2789.

¹⁶¹ CAL. BUS. & PROF. CODE § 23789.

¹⁶² CAL. WELFARE & INST'NS CODE § 505.

¹⁶³ CAL. WELFARE & INST'NS CODE § 1524.

¹⁶⁴ CAL. WELFARE & INST'NS CODE § 5156.

¹⁶⁵ CAL. CODE CIV. PROC. § 1919a.

¹⁶⁶ CAL. CODE CIV. PROC. § 690.4.

¹⁶⁷ CAL. CIV. CODE §§ 801-02.

¹⁶⁸ CAL. CODE CIV. PROC. § 1881.

In addition to church property tax exemptions discussed above, a minister of the gospel is exempt from personal income taxes on the rental value of a home furnished (or a rental allowance furnished, if actually used for that purpose).¹⁶⁹

And perhaps most interesting, denominational religious chapels can be constructed and maintained on state property at Youth Authority institutions,¹⁷⁰ and state hospitals.¹⁷¹ It has been contended, however, that this is *not* true for universities, colleges, and schools. Noting this distinction, the associate general counsel of the University of California observed that a chapel should be as legal on a campus as on property of other state institutions, but that *historical* facts determined the differing treatments.¹⁷²

An attorney general's opinion states that there are no constitutional objections to the sale or lease of public property to religious organizations for religious or other proper purposes, provided that legal sale or leasing procedures are complied with, and provided that the property is not needed for public purposes and that there is no interference with primary public purposes for which the property is held.¹⁷³

Sometimes religious freedom is protected by the requirement that government must act reasonably or with reasonable classifications. For instance, although a zoning ordinance can provide for an area of single family residences and thereby prevent a church from being built in that area,¹⁷⁴ a zone that covers 98.7 per cent of a city and prohibits the construction of any but public schools therein is an unreasonable classification against private and parochial schools.¹⁷⁵

California Sunday closing laws were held not to violate the California constitution in *Ex parte Andrews*,¹⁷⁶ decided in 1861. The court stated that "while the primary object of legislation, which respects secular affairs, is not the promotion of religion, yet it can be no objection to laws, that while they are immediately aimed at secular interests, they also promote piety."¹⁷⁷ This case (which adopted a vigorous dissent of Justice Field in the earlier California case of *Ex parte Newman*¹⁷⁸) was cited with approval by the United States Supreme Court in *McGowan v. Maryland*.¹⁷⁹

¹⁶⁹ CAL. REV. & TAX. CODE § 17141.

¹⁷⁰ CAL. WELFARE & INST'NS CODE § 1752.9.

¹⁷¹ CAL. WELFARE & INST'NS CODE § 6513.

¹⁷² Memo from Associate General Counsel to the Law Librarian, University of California School of Law, Berkeley, Jan. 24, 1957.

¹⁷³ 25 OPS. CAL. ATT'Y GEN. 309 (1955).

¹⁷⁴ *Corporation of Presiding Bishop v. City of Porterville*, 90 Cal. App. 2d 656, 203 P.2d 823 (1949).

¹⁷⁵ *Roman Catholic Welfare Corp. v. City of Piedmont*, 45 Cal. 2d 325, 289 P.2d 438 (1955).

¹⁷⁶ 18 Cal. 678 (1861).

¹⁷⁷ *Id.* at 684.

¹⁷⁸ 9 Cal. 518 (1858).

¹⁷⁹ 366 U.S. 420, 435 (1961). In *County of Los Angeles v. Hollinger*, 200 Cal. App. 2d 877,

III

RELIGION AND CALIFORNIA HIGHER EDUCATION—LAW AND PRACTICE

There are three systems of public higher education in California: the university, the state colleges, and the junior colleges. Attention will now be given specifically to the law concerning religion in these three systems. At the end of this part is a discussion of the extent to which religion now appears in the curricula of the first two of these systems. Pertinent to all three systems are the constitutional provisions discussed in part II above that provide for the free exercise of religion and prohibit the use of public funds for or in aid of any religious sect, church, creed, or sectarian purpose.¹⁸⁰

A. *The University of California*1. *Historical Background and the State Constitution*

In 1855 the privately owned and operated College of California was incorporated, located in Oakland.¹⁸¹ Many of the founders and early professors were clergymen of various faiths,¹⁸² the college thus had a religious orientation.¹⁸³ As the result of a lack of sufficient private funds to expand the facilities as quickly as desired, the controlling groups reached an agreement whereby the college was purchased by the state for a nominal \$54,000, with much of the property being donated by the college.¹⁸⁴ Pursuant to an act of the legislature the university was formally chartered on March 23, 1868, as the University of California.¹⁸⁵ This "Organic Act"

19 Cal. Rptr. 648 (1962), the court held payment of public funds for the production of Verdi's opera "Nabucco," with an Old Testament theme, does not violate CAL. CONST. art. IV, § 30, or the first amendment.

¹⁸⁰ See text accompanying notes 78-83 *supra*.

¹⁸¹ FERRIER, ORIGIN AND DEVELOPMENT OF THE UNIVERSITY OF CALIFORNIA 143 (1930).

¹⁸² *Id.* at 189.

¹⁸³ *Id.* at 233.

¹⁸⁴ *Id.* at 274.

¹⁸⁵ An Act to create and organize the University of California, Cal. Stat. 1867-1868, ch. 244, at 248 [hereinafter cited as the Organic Act]:

Sec. 1. A State University is hereby created, pursuant to the requirements of Section four, Article nine, of the Constitution of the State of California, and in order to devote to the largest purposes of education the benefaction made to the State of California under and by the provisions of an Act of Congress passed July second, eighteen hundred and sixty-two, entitled an Act donating land to the several States and Territories which may provide colleges for the benefit of agriculture and the mechanic arts. The said University shall be called the University of California, and shall be located upon the grounds heretofore donated to the State of California by the President and Board of Trustees of the College of California. The said University shall be under the charge and control of a Board of Directors, to be known and styled "the Regents of the University of California." The University shall have for its design, to provide instruction and complete education in all the departments of science, literature, art, industrial and professional pursuits, and general education,

did not mention religion except to provide that no religious test should be required for regents, professors, officers, or students, and that the board of regents should not have a majority belonging to any one religious sect or of no religious sect.¹⁸⁶ Soon, however, the constitution of 1879 was adopted, containing article IX, section 9, which establishes the university 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"¹⁸⁷

Professor Henry Durant, a former Congregational minister, was named as the first President of the University of California.¹⁸⁸

2. Statutes and Court Decisions

The few existing statutes concerning religion in higher education in California provide that the awarding of competitive scholarships cannot be based on religion, creed, or race,¹⁸⁹ and that grantors of money or property cannot place enforceable restrictions thereon that require religious instruction or belief.¹⁹⁰

In addition the legislature has provided that the name "University of California" shall not be used without permission to designate any affiliation with business, religious, or other groups;¹⁹¹ in accordance with that law the general counsel of the university has requested religious organizations adjacent to campuses to alter letterheads or brochures to read "Chaplain adjacent to" the university rather than "Chaplain at" the university.¹⁹²

The only judicial decision concerning religion and the university appears to be *Hamilton v. Regents of the Univ. of California*.¹⁹³ In this

and also special courses of instruction for the professions of agriculture, the mechanic arts, mining, military science, civil engineering, law, medicine and commerce, and shall consist of various colleges, namely: . . . Sec. 13. . . . And it is expressly provided that no sectarian, political, or partisan test shall ever be allowed or exercised in the appointment of Regents, or in the election of professors, teachers, or other officers of the University, or in the admission of students thereto, or for any purpose whatsoever; nor at any time shall the majority of the Board of Regents be of any one religious sect, or of no religious sect; and persons of every religious denomination, or of no religious denomination, shall be equally eligible to all offices, appointments, and scholarships.

The constitution of 1849, article IX, § 4, had provided for legislative protection for university land and funds that had been or might be made available for a university.

¹⁸⁶ Organic Act § 13; FERRIER, *op. cit. supra* note 181, at 288.

¹⁸⁷ CAL. CONST. art. IX, § 9, set out in text following note 79 *supra*. Compare Organic Act § 13, at note 185 *supra*; CAL. EDUC. CODE § 13732.

¹⁸⁸ FERRIER, *op. cit. supra* note 181, at 328.

¹⁸⁹ CAL. EDUC. CODE § 31202.

¹⁹⁰ CAL. EDUC. CODE § 31069.

¹⁹¹ CAL. EDUC. CODE § 23001.

¹⁹² Letter from the General Counsel to Reverend C. E. Crowther, Los Angeles, June 8, 1961; Letter from the General Counsel to Reverend Hadsell, Berkeley, 1960 (the minister had called himself "Presbyterian University Pastor at the University of California").

¹⁹³ 293 U.S. 245 (1934).

case the Supreme Court of the United States refused to compel admission of a student despite the fact that his refusal to participate in the then compulsory ROTC program was predicated on grounds of sincere religious objections.

As might be expected, since the university is a constitutional body, statutes do not regulate it in detail. There is no express statutory limitation on curriculum.¹⁹⁴ Thus constitutional and statutory provisions that might bear on the question of religion in the university curriculum are few, and expressed in general terms. To summarize, they consist of the constitutional provisions (a) providing for free exercise and enjoyment of religion; (b) prohibiting use of public funds to or in aid of any religious sect, church, or creed; and (c) providing that the university shall be "entirely independent of all political or sectarian influence." Statutes bear on the use of the university name and restrictions on gifts, but place no limitations on curriculum.

3. *University Orders and Rules*

The board of regents, as the constitutional body in control of the university, has established bylaws and standing orders to guide the university in its operations. These bylaws and orders do not expressly touch on the question of religion or instruction in religion at the university, but chapter IX, order 2(b), provides that "the Academic Senate shall authorize and supervise all courses of instruction." Under this authority the senate has allocated this supervisory function so that the northern section of the academic senate supervises the courses of instruction on the Berkeley, San Francisco, and Davis campuses,¹⁹⁵ and divisions of the southern section perform a similar task for the Los Angeles, Riverside, and Santa Barbara campuses.¹⁹⁶ In addition to senate committees with varying powers, the academic council (a body subordinate to the senate) can on its own initiative study problems of over-all concern to the university and make recommendations to the president and to each section or division of the senate.¹⁹⁷ Nowhere in the bylaws of the academic senate is religion mentioned. An examination of the minutes of most of the recent meetings of the northern and southern sections revealed no formal discussions of religious problems.

It appears that questions of religion in the curriculum rarely reach the faculty senate committees, at least in recent times, although currently

¹⁹⁴ CAL. EDUC. CODE § 22551 provides: "The University may provide instruction in the liberal arts and sciences and in the professions"

¹⁹⁵ University of California, Bylaws and Regulations of the Academic Senate, Bylaw No. 22 (1961).

¹⁹⁶ *Id.* Bylaw Nos. 22, 23, 24.

¹⁹⁷ *Id.* Bylaw No. 40.

it is reported that they are being considered by senate as well as administrative officials. Not infrequently such questions have been referred to the general counsel for legal opinion. A religious leader "adjacent to" U.C.L.A. recently suggested either the establishment of a department of religion to teach nonsectarian theology as an academic discipline or the extension of university credit for off-campus courses offered by individual religious groups.¹⁹⁸ The general counsel's reply specifically declined to answer the basic question posed, *i.e.*, whether "those Sections and Amendments of the Federal and State Constitutions specifically designed to guarantee freedom of religion have been transformed by the secularist mind into means by which religious freedom in higher education is denied."¹⁹⁹ He continued with an analysis of the *Everson*, *McColum*, and *Zorach* cases,²⁰⁰ concluding that the breadth of the language therein allowed application of their principles to higher education. After discussing the relevant provisions of the California constitution,²⁰¹ he concluded that in the light of them and of the first amendment it would be unconstitutional for the university to embark on the activities suggested.²⁰²

A university regulation on academic freedom provides:

The function of the university is to seek and to transmit knowledge and to train students in the processes whereby truth is to be made known. To convert, or to make converts, is alien and hostile to this dispassionate duty. Where it becomes necessary, in performing this function of a university, to consider political, social, or sectarian movements, they are dissected and examined not taught, and the conclusion left, with no tipping of the scales, to the logic of the facts. . . . Its high function and its high privilege, the University will steadily continue to fulfill, serving the people by providing facilities for investigation and teaching free from domination by parties, sects, or selfish interests. The University expects the State, in return, and to its own great gain, to protect this indispensable freedom, a freedom like the freedom of the press, that is the heritage and the right of a free people.²⁰³

By an order of the university president, any course in religion, like every other course, is subject to the investigation of a committee on courses as to its content.²⁰⁴ In addition, pursuant to its responsibility for the intellectual development of its students, the university regulates the use of its facilities so as to allow speakers on controversial and religious

¹⁹⁸ Letter and Memo from Reverend C. E. Crowther to Chancellor F. D. Murphy of U.C.L.A., May 23, 1961.

¹⁹⁹ Letter from the General Counsel to Reverend C. E. Crowther, June 8, 1961.

²⁰⁰ See discussion in part I, following note 7 *supra*.

²⁰¹ See discussion in part II, A, following note 77 *supra*.

²⁰² He also quoted freely from a California attorney general's opinion which recognizes the significance of religion in society, but upholds the separation of church and state so far as concerns religious instruction in public schools. 25 OPS. CAL. ATT'Y GEN. 316, 324-25 (1955).

²⁰³ University of California, University Regulations No. 5 (1944).

²⁰⁴ University of California, Standing Orders of the President No. 3 (1935).

subjects without involving the university as an institution in the particular issues.²⁰⁵ Campus officers have established rules that prohibit the use of university facilities for soliciting for either religious or political conversion.²⁰⁶

Courses in religion that are consistent with these policies can, of course, be taught, and it would seem that there are sufficient safeguards against violation of the constitutional and policy requirements already established.

The general counsel for the university has on a number of other occasions given his opinion concerning various aspects of religion in the university. He recognizes, for instance, that no constitutional provisions would be violated if a student, as a result of a class in religious philosophy, became interested in a particular faith and was ultimately converted.²⁰⁷ One letter from the general counsel discusses a program of "Conversations in Religion" proposed by the Associated Students at the University of California. Designed to offer incoming students orientation sessions about religious opportunities available near campus, and to sponsor informal "conversations" with the various religious leaders, the program was considered legal by the general counsel if certain limitations were followed. These limitations provided that although the *fact* of religious opportunities could be mentioned, there could be no encouragement of their use or of the use of university facilities by the religious leaders. Opportunities for students to inform themselves about religion would be permitted, but advocacy of conversion could not be allowed.²⁰⁸

More recently, the general counsel advised that students on the Santa Barbara campus may gather in university facilities, *i.e.*, dormitories, for informal Bible study classes, since an abstract discussion of religion is permissible along with any other issue of public interest.

But when the discussion shifts to an area of advocacy and intention to convert, Constitutional prohibitions are raised. Similarly, while private, individual prayer by students in their dormitory rooms would appear permissible, a "prayer meeting," regardless of size, quite possibly could constitute "religious worship" within the meaning of the University Regulation.

It was observed, in addition, that students possessing the intellectual acumen necessary for admission to the school would be able to discern with some exactitude when they have left the permissible area of abstract discussion of religious issues.²⁰⁹

²⁰⁵ University of California, University Regulation No. 17 (revised), University Bulletin, Aug. 28, 1961.

²⁰⁶ *Ibid.*

²⁰⁷ Memo from the General Counsel to Stanley E. McCaffrey, Santa Barbara Campus, March 17, 1958.

²⁰⁸ Memo from the Counsel General to Vice Chancellor Hart, April 24, 1958.

²⁰⁹ Memo from the General Counsel to Chancellor Gould, Santa Barbara, Oct. 24, 1960.

The use of university facilities for a scheduled speech of Malcolm X, a leader of the Black Muslim Brotherhood, was denied recently. University officials based their decision on the regulation against use of facilities for "conversion."²¹⁰ The leader admitted his religious affiliation, but claimed he was planning to discuss facts and views about current racial problems, and not to advocate any belief.²¹¹ The address of Billy Graham on the campus apparently was considered by some as part of his religious crusade,²¹² and hence to raise church-state separation problems. At U.C.L.A., on the other hand, classes were cancelled for one hour during a "Religion in Life" Week sponsored by the University Religious Conference. Bishop James A. Pike of the Episcopal Diocese of California was the speaker, but he did not overtly advocate conversion.²¹³

Other practices of the university further evidence its relation to religion, as conceived by the administration. For instance, the university allows students to be excused from classes on certain religious holidays.²¹⁴

The university maintains hospital facilities in connection with the school of medicine in San Francisco. A Lutheran welfare service offered the services of a full time chaplain to administer to the spiritual needs of all patients at the hospital. Despite contrary advice from the general counsel, a chaplain was finally installed. When the general counsel learned of this he wrote the medical school provost outlining his reasons for believing the services of such a chaplain to be unconstitutional.²¹⁵

Another interesting problem arose with regard to establishing memorial chapels on university campuses. The chancellor at Berkeley was informed that building a chapel would be unconstitutional as an aid to a "church," since "chapel" and "church" can be used synonymously; if a chapel were built it could be used as a meditation room only.²¹⁶ Accordingly, a meditation room was recently included at the top of a new student union building on the Berkeley campus. In response to rumors about its becoming a wedding chapel, the general counsel ruled that civil weddings may be allowed, but no religious ceremonies of any nature could be permitted.²¹⁷ At the

²¹⁰ *The Daily Californian*, May 5, 1961, p. 1, col. 4.

²¹¹ *Id.* May 8, 1961, p. 1, col. 3.

²¹² *Id.* May 6, 1958, p. 6, col. 1.

²¹³ *U.C.L.A. Daily Bruin*, March 4, 1959, p. 1, col. 1.

²¹⁴ The specified holidays are Good Friday, Yom Kippur, Passover, and Conclusion of Passover. University of California, University Bulletin, Sept. 10, 1956, p. 29.

²¹⁵ Memo from the General Counsel to Provost Saunders of the School of Medicine, June 16, 1961.

²¹⁶ Memo from the General Counsel to Chancellor Kerr, Berkeley, Nov. 16, 1955.

²¹⁷ Memo from the General Counsel to President Kerr, May 15, 1961. Forbidding marriage ceremonies solely because they are of a religious nature, while permitting those of a secular nature, we think discriminates against religion. That is, such a rule more nearly incurs the danger of infringing upon free exercise of religion than of fulfilling the requisites against establishment of religion.

same time the chancellor at U.C.L.A. was advised similarly, the advice stating that a chapel for religious services would be unconstitutional on university property even if built with private funds.²¹⁸

The use of university facilities has been granted where a church paid a fair rental for an off-campus university owned YWCA building for four Sundays, the decision being influenced by imminent nonuse and destruction of the building.²¹⁹ It was observed that to deny use of the facilities at a fair rental would be discrimination against religion in favor of non-religious private groups.²²⁰

B. The State Colleges

The seventeen state colleges, which form a second system of public higher education in California, are established not by the constitution but by legislative action.²²¹ This system is administered by a board designated as the Trustees of the State College System of California,²²² but with cooperation and advice from the Regents and President of the University of California.²²³ The primary function of the state colleges is the "provision of instruction for undergraduate students and graduate students, through the master's degree in the liberal arts and sciences, in applied fields and in the professions, including the teaching profession."²²⁴ Bachelor's and master's degrees are awarded by the colleges; doctoral degrees may be awarded jointly with the University of California.²²⁵ The colleges are expressly required by statute to be entirely independent of all political and sectarian influence, in words lifted from the constitutional section establishing the university.²²⁶

The trustees of the California state colleges succeeded to the powers formerly exercised in connection with the colleges by the state board of education and the director of education.²²⁷ Presumably, this includes decisions as to which courses to offer. One college already offers a number of religion courses.²²⁸

²¹⁸ Memo from the General Counsel to Chancellor Murphy, U.C.L.A., May 16, 1961.

²¹⁹ Memo from the Associate General Counsel to Berkeley Campus Real Estate Officer, April 21, 1958.

²²⁰ Memo from the Associate General Counsel to the General Counsel, April 18, 1958.

²²¹ The State Colleges are listed in CAL. EDUC. CODE § 23601.

²²² CAL. EDUC. CODE § 22600.

²²³ CAL. EDUC. CODE § 22603.

²²⁴ CAL. EDUC. CODE § 22606.

²²⁵ CAL. EDUC. CODE §§ 22606, 22552.

²²⁶ CAL. EDUC. CODE § 22605:

The California State Colleges shall be entirely independent of all political and sectarian influence and kept free therefrom in the appointment of its trustees and in the administration of its affairs, and no person shall be debarred admission to any department of the state colleges on account of sex.

²²⁷ CAL. EDUC. CODE § 22604.

²²⁸ See curriculum content of San Francisco State College in appendix.

C. The Junior Colleges

The third system of higher state education, comprising the junior colleges, is part of the public school hierarchy, and is thus subject to minimum standard prescriptions of the state board of education.²²⁹ Each local school district containing a junior college administers all schools from primary through secondary and the two year college education.²³⁰

Instruction in vocational, technical, and general or liberal arts subjects is offered through but not beyond the fourteenth grade, and includes college courses for transfer to higher institutions.²³¹

The limitations on religion in the curriculum applicable to the lower grades also govern the junior colleges.²³² Nevertheless, more liberality apparently is shown in actual practice in the junior colleges than in the primary or secondary schools. Courses presently offered include such titles as History of Religion, Introduction to Religious Thought, The Bible as Literature, and World's Great Religions.²³³ This liberal attitude is significant, for it indicates a recognition of the ability of more mature minds, at the college level, to handle problems and ideas of a religious and philosophical nature without being subject to attacks of "sectarianism" in the classrooms. The presence of religion courses in the junior colleges, which under the statutes are more severely restricted than the state colleges and the University of California, indicates also the feasibility of such courses in the higher institutions.

Evidence of the junior college situation is summarized in a booklet prepared after a conference on moral and spiritual values in California junior colleges held at Davis, California, in 1958.²³⁴ The nature and proceedings of that conference demonstrate a serious concern on the part of educational leaders for the spiritual and moral guidance of students. The participants discussed the entire range of religious problems, including off-campus religious organizations, the curriculum, relations with the community, and training teachers for the religion courses. One spokesman analyzed the legal questions and concluded that the courses and religious activities, as they were administered, did not violate either the United States or the California constitutions.²³⁵

²²⁹ CAL. EDUC. CODE § 22650.

²³⁰ CAL. EDUC. CODE § 7801.

²³¹ CAL. EDUC. CODE § 72651.

²³² See discussion in part II, B, following note 83 *supra*.

²³³ Moral and Spiritual Values in California Junior Colleges, Proceedings of the Davis Conference 54 (1958) (held at University of California at Davis, with the co-operation of the Department of Religion in Higher Education of the Pacific School of Religion, and supported by the Edward W. Hazen Foundation).

²³⁴ *Ibid.*

²³⁵ "Constitutions and Classrooms," An Address by Professor Arthur E. Sutherland, Professor of Law, Harvard University, *id.* at 30.

D. Survey of Present Curricula

We have examined the description of all courses with an apparent religious content that are contained in official bulletins of the University of California, fourteen of the seventeen state colleges, and for the sake of comparison, two private universities in the state. The appendix contains the course listings. The limitations of course descriptions are obvious. Whatever the formal description of a course, its significance often is the function primarily of the caliber and purpose of the instructor. A course formally described as one in religion actually could be so gauged as artificially to minimize all theological and religious factors, whereas a course in history whose description did not mention religion could be essentially a penetrating inquiry into the theological conflicts of an era. But the listing seems to have value at least as a starting point.

Perhaps of most significance, so far as the University of California curricular offerings in the religious area are concerned, is the experience on the Santa Barbara campus. In 1956 the regents of the university gave approval to the provost at Santa Barbara for the solicitation of funds from a private foundation, the Religion in Education Foundation, sufficient to pay the salary of a visiting professor to offer courses in the study of religious institutions during the year 1956-1957. For some reason the tentative arrangement with this foundation was not consummated. In March, 1958, an official at Santa Barbara requested an opinion from the university general counsel relative to solicitation of funds from another foundation. The general counsel replied in a memorandum of March 17, 1958, to the effect that the regents' approval expired at the conclusion of the 1956-1957 academic year. He reasoned that the law of church-state relations had not changed substantially since his opinion of November 16, 1955, relative to the proposed memorial chapel, and that since the government could not pass laws aiding one religion or all religions, or prefer one religion over another, it was clear that the state university could not conduct a program of instruction designed to promote the acceptance of any particular religion or even promote religion in the abstract. Nevertheless, in accordance with a 1955 California attorney general opinion²³⁶ the general counsel's memorandum stated that all reference to religion or religious works need not be deleted from university courses. The Bible itself may be discussed in a general way in appropriate classes, and specific passages, because of eloquence or poetic beauty, may be used for special study, although the Bible cannot be used for religious purposes in the schools or colleges. An inquiry into the significance of religious thought and institutions in society would be appropriate under the doctrine of separation of

²³⁶ 25 OPS. CAL. ATT'Y GEN. 316 (1955), discussed in text accompanying notes 90-93 *supra*.

church and state, but the Constitution would be violated if an instructor attempted to persuade his student to accept either his religion, any religion, or religion in general. An individual student, who, after critical analysis and historical review of religion, decides of his own volition to affiliate with a church or religious philosophy, will not thereby cause the university to be in violation of the Constitution. It is thus permissible, the general counsel concluded, to study religion and religious institutions if the purpose of the study is to examine a historical and present factual part of human society.²³⁷

The details of the present Santa Barbara program perhaps are most authoritatively stated in the University of California Bulletin.²³⁸ There is listed under courses of instruction an entity called "Religious Institutions" with a committee of four professors and one assistant professor in charge. The following description appears: "The major in Religious Institutions is designed for students desiring a general education with emphasis upon this aspect of Western civilization and comparative culture. Specific programs will be arranged by consultation with the Committee in charge to meet individual needs and objectives." The requisite preparation for the major and the major requirements are listed together with the titles of five courses on religious subjects. The availability of further offerings under the general title "Group Studies in Religious Institutions" is indicated. Paul Tillich, Ph.D., is named as a Visiting Professor of Religious Institutions.

IV

CONCLUSION

The problem of the place of theology in the university has to be faced. The dialogue of an intellectual community is not complete without the participation of theology. We cannot afford to leave its voice indefinitely muted or to hear it at most only tangentially and indirectly. Ideally, this discipline overtly and forthrightly should resume its historic university role. Is the ideal precluded for the public university by constitutional or other legal criteria?

To offer theological or other courses in religion which are voluntary, conducted on a high level, intellectually objective, given to students at college age in absence of circumstances which would render such courses coercive on the religious beliefs of students or indicate an "official" approval or disapproval of a particular viewpoint, is constitutionally and legally unobjectionable. A recent letter by the General Counsel of the

²³⁷ Memo from the General Counsel to Vice President-Executive Assistant Stanley E. McCaffrey, Santa Barbara, March 17, 1958.

²³⁸ BULLETIN, UNIVERSITY OF CALIFORNIA, SANTA BARBARA GENERAL CATALOGUE 195 (1962).

University of California²³⁹ seems to agree with this conclusion:

In view of the foregoing, therefore, the legal question depends upon what is embraced in the curriculum of a Department of Religion. There is no legal objection to the objective and non-advocatory review of religious thought and opinion in an historical or academic manner. In this connection it is my understanding that various courses in the University involve, in whole or in part, such a review.

With the foregoing in mind, the question as to whether or not it is either necessary or desirable to create a "Department of Religion" in which to group these courses and whether or not a clergyman can, in fact, "objectively" review his own or any other religion require determinations basically of a policy rather than legal nature. I must emphasize again, however, that this statement is predicated on the assumption that religion would not be "taught," i.e., "advocated," either as to one sect over another, or as to religion in general over non-religion.

The policies and controls of the academic senate at the University of California, and other appropriate bodies in California higher education, are legally sufficient to eliminate or minimize any dangers to religious freedom that might be thought to exist in the institution of courses in religion in the curriculum. The important secular needs of the community for a sound and many faceted educational opportunity for its young citizens indicate that theological and other courses of a religious nature, conducted in accordance with the academic standards of higher education, would not violate the principle of nonestablishment of religion or any other valid legal criteria.

It is submitted, therefore, that our attention and energies should be directed to the substantial and truly significant practical problems in the area. Is theology ready to resume its classical role in university life? In our pluralistic society, what are the soundest and fairest ways of effectuating the resumption? Are we mature enough to permit the fires of theological controversies to burn, subordinating their emotive heat to the light they may cast on the permanent problems of man? If there is light, can we today afford to ignore it? Can we attract the genius of such as Buber, D'Arcy, Tillich, Weigel, Dawson, Niebuhr, Barth, Murray, Brown and the like? If we could, would it not find its intellectual counterpart in the other classical segments of a university community which already we proudly possess?

Some of these practical problems are difficult but it would be unduly pessimistic to regard them as insurmountable. Good will and open-mindedness, coupled with the American genius for working out feasible solutions in areas where the extremities of dry logic would keep our pluralistic society in intolerable conflict, are surely as available in our academic as in our political life.

²³⁹ Letter from the General Counsel to Mr. Larry Beyersdorf, Jan. 16, 1962.

APPENDIX

RECENT RELIGION CURRICULA IN STATE HIGHER EDUCATION INSTITUTIONS
AND TWO PRIVATE UNIVERSITIES

An examination of the official bulletins of the campuses of the University of California and fourteen of the seventeen state colleges, plus, for purposes of comparison, two private universities, revealed the following listing of courses with substantial content of religious philosophy, history, and literature pertaining to the Judaeo-Christian religious traditions.

*A. The University of California**1. The University of California, Berkeley (1962-1963)*

Preliminary: Off-campus religious facilities are listed. No course major in religion is offered.

ENGLISH

English Bible as Literature

HISTORY

Medieval Europe

Medieval Institutions

Age of Renaissance

Age of Reformation

NEAR EASTERN LANGUAGES

Languages and Cultures of the Near East

Great Books of Hebrew Literature

Jewish Civilization

PHILOSOPHY

Ethics (moral values—good and right, etc.)

Metaphysics

Philosophy of Religion (nature and validity of religious ideas)

SOCIOLOGY

Sociology of Religion (theory, structure, relation to individual life)

Religious Doctrines and Social Conduct

Sociology of Religion (interplay between theory and research)

2. The University of California, Davis (1961-1962)

HISTORY

Medieval History (Constantine to Renaissance)

The Renaissance and Reformation

PHILOSOPHY

Ethics (intelligent conduct, status, and nature of right and wrong)

Metaphysics (search for being—relation to ontology)

Philosophy of Religion (nature of religion, relations to morality and institutions, existence of God, kinds of religious knowledge, concepts of death, survival, etc., relation of church and state)

3. The University of California, Los Angeles (1962-1963)

Preliminary: Religious facilities generally described. Advisory committee of three members for religion-interested students. No special courses or graduate school of theology, but training can be advised by the committee, with recommendations from the American Association of Theological Seminaries.

ANTHROPOLOGY

Comparative Religion (origin, elements, symbolism, role in society)

ENGLISH

The English Bible as Literature (Old and New Testament)

HISTORY

The Early and Late Middle Ages

Jewish History—Biblical times to present

Seminar in Medieval History

MUSIC

History and Literature of Church Music (worship forms and liturgies)

HEBREW AND SEMITICS

Selected Texts of the Bible

Biblical Aramaic

Ancient Aramaic and Aramaic Literature (including the Bible)

PHILOSOPHY

Problems of Ethics and Religion (human conduct, rules and natural law, religion and moral order)

Ethics (fundamental concepts, theories of morals)

Ethics and Society (ethics in contemporary society)

Metaphysics (theories of God, man, the universe, etc.)

Belief

Philosophy of Religion (nature and existence of God, immortality, obligation and free will, etc.)

Medieval Philosophy

Ethical Theory (right and wrong, God, evil, various theories)

4. *The University of California, Riverside* (1962-1963)

HISTORY

History of Middle Ages

Renaissance and Reformation

PHILOSOPHY

Ethics

Metaphysics

Philosophy of Religion (role of religion in human life, contributions of psychology and anthropology, religion and ethics, art, Christian, Jewish, Hindu, and Buddhist ideas)

5. *The University of California, San Diego* (1962-1963)

Only School of Science and Engineering, Scripps Institute of Oceanography, and other scientific institutes.

6. *The University of California, San Francisco* (1962-1963)

School of medicine: no relevant courses

7. *The University of California, Santa Barbara* (1962-1963)

ENGLISH

The English Bible as Literature

HISTORY

Medieval Europe

PHILOSOPHY

Ethics (human problems, good, evil, deliberation, etc.)

Metaphysics

Philosophy of Religion (existence, nature of God, free will, evil, immortality, rivalry of living religions)

RELIGIOUS INSTITUTIONS

Western Religious Heritage (Judaic, Greek, Christian ideas and institutions)

Contemporary Religious Movements (doctrines, practices of organizations and movements in United States)

Comparative Religion (origins, development, doctrines of major world religions)

Group Studies in Religious Institutions

B. The State Colleges

1. *California State Polytechnic College, San Luis Obispo, San Dimas, and Pomona* (1962-1963)

PHILOSOPHY

Introduction to Philosophy

Ethics (moral systems, human actions, etc.)

2. *Chico State College, Chico* (1962-1963)

Preliminary: Student religious groups affiliated with local churches not listed in detail.

HISTORY

Renaissance and Reformation

PHILOSOPHY

Philosophy of Religion (basic problems, Deity, and morality)

Ethics (ethical theories and current moral problems)

SOCIOLOGY

Religion in American Society (role of religion in culture)

3. *Fresno State College, Fresno* (1962-1963)

Preliminary: Student religious clubs, not detailed.

ENGLISH

The Bible as Literature

PHILOSOPHY

Ethics (right and wrong analysis)

Philosophy of Religion (concepts of God, good and evil, etc.)

Comparative Religions (Oriental, Judaic, Christian)

Living Philosophies in World Literature (books dealing with problems of life generally)

PSYCHOLOGY

Psychology of Religion (psychological foundations of religious experience)

HISTORY

The Renaissance and Reformation

4. *Humboldt State College, Arcata* (1962-1963)

Preliminary: Six religious organizations listed. Liberal arts curriculum offers no major in religion, but suggests that liberal arts and general studies can be a background for the ministry.

ENGLISH

The Bible as Literature (Old and New Testaments)

MUSIC

Sacred Music (liturgies, hymnology, etc.)

HISTORY

The Middle Ages

PHILOSOPHY

Ethics (ethical theories)

SOCIOLOGY

Introduction to Sociology (social values, structure, etc.)

5. *Long Beach State College, Long Beach* (1962-1963)

Preliminary: Religious organizations not listed in detail. Philosophy courses may serve as background for theology.

HISTORY

Renaissance and Reformation

MUSIC

Church Music (historical and analytical)

PHILOSOPHY

Ethics (right and wrong in everyday moral problems)

Advanced Ethics (ethical systems)

Religions of the World (comparative of all eastern and western)

Philosophy of Religion (nature and function of religions)

Metaphysics (basic problems of existence)

6. *Los Angeles State College of Applied Arts and Sciences, Los Angeles* (1962-1963)

Preliminary: Student religious groups not listed in detail.

WORLD LITERATURE

The Bible as Literature (Old and New Testaments)

HISTORY

Renaissance to the Enlightenment (includes the Reformation)

PHILOSOPHY

Ethics (types of theory, nature of moral standards and judgment)

History of Ancient and Medieval Philosophy

Philosophy of Religion

Metaphysics

7. *Orange County State College, Fullerton (1962-1963)*

COMPARATIVE LITERATURE

The Bible as Literature

8. *Sacramento State College, Sacramento*

Preliminary: Student religious groups not listed in detail. Preministry students encouraged to major in Social Sciences or Humanities.

ENGLISH

The English Bible (Old Testament literature)

The English Bible (New Testament literature and culture)

HISTORY

Medieval Civilization (political, social, religious developments)

Renaissance and Reformation

PHILOSOPHY

Ethics (rival attitudes regarding life in western thought)

Philosophy of Religion (concepts, relation to science and philosophy)

SOCIOLOGY

Sociology of Religion (theories of origin and functions of religion in contemporary United States)

9. *San Diego State College, San Diego (1962-1963)*

ENGLISH

The Bible as Literature

HISTORY

Europe in the Middle Ages (fall of Rome to Renaissance)

Renaissance and Reformation

PHILOSOPHY

Ancient and Medieval Philosophy (Greek and Christian philosophies)

Theory of Ethics (value systems)

Social Ethics (problems of contemporary life)

Philosophy of Religion (impartial survey of thought and practice in the major world religions)

Seminar in Ethics (contemporary theorists)

SOCIOLOGY

Sociology of Religion (role in modern and ancient society as cults and institutions)

10. *San Fernando Valley State College, Northridge (1962-1963)*

HISTORY

Renaissance and Reformation

PHILOSOPHY

Ethical Theory (values, moral conduct, etc.)

Philosophy of Religion (meanings of words and concepts)

The Nature of Value (theories of social and individual conduct)

Metaphysics (basic problems and nature of reality)

11. *San Francisco State College, San Francisco (1962-1963)*

Preliminary: Student religious groups not listed in detail. A philosophy program is designed, in part, for the religion major (pretheology or otherwise) or for others interested in religion.

HUMANITIES

American Values (character and value patterns)

PHILOSOPHY

Introduction to Ethics (moral theories)

Ethics (basic morality problems)

Advanced Ethics

Theory of Value (origin, nature of values)

Philosophy of Religion (nature and function of religion and concepts and claims)

Religions of Mankind (study of world religions, mostly oriental)

History of Western Religious Thought (St. Paul to the Reformation, with influences of Jewish and Greek thought)

Indian Philosophy and Religion (compared with western religions)

Far Eastern Philosophy and Religion

Near Eastern Philosophy and Religion (Judaism and Islam compared with West)

Modern Religious Thought (philosophical issues of religion, compared with secular Existentialism, Naturalism, Humanism, Marxism)

Major Religious Thinkers (varies each year)

Metaphysics (nature of God, substance, cause, time, etc.)

WORLD LITERATURE

The Bible as Literature

HISTORY

Renaissance and Reformation

12. *San Jose State College, San Jose* (1962-1963)

Preliminary: Student religious organizations not detailed. A "Religion in Life" week sponsored yearly. Pre-Theology curriculum suggested, consisting of very broad liberal arts studies.

ENGLISH

Introduction to Biblical Literature

PHILOSOPHY

Basic Ethics (moral philosophy, classical theories)

Philosophy of Religion (development in society and mature individuals)

Ethical Theory (crucial problems in values and obligations)

HISTORY

The Medieval World (Diocletian to Dante)

Renaissance and Reformation

13. *State College for Alameda County, Hayward* (1962-1963)

HISTORY

Renaissance and Reformation

SOCIOLOGY

Religion and Social Conduct

14. *Stanislaus State College, presently at Turlock.*

A new college, with no religious offerings yet.

C. *Two Private Universities*

1. *The University of Southern California, Los Angeles* (1962-1963)

Originally a Methodist school, the administration is now nondenominational. The university has a graduate school of theology and a liberal offering of religion courses for undergraduates, so that religion majors may be awarded a bachelor's, master's, or doctor of philosophy degree. The general course offerings are:

HISTORY

The Reformation

MUSIC

Music of the Great Liturgies

Music and Worship

Hymnology

Roman Chant

RELIGION

Scope and Problems of Religion

The Protestant Faith (history, beliefs, practices of major denominations)

The Roman Catholic Faith (doctrines)

The Roman Catholic Faith (Rites and Sacraments)

The Jewish Faith

History of Judaism

Life and Religion of Jesus

Old Testament Literature and Life

New Testament Literature and Life

Religions of the Ancient Near East

Living Religions of the World (oriental and occidental)

Hebrew Bible

Biblical Archeology

Aramaic Studies

Psychology of Concept Formation in Religion and Science

Psychological Aspects of Religion

Religious Philosophies of Western Man

Philosophy of Religion

Council of Trent

Post-Tirrentine Roman Catholic Theology

Patterns in Contemporary Religious Thought

(In addition to the above, there are forty-six seminars involving the finer points of all the above subjects, all of them being graduate courses.)

SOCIOLOGY

Sociology of Religion

PHILOSOPHY

Medieval Philosophy

Current Conflicts in Morals

Seminars in Value Theory, Ethics, and Philosophy of Religion

2. *Stanford University, Stanford* (1962-1963)

HEBREW

Introduction to Language (emphasizing Bible studies)

Advanced Bible Reading

HISTORY

Age of the Reformation

Humanism, Protestantism, Catholicism in Early Modern Europe

Senior Research in Renaissance and Reformation

Graduate Colloquium: The Course of Christian Humanism

Graduate Research—Renaissance and Reformation

HUMANITIES

Comparative Religion

Ancient Cultures of the Near East

Biblical Literature and Religion (Old and New Testaments)

History of Christian Doctrine to 1500 A.D.

History of Christian Doctrine since 1500 A.D.

The Protestant Reformation

Christian Ethics

Christianity and Culture

Religion in America

Christian Classics (such as Kierkegaard's *Fear and Trembling*)

The Prophets of Israel

Myth and Wisdom in Israel

The Four Gospels

Paul and the Early Church

Theology and Contemporary Literature

Theology of History (Tillich, Niebuhr, Maritain, D'Arcy, etc.)

Introduction to Christian Thought

Contemporary Trends in Religious Thought

Seminar in the History of Christian Thought: Romanticism and the Origins of Liberal Protestant Theology

PHILOSOPHY

Introduction to Ethics

Early Christian, Medieval, and Renaissance Philosophy

The Philosophy of St. Thomas Aquinas

Introduction to Ethics

Proseminar in Ethical Theory

Philosophy of Religion

SENIOR COLLOQUIA (2 required of most A.B. candidates)

Ceremony and Symbol in Religion and Society (religious symbolism and accepted forms in society)

Faith and Freedom: The Thought of Rudolf Bultmann