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Articles

“WE DO NOT PREACH. WE TEACH.”†
RELIGION PROFESSORS AND THE FIRST AMENDMENT

*By Leslie Griffin**

Consider some of the classes that a religion professor might propose for the curriculum. A hypothetical Professor One, who is Christian, focuses on Christian texts (primarily passages from the Old Testament and the New Testament) because he wants to spread the Good News. His students also read United States Supreme Court cases about religion and Christian commentary that is critical of those cases for their secular bias. At the end of each semester, the professor says, “we have ranged far and wide here, and this has been a university

† Jacob Neusner, “*Being Jewish*” and *Studying About Judaism*, in JUDAIC STUDIES: AN EXERCISE IN THE HUMANITIES 1, 2 (David R. Blumenthal ed., 1977).

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course, not a sermon, but everything in the course converges on the conclusion that Jesus Christ is our Lord and Savior. That is the message I hope you take away. Good luck on the exam.”¹

A very different Professor Two is fascinated by religious belief and practice and does not believe in God. In his class, students learn some basic historical background about Buddhism, Christianity, Daoism, Hinduism, Judaism, Islam and the classical religions of Black Africa. They compare these religions and explore whether there is “some essence which is common to all religions.”²

Meanwhile Professor Three invites numerous guest speakers into his classroom. The visitors lecture about their religious beliefs. The professor thinks that hearing the speakers will help the students to understand the phenomenon of religion. The speakers often proclaim their faith and personal beliefs in the classroom; the professor likes this aspect of the course because he wants the students to understand the strength of religious convictions. Professor Three presents speakers representative of a range of religious convictions and strives to give numerous religious views equal time (although he can never find representatives of all the traditions taught by Professor Two).

Professor Four offers a course on the history of Christianity (which is a huge topic) so he limits the course by focusing on Christology. Students read passages from the New Testament, Arius and Athanasius, some materials about the Council of Chalcedon, Anselm, Martin Luther and John Calvin. To gain a sense of modern Christological disputes, they also read Bultmann, Käsemann, Moltmann, Pannenberg, Rahner and Schillebeeckx. At the end of the semester, the professor summarizes the course by telling students, “This semester, we have covered a lot of material. I believe that I have demonstrated to you the reasoning by which mainline Christians claim Jesus is the Christ.” One student asks: “Do you think Jesus is the *only* Savior, I mean, the one Savior for all human beings, or just one important religious figure equal to others like the Buddha?” The professor responds, “Within the Christian tradition the predominant view is that Jesus Christ is the one

1. In one case, an exercise physiology professor said in class:

I personally believe God came to earth in the form of Jesus Christ and he has something to tell us about life which is crucial to success and happiness. Now this is simply my personal belief, understand, and I try to model my life after Christ, who was concerned with people, and I feel that is the wisest thing I can do.

Bishop v. Aronov, 926 F.2d 1066, 1068 (11th Cir. 1991). The court ruled that there was no constitutional violation in a policy that restricted such speech by professors.

2. NINIAN SMART, *THE WORLD'S RELIGIONS* 11 (1998).

and only Lord and Savior of all human beings. The equality view that you mention is growing in popularity, but in my opinion the claim that Jesus is *the* Lord is most representative of the history of Christianity.”

These four courses also represent some of the options available to the chairman of a hypothetical religion department. He could hire some combination of Professors One, Two, Three and Four and assign them to these classes. Another chairman’s choice is suggested by Professor Three. Why not transport the professor’s “visitors” to the whole department of religion, i.e., have a religion department composed of individual believers representing different religious traditions? Claude Welch once described such a department as “a museum or a zoo, responsible for exhibiting all species of believers.”³

This zoo is not a new idea.

After World War I, religion was at times taught by church personnel who lived near state universities, not by professors in regular academic departments. At the University of Illinois in 1919, for example, “clergy representing the campus ministries of the Methodists, Disciples, and Roman Catholics” petitioned to have “university credit offered for courses taught at their campus houses.”⁴ “The ‘Illinois Plan’ involve[d] the accreditation of courses in religion taught by approved scholars in the various denominational centers surrounding the state university campus.”⁵ In the same era, the University of Iowa developed a school of religion that “employed teachers of religion paid by the different confessions (Catholic, Jewish, and Protestant)”;⁶ these faculty

3. See Karl D. Hartzell, *Review of the Discussions*, in *THE STUDY OF RELIGION ON THE CAMPUS OF TODAY* 50, 62 (Karl D. Hartzell & Harrison Sasser eds., 1967).

4. GEORGE M. MARSDEN, *THE SOUL OF THE AMERICAN UNIVERSITY: FROM PROTESTANT ESTABLISHMENT TO ESTABLISHED NONBELIEF* 336 (1994).

5. Franklin H. Littell, *Church, State, and University*, in *RELIGION AND THE PUBLIC ORDER* 78, 93 (Donald A. Giannella ed., 1963).

6. *Id.* at 92-93.

In the Iowa Plan, a school of religion is developed *at*, and finally *in*, the state university, with competent teachers of religion paid by the different confessions (Catholic, Jewish, and Protestant). . . . Most important, perhaps, it demonstrates to the republic of learning as a whole the existence of a live dialogue between believing Protestants, Catholics, and Jews. It is this point which has to be made, if we are to move out of the shadow of a declining Protestant culture-religion without falling into the trap of a militant and anti-humane secularism.

Id.; see also F. EARNEST JOHNSON, *RELIGION AND THE SCHOOLS* 75 (Robert Gordis et al. eds., 1959).

It is not a ‘nonsectarian’ approach. Omnisectionarian would be a more accurate term, though the scope is necessarily limited. Definitive information about sectarian beliefs and practices, under such a plan, would come, not from the school but from authoritative spokesmen for their respective faiths whom students would question

were *believing* Protestants, Catholics, and Jews. George Marsden reports that “[t]he original purpose of the [Iowa] school was not simply the academic study of religion. Rather the school was also explicitly to *promote religious interests, to foster sympathy for religion* among students, and to encourage students to go into religious *vocations*.”⁷

These *off-campus* denominational arrangements evolved in the *state* universities because of the conviction that the presence of religion departments in public institutions violates the Establishment Clause of the First Amendment. If fostering religious life is the goal of courses in religion, then public universities must avoid teaching religion for constitutional reasons. Hiring off-campus personnel who do not have regular academic appointments is supposed to solve the constitutional problem.⁸

Constitutional arguments have always influenced the teaching of religion in American public universities. In his 1965 *Study of Religion in American Universities*, Robert Michaelson described the situation in this way:

Religion studies faced special difficulties in the emerging state universities, where often a strong liberal arts or classical humanistic tradition had never existed and where constitutional limitations appeared to restrict what could be done in this area. Theology rarely received formal academic attention in these institutions, and such areas as church history, history of religions, and Biblical studies were commonly neglected or grossly underdeveloped. A few state universities—such as Michigan and California—did develop significant work in areas related to the study of religion such as anthropology and Near Eastern studies, but most of the state schools contributed little to the advancement of scholarship in religion. At the same time efforts were made to provide studies in religion in some state universities through some type of extra-university structure. Denominational groups founded ‘Bible chairs’ or set up some other type of device whereby students could take courses which were accredited either directly by the university or through some kind of transfer procedure.

when they visit churches and synagogues just as they visit the markets, industries, and welfare agencies.

Id.

7. MARSDEN, *supra* note 4, at 336 (emphasis added).

8. See generally MERRIMON CUNINGGIM, *THE COLLEGE SEEKS RELIGION* 83 (1947).

At any rate, it will later be made clear that during this century the religious life of the tax-supported institutions has largely been expressed through the work of voluntary organizations, and much of the interest which administrators have expressed has consisted solely of moral support for the work of these unofficial agencies.

Id.

Such courses were almost always taught by instructors who did not have faculty status in the university and were offered in an off-campus setting. Independent schools of religion were established at some universities in order that students could study this area which was not available to them in the university. Such extra-university structures were often represented as offering a *legitimate solution to problems stemming from the American tradition of separation of church and state*.⁹

9. ROBERT MICHAELSEN, *THE STUDY OF RELIGION IN AMERICAN UNIVERSITIES* 2-3 (1965); see also CUNINGGIM, *supra* note 8, at 79.

In 1947, Cuninggim had acknowledged that the "tax-supported institution" "pose[s] a special problem." *Id.* at 83. Cuninggim knew, as did Michaelsen, that religion had always been taught in American colleges. Nonetheless, "[t]he bogey of the separation of church and state plagued the college officials." *Id.* at 124. Some people argued that "the presence of religion in any form in a state institution is both illegal and inappropriate." Cuninggim described John Dewey and Alvin W. Johnson as advocates of keeping religion out of schools due to separation of church and state; Cuninggim thought that their argument was mistaken. See *id.* at 79. Cuninggim argued for a greater role for religion:

It is often considered that the principle of the separation of church and state prevents their manifesting any strong religious interest and assuming any real responsibility for the religious life of their students. . . . Suffice it to say now that the necessity for their neutrality on the subject of religion is at least debatable.

MICHAELSEN, *supra*, at 129.

[T]here does not exist any nation-wide legal or constitutional principle which prevents such institutions from including religion in their programs if they so desire. Their own state laws or court interpretations may raise difficulties, but these occur in only a small minority of the states, and there is no state in which nothing at all can be done.

Id.

Many writers shared Cuninggim's view that separation of church and state did not preclude religion courses in state universities; this opinion grew more popular as departments of religion expanded in the 1950s and 1960s. See David W. Louisell & John H. Jackson, *Religion, Theology, and Public Higher Education*, 50 CAL. L. REV. 751, 753 n.3 (1962). In 1962, Louisell and Jackson had concluded "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." *Id.* 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. Others continued to argue that the First Amendment did not allow any religion professors in the state universities. See, e.g., CLYDE A. HOLBROOK, *RELIGION, A HUMANISTIC FIELD* 169 (1963). Some writers even thought that giving university credit for the denominational courses violated church-state separation. See, e.g., Erich A. Walter, *Introduction*, in *RELIGION AND THE STATE UNIVERSITY* 1 (Erich A. Walter ed., 1958). Yet others thought that that compromise was

perfectly appropriate to the general nature and circumstances of the state university itself, and typical of it. . . . On the one hand, there is the principle of separation of

A more surprising development in American universities is that the First Amendment's influence has not been restricted to public universities and state university professors of religion. In the United States, the constitutional debates about public universities and religion in the 1950s and 1960s coincided with an extensive academic dispute among private university religion professors about what they should teach. Many of these professors argued, e.g., that Professors One, Three and Four do not meet the academic standards of the profession. These scholars challenged the academic rigor of professors who were committed to religious beliefs and the academic merit of courses that include normative arguments about religious traditions. The terminology was important in the academic conflict: the scholars distinguished the traditional field of theology from the newer religious studies. The committed and normative study of religion was identified as theology. The paradigmatic religious studies professor was an outsider whose scholarship was descriptive and comparative.

In the public schools, committed religious professors and normative religious courses were also viewed with suspicion: they posed the threat of the establishment of religion. The constitutional and academic debates converged. Eventually, the religion professors—both public and private—looked to the Supreme Court to resolve the controversy. The scholars decided that the Court settled the constitutional question in a 1963 school prayer case, *Abington School District v. Schempp*,¹⁰ when the Court stated (in dicta) that “teachers may teach *about* but not *of* religion in the public schools.”¹¹ From *Schempp* the scholars concluded that the First Amendment prohibits the teaching of theology but permits religious studies in state universities. In fact, the Court has never addressed the constitutional status of

church and state. On the other, there is the fact that religion is inseparable from large areas of human thought and feeling and thus from higher learning.

Walton E. Bean, *What Is the State University?*, in RELIGION AND THE STATE UNIVERSITY 58 (Erich A. Walter ed., 1958).

The commentators noticed the difference between universities and elementary schools. See HOLBROOK, *supra*, at 171 (“Apparently publicly supported universities have not been content to divorce religion as an academic subject from higher education with the same decisiveness with which the American people have insisted upon its omission in the public schools at lower levels.”); Louisell & Jackson, *supra*, at 766 (“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*.”).

10. 374 U.S. 203 (1963).

11. *Id.* at 306.

theology or religious studies. In time, religious studies became the preferred academic discipline in both private and public universities as theology declined in influence.

In this essay, I examine the interaction of academic and constitutional arguments about teaching religion. In the last thirty-six years, both lawyers and scholars in religion have been puzzled by the constitutional and the academic dimensions of this subject. I conclude that, although the two groups were discussing the same subject, the conversations did not influence each other in any meaningful way. While the religion professors were misinterpreting the Supreme Court cases, the justices were ignoring the profession's insights about the place of religion in the schools. This disjunction left the scholars with an inadequate professional standard and the Court with a deficient constitutional test.

In Part One, I explain that the academics have chosen a subject matter standard according to which the teaching of religious studies, but not theology, is constitutional in state universities. The Supreme Court's statements on teaching religion are dicta from *Schempp* (recognizing "the propriety . . . of the teaching *about* religion, as distinguished from the teaching *of* religion, in the public schools").¹² Nonetheless American scholars of religion relied on the dicta and linked the identity of their discipline to statements of the Supreme Court.¹³ About/of was never the Court's standard; therefore in Part Two, I identify the actual legal standard of the Supreme Court's First Amendment cases on religion in the schools. The Court has frequently ruled about the place of religion in the schools; in these cases, however,

12. *Id.* (emphasis added).

13. See ROBERT F. DRINAN, RELIGION, THE COURTS, AND PUBLIC POLICY 223-24 (1963).

The spirit and wording of the *Zorach* opinion is an example of the enormous influence which a Supreme Court opinion can exert. In an excellent study entitled *Zorach v. Clauson: The Impact of a Supreme Court Decision*, Professor Frank J. Sorauf writes: "This impact of *Zorach* beyond the bounds of the facts it decided and the rules it enunciated illustrates how Supreme Court precedents, as soon as they leave judicial hands, enter into another realm of policy-making and become symbols in political debate and deliberation." Professor Arthur E. Sutherland, Jr., in an article on the School Prayer case in the November, 1962, issue of the *Harvard Law Review*, comments in the same vein when he notes: "Some of the more startling connotations of the *School Prayer* opinions may come to be explained as springing from *obiter dicta*, unnecessary to the actual decision." But church-state cases have seemed to attribute unusual authority to dicta; even by-the-way judicial remarks about religion in schools are not readily brushed off.

Id.

distinctions about the study of religion do not determine the outcome of the case. Unlike the scholars, the justices have often promoted an *institutional principle* that ignores the content of the courses and focuses on the (religious or public) nature of the schools.

In the 1980s, both the religious studies subject matter standard and the justices' institutional principle came under attack from theologians, theists and jurists. The criticisms of the academy and the Court are described in Part Three. The Court has responded to some of these criticisms. In Part Four, I argue that the constitutional standard has changed. New dicta in *Rosenberger v. Rector & Visitors of University of Virginia*¹⁴ (suggesting that the line between "religious speech" and "speech about religion" is too hard to draw) have replaced the *Schempp* dicta. Moreover, the institutional principle was compromised in 1997 in *Agostini v. Felton*.¹⁵

In contrast to the Court, the religion professors have not yet revisited their constitutional or academic standards. In Part Five, I argue that the religion professors misinterpreted *Schempp*; teaching theology is constitutional. The religion professors should not have equated about/of with religious studies/theology. Today the *Rosenberger* dicta suggest that the line between instruction and evangelism cannot hold. That argument challenges the premises of the academic discipline of religious studies; the scholars have not yet responded.

"When instruction turns to proselyting and imparting knowledge becomes evangelism is, except in the crudest cases, a subtle inquiry."¹⁶ Such subtlety is the daily fare of religious studies; the professional standard requires that religion professors impart knowledge but not proselytize. In my conclusion I urge the religion professors not to repeat their constitutional errors. They should reject the Court's dicta in *Rosenberger*, namely Justice Kennedy's decision to fund evangelism because the line between "religious speech" and "speech about religion" is uncertain. Along with Justice Souter, the professors know that evangelism is a "core religious activity" that is distinguishable from the

14. 515 U.S. 819 (1995).

15. 521 U.S. 203 (1997).

16. *McColum v. Board of Educ.*, 333 U.S. 203, 236 (1948) (Jackson, J., concurring); see also Harry N. Rosenfield, *Separation of Church and State in the Public Schools*, 22 U. PITT. L. REV. 561, 579 (1961) ("While the line of separation is not always easy to draw, imparting secular knowledge is legal while sectarian proselytization is not: the Constitution permits secular instruction in the public schools but not religious evangelism.").

“discourse of the scholar’s study or the seminar room.”¹⁷ Under the professors’ constitutional standard, the funding of evangelism in any location is prohibited by the Establishment Clause.

I. THE RELIGION PROFESSORS’ CONSTITUTIONAL STANDARD: RELIGIOUS STUDIES OR THEOLOGY

In his seminal 1971 study, *Graduate Education in Religion*, Claude Welch stated that the legal status of the academic study of religion in state universities was settled in the 1963 *Schempp* case.¹⁸ Welch is representative of religion scholars, who after *Schempp* identified the difference between teaching *about* religion and teaching *of* religion as the constitutional standard. Teaching about religion in the state university is constitutional; teaching of religion is unconstitutional. When it barred *prayer* from the public *elementary* school classroom, the Supreme Court stated (in dicta of course) that public schools may offer religion as part of their curriculum. The Court mentioned that the Establishment Clause does not prohibit the “study of the Bible or of religion, when presented objectively as part of a *secular program of education*.”¹⁹ The Court noted that “one’s education is not complete without a study of *comparative religion* or the *history of religion* and its relationship to the advancement of civilization.”²⁰ The influential distinction came from Justice Goldberg’s concurrence, which “recognize[d] the propriety . . . of the teaching *about* religion, as distinguished from the teaching *of* religion, in the public schools.”²¹

For scholars in religion, *Schempp* settled what had been until then an open question and established the constitutionality of teaching religious studies, but not theology, in state universities. To these scholars, religious studies is teaching about religion; theology is teaching of religion.

What is religious studies? It is the name often used in the United States for the academic study of religion, a term used to distinguish such study from the more traditional theology. The title is somewhat

17. *Rosenberger*, 515 U.S. at 868.

18. CLAUDE WELCH, *GRADUATE EDUCATION IN RELIGION* vii (1971).

19. *Abington Sch. Dist.*, 374 U.S. at 225 (emphasis added).

20. *Id.*

21. *Id.* at 306.

confusing because “the activity itself is not religious.”²² For centuries in the Christian world, the study of religion was theology; theology was the core of the medieval university, the queen of the sciences. Theology was an intellectual discipline because it included a quest for knowledge; in its classic formulation, it was “*faith seeking understanding*.” Although rooted in faith, theology was properly located, not in the church, but in the university. “It was the university, not the Church, that fostered the new understanding of *theologia* as *scientia*, a scholarly ‘discipline’ that demonstrated its conclusions.”²³ “*Sacra doctrina* is a discipline, sufficiently parallel to physics and metaphysics to be a science.”²⁴ All religions do not have theologies. Due to Christianity’s influence on American and European universities, however, theology has become a generic term for a study of religion that includes some type of commitment, usually to a particular religious tradition.

In Europe in the nineteenth century, however, the scientific study of religion emerged to challenge theology’s reign.²⁵ This science is a

22. The “study of religion(s)” is “a more accurate description than ‘religious studies’ since the activity itself is not religious.” *Study of Religion(s)*, in *A NEW DICTIONARY OF RELIGIONS* 498, 499 (John R. Hinnells ed., 1995).

23. Joseph M. Kitagawa, *The History of Religions (Religionswissenschaft) Then and Now*, in *THE HISTORY OF RELIGIONS* 121, 126 (Joseph M. Kitagawa ed., 1985).

Theology along with law and liberal arts could occupy a legitimate place, in fact, the reigning place, in . . . the university. Thus it would have a method of its own, hence method itself could be thematized and become the occasion of controversy. *Sacra doctrina* is a discipline, sufficiently parallel to physics and metaphysics to be a science. As such it had founding principles and it proceeded to connect the principles with conclusions.

Id. (quoting EDWARD FARLEY, *THEOLOGIA: THE FRAGMENTATION AND UNITY OF THEOLOGICAL EDUCATION* 38 (1983)).

24. EDWARD FARLEY, *THEOLOGIA: THE FRAGMENTATION AND UNITY OF THEOLOGICAL EDUCATION* 38 (1983).

25. See *The Study of Religion*, in *THE HARPER COLLINS DICTIONARY OF RELIGION* 909 (Jonathan Z. Smith ed., 1995) (“The study of religion in a nontheological, academic setting is a modern phenomenon.”).

In a very important sense, however, the study of religion(s), as a distinctive intellectual, academic attitude towards the study of the world’s religions, is a very modern practice which did not exist until after the European, specifically German, Enlightenment. Religion . . . came to be seen as a part of human history and cultural development and an object of study, rather than as the subject of the way life should be ordered.

Joseph M. Kitagawa, *The History of Religions in America*, in *THE HISTORY OF RELIGIONS: ESSAYS IN METHODOLOGY* 1, 17-18 (Mircea Eliade & Joseph M. Kitagawa eds., 1959).

In retrospect it becomes evident that the scientific study of religions was a product of the Enlightenment. In the study of religion the Enlightenment period accepted the deistic notion of reason and rejected the authority of revelation. The

“child of the Enlightenment,”²⁶ particularly the German Enlightenment, which contributed to “the separation of theology from religion.”²⁷ In 1870 Friedrich Max Müller’s lectures at the Royal Institute of London proposed a “science of religion.” Müller might not have been the first to use the term, but his influence on the developing field was profound.²⁸ *Religionswissenschaft* became a technical term for the study of religion, a study different in method and perspective from Christian theology.²⁹

The beginnings of *Religionswissenschaft* were difficult; the “modern discipline developed rather haphazardly out of more traditional ways of studying religion and religions.”³⁰ Many of the scholars committed to the new enterprise of religion had themselves been trained in Christian theology, in denominational and seminary settings.³¹

Enlightenment thinkers also accepted the concept of *religio naturalis* or a universal religiosity underlying all historic religions which was to be perceived by reason without the aid of revelation.

Id.

26. WINNIFRED FALLERS SULLIVAN, *PAYING THE WORDS EXTRA: RELIGIOUS DISCOURSE IN THE SUPREME COURT OF THE UNITED STATES* 24 (1994) (“The academic study of religion in the West, along with the other social sciences is a child of the Enlightenment.”); see also *Study of Religion(s)*, *supra* note 22, at 499; Kitagawa, *supra* note 23, at 128 (“child of the Enlightenment”).

27. Kitagawa, *supra* note 23, at 127.

28. See *id.* Müller’s lectures were later published as the *Introduction to the Science of Religion*. Müller

is one of the most prominent of those figures to whom the history of the study of religion refers when giving an account of its genesis and history. . . . He must be regarded as one of the chief founders—as well as one of the most prominent sustaining patrons—of the new science of the study of religion.

WALTER H. CAPPS, *RELIGIOUS STUDIES: THE MAKING OF A DISCIPLINE* 68 (1995).

Kitagawa says that “Henry Benjamin Constant (1767-1830) is usually credited with having produced the first ‘scientific’ study of religions.” Kitagawa, *supra* note 23, at 128; see also MORRIS JASTROW JR., *THE STUDY OF RELIGION* 43 (1901) (“Foremost among these, by virtue of his works as well as by virtue of his services as a pioneer, stands the late Professor F. Max Müller, of Oxford.”).

29. See MIRCEA ELIADE, *THE QUEST: HISTORY AND MEANING IN RELIGION* 1 (1969) (“Since *Religionswissenschaft* is not easily translatable into English, we are obliged to use ‘history of religions’ in the broadest sense of the term, including not only history properly speaking but also the comparative study of religions and religious morphology and phenomenology.”); *Religionswissenschaft*, in *A NEW DICTIONARY OF RELIGIONS* 416 (John R. Hinnells ed., 1995).

30. *Study of Religion(s)*, *supra* note 22, at 499.

31. See generally *Religionswissenschaft*, *supra* note 29, at 416-17.

The division of labour is difficult to maintain because the study of Christianity in Europe has for a long time been—and still is—the exclusive domain of theologians, and theologians have also been working in the field of *Religionswissenschaft*. In consequence, the methodology used in both disciplines is not questioned as such, so that theology and *Religionswissenschaft* are separated

Accordingly they might be unable to change or challenge their theological presuppositions. Scholars trained in theology outnumbered the new scientists for many years. Joseph Kitagawa has demonstrated that

this early history of religions did not win its independence easily. On the one hand, religiously committed Europeans did not readily accept an alternative method in the study of religion which compared Jewish and Christian traditions with other religions of the world on the same plane. Furthermore, the teaching of *Religionswissenschaft* was often done in the theological faculties of universities, faculties not inclined to trust the new discipline and its rationalistic and/or evolutionary thrust. On the other hand, those who *were* "scientifically oriented" suspected hidden religious or theological agendas behind what claimed to be an objective approach.³²

The new scientists pressed on despite these difficulties. By 1899, Cornelis P. Tiele³³ described Muller's work as "more an apologetics for the young discipline of *Religionswissenschaft* than an introduction to the discipline itself."³⁴ Nonetheless, Tiele argued that the discipline had developed in the years since Muller began his work.³⁵ Scholars had begun to identify the distinctive methods that characterize the study of religion.

A new discipline might require a different institutional setting as well as a new method.³⁶ University of Chicago Professor Jonathan Z.

more by their fields of research than by their respective methodologies, and the theoretical distinction in work seems obsolete to many academics outside the field.

Id.

32. Joseph M. Kitagawa, *Introduction*, in *THE HISTORY OF RELIGIONS: RETROSPECT AND PROSPECT* xii (Joseph M. Kitagawa ed., 1985).

33. See JASTROW JR., *supra* note 28, at 47 ("The most distinguished representative of the subject at the Dutch universities is Professor C. P. Tiele, whose contributions to the elucidation of the religious history of mankind have secured for him the place of honour by the side of Max Müller.").

34. Kitagawa, *supra* note 23, at 121.

35. See *id.*; see also CAPPS, *supra* note 28, at 69.

Müller's remarks indicate that he did not assume that the history of religions was to be classified as a separate field or discipline. History of religions—he called it "science of religion"—had no developed conscious sense of its range, capacities, and ongoing tradition. In fact, a tradition had not as yet been formed. The makeup of the subject-field was still fluid, and its capacities were embryonic and, thus, untested.

Id.

36. See *The Study of Religion*, *supra* note 25, at 915.

One consequence of this approach to the study of religion was that it gave scholars a reason for the creation of departments of religion as independent disciplines in

Smith reports that, in 1877, in Holland, “[f]or the first time in western academic history, there were established two, parallel possibilities for the study of religion: a humanistic mode within the secular academy and a theological course of study within the denominational seminary.”³⁷ Until then, the seminary had been the proper center for the study of religion (i.e., Christianity). With the institutional move from seminary to university came changes in the study of religion; the demands of the “secular academy” were different from those of the “denominational seminary.”

Professor Smith explains that the United States did not immediately pursue the pathway taken by Holland in the 1870s. Instead it followed a “sequential pattern”;³⁸ divinity degrees were usually prerequisites to doctoral degrees in religious studies. According to Professor Smith, however, it was not until *Schempp* that American public universities followed the “parallel” pattern of Holland and other European countries and that religious studies flourished.

The preeminence of religious studies in American universities was new in the 1960s, but the study of religion was not new, even in state

colleges and universities. If religion needs its own methodology, it can join other academic disciplines that have specific methods for inquiring into subjects not reducible to other departments.

Id.

37. JONATHAN Z. SMITH, *IMAGINING RELIGION: FROM BABYLON TO JONESTOWN* 103 (1982); *see also* JASTROW JR., *supra* note 28, at 47.

To Holland belongs the distinction of having been the first country to make adequate provision for the study of the subject in her higher schools. A decree was passed in 1876, by which the theological faculties of the four Dutch universities—Leiden, Amsterdam, Utrecht, and Groningen—were changed from mere training schools for ministers of a certain denomination into purely scientific bodies of the same order as the philosophical, law, and medical faculties. All the subjects represented—Old and New Testament, Church History, Dogmatics—were henceforth to be taught as purely historical disciplines and from a purely scientific point of view, the specific training for the service of the Church being left to supplemental courses provided for by each denomination, or relegated to non-official separate seminaries. At the same time the important step was taken of adding to each of the four faculties a chair for the general and comparative History of Religions.

Id.

38. SMITH, *supra* note 37, at 103; *see also* James M. Gustafson, *The Study of Religion in Colleges and Universities: A Practical Commentary*, in *THE STUDY OF RELIGION IN COLLEGES AND UNIVERSITIES* 330, 338 (Paul Ramsey & John F. Wilson eds., 1970). Princeton University Department of Religion took the lead in “conceiv[ing] of graduate studies in religion in such a way that the necessity for (or expectation of) an intermediate professional degree could be eliminated.” *Id.*

schools.³⁹ As Merrimon Cuninggim reported in his 1947 book *The College Seeks Religion*: "Religion has always been present in the colleges of America. . . . Prior to the [twentieth] century the intimacy of this relationship was inevitably subject to ebb as well as flow."⁴⁰ After all, early American universities were founded and staffed by Protestant clergy; one of their functions was to train ministers by teaching them theology.⁴¹ The earliest state universities shared many similarities with the Christian universities, e.g., in trying to produce "Christian gentlemen."⁴² Such religious and moral purposes in education help to explain why theology was often characterized as an integrating subject. If education's goal is the formation of Christian gentlemen, then theology may be the core study that integrates all learning, that links education to morality.

Throughout the nineteenth and into the twentieth century (indeed to the present day), the integrative possibility of religious/theological education is a recurring theme in American education. Professor Michaelsen explains, however, that in the second half of the nineteenth century the "curriculum of Christian humanism went into decline" when American university presidents adopted the German model of specialization. As the German model grew in influence, "theology, which had been considered important enough to be of interest to all students in the early American colleges, became a minor enterprise of little or no importance in the majority of developing American universities."⁴³ The churches developed their own universities; theology moved to the seminaries and denominational schools. Although German universities had faculties of theology, "most American universities developed in an intellectual atmosphere which was quite hostile to theology."⁴⁴ As agricultural schools and other state universities, including the land grant colleges, developed, they followed

39. MICHAELSEN, *supra* note 9, at 156 ("Obviously religion is being studied in American universities, including state universities.").

40. CUNINGGIM, *supra* note 8, at 1.

41. See Littell, *supra* note 5, at 81 ("Theological education" was a "moving force in the foundations" of these universities.).

42. See *id.* ("Even during the nineteenth century, when the churches were perforce shifting to a basis of voluntary membership and support, the earlier tradition that we were a Christian people carried over at law and was expressed in the public liturgy and in the public schools and state universities.").

43. MICHAELSEN, *supra* note 9, at 1.

44. *Id.*

many of the patterns set by the private schools. "There was one sharp difference: they had no theological faculties."⁴⁵

As theology declined in influence in the late nineteenth century, some short-lived attempts were made in the late nineteenth and early twentieth centuries to establish the *scientific* study of religion in American universities. Professor Michaelsen describes the years between 1890 and 1910 as "the 'golden age' of American scholarship in religion."⁴⁶ Important history of religion chairs were established at Harvard and at Boston University in the nineteenth century. At the University of Pennsylvania, Morris Jastrow, influenced by his training in Europe, led the scientific movement with *The Study of Religion*.⁴⁷

Jastrow advocated the scientific study of religion and worked to establish it as a rigorous discipline at Penn. He warned that students would expect their religion courses to provide meaning to their lives, perhaps to fulfill an integrative function in their education. Questions about religion's integrative role (as the field that provides, e.g., the moral center or focus for all education) have been present in curricular debates since the founding of American universities; they continue to confound us in the 1990s.⁴⁸ Jastrow urged scholars of religion to pursue their study as a science:

45. Littell, *supra* note 5, at 82.

46. MICHAELSEN, *supra* note 9, at 2; *see also* Kitagawa, *supra* note 32, at xii.

In comparison with Europe, nineteenth-century North America was more hospitable to the historical study of religions ("history of religions" in a primarily historical sense) and the comparative study of religions, but not to the more fully developed discipline of the history of religions (*Religionswissenschaft*), which was yet to be introduced. Humanistically oriented historical study was exemplified by the establishment of the prestigious "American Lectures on the History of Religions" in 1891, while comparative study, which was more religiously motivated, was dramatically symbolized by the World's Parliament of Religions held in Chicago in 1893.

Kitagawa, *supra* note 25, at 2.

In the latter half of the nineteenth century, however, interest in religions of the world became rather widespread in America. Philosophers, theologians, philologists, historians, and ethnologists began to be fascinated by the so-called comparative approach. In the year 1867, James Freeman Clarke was called to the chair of natural religion and Christian doctrine in the Harvard Divinity School. . . . In 1873 Boston University invited William Fairfield Warren, author of *The Quest of Perfect Religion*, to become its first professor of comparative theology and of the history and philosophy of religion.

Id.

47. *See* JASTROW JR., *supra* note 28.

48. *See, e.g.,* MARSDEN, *supra* note 4, at 336.

There is a special reason for *emphasizing the importance of method* in the study of the various religious systems of the past and present, and of religious phenomena in general. In the study of religion, a factor that may be designated as the personal equation enters into play. So strong is this factor that it is perhaps impossible to eliminate it altogether, but it is possible, and indeed essential, to keep it in check and under safe control; and this can be done only by the determination of a proper method and by a close adherence to such a method.⁴⁹

Scholars of religion have spent the last century trying to identify and clarify this method. In the scientific study of religion, the subject matter is obviously religion. However, there are numerous disciplines that examine religion: history, sociology, anthropology, psychology, philosophy, linguistics, philology (as well as traditional theology). All are fields that are valuable to the study of religion. Once theologians are no longer the scholars best equipped to study religion, these practitioners of other disciplines are well qualified to offer "scientific" analyses of religion. Anthropologists, after all, study the anthropology of religion; sociologists focus on the sociology of religion. What insight can religion scholars offer to trained anthropologists, sociologists or philosophers? Scholars of religion have desired to build a science with its own method around the study of religion, but the nature of the science is not obvious. Is the study of religion a distinct subject that needs a separate department, a separate method?⁵⁰ With the

49. JASTROW JR., *supra* note 28, at 1 (emphasis added).

50. See, e.g., David W. Atkinson, *Religious Studies: In Search of a Paradigm*, 11 REL. STUD. & THEO. 10, 10 (1992); Elizabeth Isichei, *Some Ambiguities in the Academic Study of Religion*, 23 RELIGION 379, 379 (1993) ("Few questions are more in need of reflection and discussion than this: is Religious Studies a discipline with a distinctive methodology and intellectual heritage, or is it multidisciplinary, like American Studies, or Women's Studies? It seems to me self evident that it is the latter . . .").

A peculiarity of Religious Studies departments is how faculty in such departments often do not graduate from programs by that name. One commonly finds philosophers, anthropologists, theologians, sociologists, and the like attaching themselves to Departments of Religious Studies, as if they can pull on a new set of clothes over those they are already wearing. Under such circumstances, an ongoing challenge for Religious Studies is the difficult matter of self definition, and how Religious Studies is to be distinguished from other disciplines that focus on religion. A number of commentators have suggested that the continuation of Religious Studies as an academic discipline requires "more than a polite acknowledgement of its 'polymethodic' nature."

Atkinson, *supra*, at 10.

One of the problems in discussing the study of religions, especially as it applies to academic study, is that it involves a number of different disciplines or methods.

“abandonment” of theology, why not offer the history of religion, the sociology of religion, the philosophy of religion, the anthropology of religion, in courses taught by professors trained in those disciplines? Perhaps a religion department should include scholars trained in disciplines other than religion instead of a group of scientific students of religion in a distinctive discipline with its own method. (Neither of these options, of course, permits the visitors of Professor Three.)

By the end of World War I, Jastrow's model of scientific American departments of religion had faded as theology returned.

After World War I, a self-conscious and largely successful effort was made to bend efforts on behalf of religion in American academia toward providing a *theological* ideology of higher education. Graduate training in religion largely passed from departments (like Jastrow's), teaching the philologies and histories of the several religions impartially, to the theological seminaries, both Christian and Jewish, where existential and neo-orthodox *theology* dominated the scene.⁵¹

Remember that it was in the post-World War I era that the denominational and Bible chairs system flourished. The integrative function of religious education was prominent. The public universities faced a special problem: if fostering religious life is the goal of courses in religion, then public universities might have to avoid religion for constitutional reasons. The Iowa, Illinois and comparable plans existed because state departments of religion were presumed unconstitutional.

The 1930s were a low point in American religious studies; the era favored theology and not religion.⁵² “Th[e] tendency favorable to the

The overall study has been described as polymethodic. There is some question as to whether the study of religion(s) can be referred to as a discipline at all.

Murray G. Murphey, *On the Scientific Study of Religion in the United States 1870-1980*, in RELIGION AND TWENTIETH-CENTURY AMERICAN INTELLECTUAL LIFE 136 (Michael J. Lacey ed., 1989); see also *Study of Religion(s)*, *supra* note 22, at 500; Michel Meslin, *From the History of Religions to Religious Anthropology: A Necessary Reappraisal*, in THE HISTORY OF RELIGIONS 31 (Joseph M. Kitagawa ed., 1985); Ninian Smart, *Religious Studies and Theology*, 26 BULLETIN/CSSR 66, 67 (Sept. 1997) (“Religious Studies is multidisciplinary, or as I prefer to say ‘polymethodic’ (in the early days of the Lancaster Department, Britain’s first Department of Religious Studies, we used to say that we polymethoddoodled all the day).”).

51. See William A. Clebsch & Charles H. Long, *Introduction*, in THE STUDY OF RELIGION 1, 13 (William A. Clebsch & Charles H. Long eds., 1981) (emphasis added).

52. See Kitagawa, *supra* note 32, at xii.

The popularity of historical and comparative studies of religions was enhanced by liberalism during the first quarter of the century, but it eroded quickly in the 1930s.

Historical, comparative, and humanistic studies of religions in North America

history of religions and comparative religion has been reversed since the middle of the 1930's, partly under the influence of the theological renaissance and partly because of the change which has taken place in cultural and educational domains."⁵³ There were also practical reasons for the decline in religion study. For example, the scholars were not yet equipped to advance the scientific study of religion; there were not enough graduate students trained in the history of religions available to teach at either private or public universities.⁵⁴

After World War II, however, the "scientific-scholarly approach staged a gradual, by no means yet universal, comeback."⁵⁵ Such growing interest in the study of religion did not settle the theology vs. scientific study debate. Cuninggim, for example, warned in 1947 of "the low intellectual level characteristic of much of the religious instruction now being offered, and the consequent lack of respect in which religion as a subject of study is often held by the rest of the college."⁵⁶ "Courses in religion, as any experienced observer knows, are often 'snaps' or 'crips'";⁵⁷ this must change. Nonetheless Cuninggim argued that the goal of the courses was not only intellectual; the study of religion should integrate the curriculum and should nurture students' religious lives. He noted with approval that "the secularization of higher education seems to have reached its peak around the time of the first World War, and that since then the colleges have recaptured much of their lost concern for the religious development of their students and have increasingly assumed responsibility for such nurture."⁵⁸

barely survived. Where they survived, they did so mainly in private graduate universities and particularly in the divinity schools of such universities.

Id.

53. *See id.*

54. *See id.*

55. Clebsch & Long, *supra* note 51, at 13; *see also* MARSDEN, *supra* note 4, at 336-37.

Despite some such successes, the school of religion idea began to recede during the 1930s. . . . [T]he very success of the campaign to promote the academic study of religion was making sponsorship by outside religious groups superfluous. Increasing numbers of colleges and universities were now offering courses in religion and establishing their own departments of religion. When university administrators were responsive, as they often were, to demands for offerings in religion, it was in their interest to offer such courses within the university as scientific or literary studies, rather than have them administered by denominations whose primary purpose was to promote a religious cause.

Id.

56. CUNINGGIM, *supra* note 8, at 148-49.

57. *Id.* at 149.

58. *Id.* at 1.

As American higher education expanded after World War II, the study of religion prospered with it.⁵⁹ In the 1940s, there were numerous American departments of religion; “[o]nly 27 percent of nationally accredited colleges had no formal offerings on religious topics.”⁶⁰ “By 1950 some 60 percent of state universities and land grant colleges were offering courses in religion, and during the next decades the field continued to grow.”⁶¹ Departments of religion burgeoned in importance and quality in many schools in the 1940s and 1950s.⁶² In 1965, Robert Michaelsen reported that “it appears that American universities have been giving more serious attention to the study of religion in the past two decades than they had since early in the century. *And in the case of state universities the recent interest in this area is unparalleled in American history.*”⁶³ Yet the schools continued to vary in type and quality of course offerings.

The particular arrangements vary widely from institution to institution. In some institutions the courses are listed in the regular catalogue and taught in University classrooms; and in others they are listed in separate bulletins and taught in private facilities. In some instances, credit is granted in the regular manner and in others credit is treated on a transfer basis. In some cases the program serves in effect as a Department of Religion.⁶⁴

59. See *id.* at 86 (“Since about 1930 there has occurred a tremendous increase of interest in religion on the part of tax-supported colleges and universities.”).

60. MARSDEN, *supra* note 4, at 337.

61. *Id.* at 414.

62. See MICHAELSEN, *supra* note 9, at 3; John F. Wilson, *Introduction: The Background and Present Context of the Study of Religion in Colleges and Universities*, in *THE STUDY OF RELIGION IN COLLEGES AND UNIVERSITIES* 3, 6-7 (Paul Ramsey & John F. Wilson eds., 1970) (explaining that growth in religion started after the Second World War and was not brought on only by *Schempp*). See generally MILTON D. MCLEAN & HARRY H. KIMBER, *TEACHING OF RELIGION IN STATE UNIVERSITIES: DESCRIPTIONS OF PROGRAMS IN TWENTY-FIVE INSTITUTIONS* 3 (1960).

63. MICHAELSEN, *supra* note 9, at 3 (emphasis added). But see HOLBROOK, *supra* note 9, at 62-63.

Whereas sectarianism and secularism seemed to have effectively closed the doors to any substantial advance in making religion a part of a liberal education in the early part of the twentieth century, the much heralded impact of the “moral and spiritual crisis” had its effect on higher education. . . . [T]he crisis alerted some educators to the unacceptability of an education which failed to deal trenchantly and convincingly with the foundations of human values. . . . What the churches had not done, the introduction of religion into the curriculum could not be expected to accomplish.

Id.

64. MCLEAN & KIMBER, *supra* note 62, at 62; see also CUNINGGIM, *supra* note 8, at 79 (The universities show a variety of approaches to the study of religion: department;

The status of religion in public universities, moreover, remained uneven and uncertain.⁶⁵ Part of the problem was the ongoing questioning of the constitutional status of teaching religion;⁶⁶ before 1963 “[n]o case involving religion in a state university ha[d] ever come before the U.S. Supreme Court for consideration and decision.”⁶⁷ Some writers argued that public universities could offer religion courses as long as “such study be academic or educational in nature rather than devotional or indoctrinational.”⁶⁸ Others thought the state university should stay clear of religion because “the presence of religion in any form in a state institution is both illegal and inappropriate.”⁶⁹ Professor Cuninggim argued that schools should strengthen their courses in religious instruction instead of ignoring them because of worries about church/state separation.⁷⁰ Paul Kauper wrote that the teaching of religion in state universities was constitutional as long as it met certain conditions:

There should be, e.g., no discrimination against students on religious grounds; no religious conditions on employment or student status; no compulsory religious services or courses; and equality of opportunity (i.e., all religions should be taught) [T]he distinction should be observed between the teaching of religion to promote knowledge and understanding and that type

interdepartmental program; comparative religion plus independent school; campus clergy as staff; denominational Bible chairs.); Bean, *supra* note 9, at 59. Bean had noticed that public and private universities could not be easily divided into categories by their teaching of religion.

It is widely supposed that different conditions governing the treatment and status of religion are among the essential distinctions between public and private higher education in America. It is true, in general, that private universities have schools or departments of religion and public ones do not, but there are major exceptions even to this generalization [namely Iowa City School of Religion and Religious Education at Iowa State College at Ames.].

Id.

65. See MICHAELSEN, *supra* note 9, at 5.

66. CUNINGGIM, *supra* note 8, at 83 (“The bogey of the separation of church and state plagued the college officials.”).

67. See Paul G. Kauper, *Law and Public Opinion, in RELIGION AND THE STATE UNIVERSITY* 69, 77 (Erich A. Walter ed., 1958).

68. MICHAELSEN, *supra* note 9, at 5.

69. See HOLBROOK, *supra* note 9, at 169 (The First Amendment does not allow any religion professors in the state universities.); CUNINGGIM, *supra* note 8, at 124 (citing disapprovingly John Dewey and Alvin W. Johnson).

70. CUNINGGIM, *supra* note 8, at 79 (“It is often considered that the principle of the separation of church and state prevents their manifesting any strong religious interest and assuming any real responsibility for the *religious life* of their students. . . . Suffice it to say now that the necessity for their neutrality on the subject of religion is at least debatable.”) (emphasis added).

aimed deliberately at indoctrination and *commitment to religious faith*. The teaching of religious ideas in an objective and fair way is appropriately a state university function. To win converts and seek commitment is outside its function and violates the separation principle.⁷¹

As we have seen, it was not until the 1960s that American universities followed the “parallel” pattern of Holland and other European countries.

It was not until the rise of programs in state universities, a development which followed the 1963 U.S. Supreme Court decision on the *School District of Abington v. Schempp*, in which Mr. Justice Goldberg observed, “it seems clear to me . . . that the Court would recognize the propriety of the teaching *about* religion as distinguished from the teaching *of* religion in the public schools,” that the parallel course of religious studies in the academy, instituted a century ago in Holland, became possible in this country.⁷²

Conrad Cherry concludes in his study of American divinity schools that “[b]eginning in the late 1960s, the growth of religious studies programs in state universities would force a clear separation between

71. Kauper, *supra* note 67, at 92; *see also* MCLEAN & KIMBER, *supra* note 62, at 116.

This Study has shown that both the legal and the practical obstacles to teaching programs in the field of religion in state colleges and universities may be overcome. This is not to say that we have reached the point in the United States where religion may be taught in public universities with integrity, nor that it is as yet a subject which is accorded a position comparable to other major academic disciplines. This goal has yet to be attained. But there are substantial signs that it is not beyond attainment. It is of course possible that a cultural crisis may arise, such as that faced in Russian or in Germany, which will make it impossible for men of integrity to teach religion in public or quasi-public institutions. In such a crisis, “the wall of separation” between church and state can be a boon to the church and to liberal education. At present, however, a *rapprochement* between faith and learning, between religious and secular scholarship in the western world, particularly in the United States, appears to be a likely possibility. Such a *rapprochement* will strengthen the type of programs described in this Study.

Id.; *see also* Louisell & Jackson, *supra* note 9, at 753 (concluding “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”). “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.” *Id.*

72. SMITH, *supra* note 37, at 103-04.

teaching about religion and the ministry.”⁷³ Parallel, not sequential. Scholars in religion decided that “religious studies” was teaching *about* religion and theology was teaching *of* religion. From that point on, religious studies would thrive in the “secular academy” as theology remained in the seminaries. Professor Smith has called *Schempp* the “‘Magna Carta’ for religious studies within state universities.”⁷⁴ Religious studies flourished as well in private universities; its flowering often attributed to *Schempp*.⁷⁵ With the growth of religious studies and

73. CONRAD CHERRY, HURRYING TOWARD ZION: UNIVERSITIES, DIVINITY SCHOOLS, AND AMERICAN PROTESTANTISM 46 (1995).

74. Jonathan Z. Smith, ‘Religion’ and ‘Religious Studies’: No Difference at All, 71 SOUNDINGS 231, 232 (1988).

75. See CHERRY, *supra* note 73, at 90 (“Aided by the Supreme Court decision in 1963 that teaching *about* religion, as distinct from instruction *in* religion, is an acceptable undertaking in public institutions, the study of religion had won its way into increasing numbers of colleges and universities as a nonconfessional examination of religious phenomena.”); WELCH, *supra* note 18, at 17 (“Expansion has been particularly noteworthy in the public sector since the United States Supreme Court decision in the *Schempp* case (1963), which in effect legitimated the formal study of religion for all United States public education.”); Robert S. Michaelsen, *Reflections on the Tie That Binds*, 71 SOUNDINGS 350 (1988); Smart, *supra* note 50, at 68 (“Would Religious Studies have taken off if it had not been for the benign influence of the U.S. constitution?”).

The study of religion should be distinguished from the practice of it. In the context of the state university that assumption was understood institutionally in terms of the separation of church from state and theoretically in terms of the distinction between theology and the academic study of religion. A conscious effort was made to develop or take a descriptive, analytical, non-normative, and even (following the Supreme Court in *Schempp*) an “objective” approach to the subject. However, as we are reminded more than once on these pages, the shapers of this developing discipline or enterprise were almost all trained in theology and ordained as clergymen. How to move from the theological seminary to the secular university, from the church to the state, from theology to the academic study of the subject, from the teaching of religion to the teaching about religion?

Michaelsen, *supra*, at 350; see also Judith A. Berling, *Is Conversation About Religion Possible? (And What Can Religionists Do to Promote It?)*, 61 J. AM. ACAD. RELIGION 1, 2 (1993); Sam Gill, *The Academic Study of Religion*, 62 J. AM. ACAD. RELIGION 965 (1994) (“The emergence of an academic study of religion has been disappointing despite the boost it received thirty years ago when religion entered the curricula of state-supported American colleges and universities.”).

Theology, once the queen of the sciences and the center of the university, is now pushed to the corners of the academy or to free-standing seminaries and all but banished from public discourse. Religious Studies, the stepchild of a Supreme Court decision in the 1960s, is a newcomer to the university, whose presence is still questioned or threatened in a number of institutions.

Berling, *supra*, at 2; see also Dorothy C. Bass, *Revolutions, Quiet and Otherwise: Protestants and Higher Education During the 1960s*, in CARING FOR THE COMMONWEAL:

ebb in theology came a decline in the perception of religion's important integrative role in the curriculum, in public as well as private schools.⁷⁶

After *Schempp*, religious studies became the popular nomenclature for American non-theological study of religion. There are other labels; one indication of the "conceptual confusion" surrounding the academic study of religion is the variety of names used to identify it. *Religionswissenschaft* and *la science des religions* were the early terms.⁷⁷

[T]here was no unanimity in the nineteenth century about the nomenclature for the scholarly study of religion(s). *A completely satisfactory name has yet to be found.* The designation "Hierology," or a "treatise on sacred (*hieros*) things," was favored by some of the discipline's pioneers. Others preferred "Pistology," or the study of "faith" or "belief" systems. Other designations

EDUCATION FOR RELIGIOUS AND PUBLIC LIFE 207, 222 (Parker J. Palmer et al. eds., 1990).

If this analysis is correct, growth in the academic study of religion was partly the result, by a curious twist, of the expansion of secular ways of thinking in the American academy. Even more clear is its link to another important event in the secularization of American education. Concern about the entanglement of church and state, which had long deterred many state universities from offering religious studies curricula, was quieted by [*Schempp*]

Id.; see also Kathryn O. Alexander, *Religious Studies in American Higher Education Since Schempp: A Bibliographical Essay*, 71 SOUNDINGS 389-90 (1988). This bibliography begins in

1963, the year when the Supreme Court decision of *Abington Township School District v. Schempp* altered the total picture of the study of religion in America by introducing the language which has governed its subsequent development in secular, public colleges, and universities. . . . Separate departments and programs devoted to the academic study of religions in public state colleges and universities were organized as a result of this decision, and the courses and techniques they subsequently developed presently serve as models for teaching about religions in other tax supported schools.

Id.; see also MARSDEN, *supra* note 4, at 414 (1994) ("Such sentiment cleared the way for accelerating the expansion of the study of religion in higher education during the next decade.").

76. See Claude Welch, *The Function of the Study of Religion*, in *THE STUDY OF RELIGION ON THE CAMPUS OF TODAY* 9, 9-11 (Karl D. Hartzell & Harrison Sasscer eds., 1967) (As religious studies grew, support for the integrative role of religion in the curriculum declined.).

77. See Kitagawa, *supra* note 25, at 17 ("The expression *Religionswissenschaft* was first used in 1867 by Max Müller."). But see Kitagawa, *supra* note 23, at 131 (Müller was not first to use these terms, because *la science des religions* and *Religionswissenschaft* had been used earlier.); ELIADE, *supra* note 29, at 1 ("Since *Religionswissenschaft* is not easily translatable into English, we are obliged to use 'history of religions' in the broadest sense of the term, including not only history properly speaking but also the comparative study of religions and religious morphology and phenomenology.").

proposed and used in some quarters were "Comparative Religion," "Science of Comparative Religion," "The Comparative History of Religion," "The Comparative History of Religions," "The Comparative Science of Religion," "Comparative Theology," and "Science of Religion." . . . "History of Religions" has been adopted officially by the International Association for the History of Religions (IAHR) as the English counterpart to *Allgemeine Religionswissenschaft*.⁷⁸

The "history of religions" and "comparative religions" schools have been successful in having their names recognized; even the Supreme Court has advocated "comparative religion" and "history of religion" for the curriculum of public schools.⁷⁹ In this essay, I follow Conrad Cherry's lead:

Departments and programs in the liberal arts would continue to use diverse designations such as "religion," "history and literature of religion," and "religion studies," as well as "religious studies." After the mid-1960s, however, most of the literature devoted to the nature of the study of religion in universities used the designation "religious studies," and I [Cherry] use the term to denote a field that took on a quite different appearance from the postwar study of religion that was shaped within the mold of theological studies in the divinity schools.⁸⁰

Schempp receives much credit for the surge in academic religious studies. Since its origins in Europe in the nineteenth century, the scientific study of religion had distinguished itself from theology. Now

78. Kitagawa, *supra* note 23, at 129 (emphasis added).

79. See *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 225 (1963); see also FALLERS SULLIVAN, *supra* note 26, at 24 ("Although the academic study of religion takes place across humanistic and social scientific disciplines as diverse and, at times, as mutually antagonistic as anthropology, sociology, psychology, history, literature, philosophy, linguistics, and theology, it finds a *particularly intense expression in the field of history of religions*.") (emphasis added). But see ELIADE, *supra* note 29, at 54 n.1.

Let us recognize it frankly. History of religions, or comparative religion, plays a rather modest role in modern culture. . . . These terms are distressingly vague, but as they belong to current language we are resigned to employing them. One generally understands "history of religions" or "comparative religion" to mean the integral study of the religious realities, that is to say, the historical manifestations of a particular type of "religion" (tribal, ethnic, *supranational*) as well as the specific structures of the religious life (divine forms, conceptions of the soul, myths, rituals, etc.; institutions, etc.; typology of religious experiences, etc.). These preliminary precisions are not at all intended to circumscribe the field or to define the methods of the history of religions.

Id.

80. CHERRY, *supra* note 73, at 114 n.*.

the Americans were ready to make their contribution; in the United States in the 1960s and 1970s the study of religion "t[ook] off," came into "full flower."⁸¹ Foreign scholars at times attribute the distinctive growth of religious studies in the United States to our separation of church and state. In the law, however, *Schempp* had not settled anything about university teaching of religion; it was a prayer and Bible reading case set in the elementary schools. Dicta. Moreover, even at the elementary school level one must ask what constitutional standard is provided by "about" and "of" religion? Nonetheless, armed with *Schempp*, American scholars promoted the study of religion (but not theology) in public and private universities. They founded the American Academy of Religion in 1964; from that point on the academic discipline of religion became more professionalized in the United States.⁸²

Private as well as public universities changed their focus after *Schempp*. John Wilson explained that public universities and private secular and private religious schools converged on religious studies until "basically similar approaches to the study of religion [existed] in all three types of setting."⁸³ A "quiet revolution" had occurred.⁸⁴ At a 1968

81. *Study of Religion(s)*, *supra* note 22, at 499; Jacob Neusner, *Judaism within the Disciplines of Religious Studies: Perspectives on Graduate Education*, in NEW HUMANITIES AND ACADEMIC DISCIPLINES 46, 50 (Jacob Neusner ed., 1984) (Commentators observe that in the twentieth century, the distinction between religious studies and theology developed primarily in the English-speaking world, and was especially important in North America.).

82. But see MARSDEN, *supra* note 4, at 337 ("The result was a hybrid field that typically had Christian form and implicitly Christian direction, but in which specific Christian purposes were subdued.").

83. Wilson, *supra* note 62, at 9-10; see also CHERRY, *supra* note 73, at 88-89; WELCH, *supra* note 18, at 15 (noting the "convergence").

The Welch Report revealed more than rapid growth in the study of religion; it also exposed some signs of the changing nature of the study. Increasing numbers of the students receiving their doctorates from Protestant university divinity schools were finding employment as undergraduate teachers of religion in colleges and universities. And graduate training was no longer conforming to the pre-World War II pattern of "preparation of the teaching ministry." In 1970, nineteen universities in North America were offering doctorates in religion without any reliance on theological school faculties, numerous students of religion were receiving their graduate education in university departments such as Semitic languages and literature and Asian studies, and fully one-half of the Ph.D. programs at theological schools were under the administrative control of university graduate school of the arts and sciences.

CHERRY, *supra* note 73, at 88-89; see also *Religious Studies in Higher Education*, in A NEW DICTIONARY OF RELIGIONS 420 (John R. Hinnells ed., 1995).

Princeton conference, Wilson predicted that this "growing convergence" of departments would lead to "the decline in influence and significance of the theological traditions and a marked reduction of their roles in shaping the study of religion."⁸⁵ Although private schools might be expected to lament the passing of theology, its decline appeared appropriate in the state university, where most scholars assumed that the presence of theology is an unconstitutional teaching of religion.

Why did the professors conclude that theology is unconstitutional? The literature on theology and religious studies is so vast that any answer risks oversimplification. It is difficult to see how any court or lawyer could compress the academic literature into a constitutional test, so we should not be surprised that religion scholars, but not courts, have chosen it as the constitutional standard.⁸⁶ Nonetheless, one can identify some general features of theology that have made it constitutionally suspect to scholars in religion. Theologians are insiders, not outsiders; committed, not uncommitted; participants, not observers; normative, not

Religious studies as a new multidisciplinary subject incorporating history of religions, cross-cultural topics, social scientific approaches and ethical and philosophical reflections . . . came to prominence chiefly in the 1960s and early 1970s, with two major trends: first, the foundation of departments in some *major public universities* in the USA and analogous developments in Canada and Britain; and second, the broadening of the scope of studies in religion offered at *private institutions* of higher education.

Id.; see also Harold Remus, *Origins*, in GRADUATE EDUCATION IN RELIGION 113, 129 (1971).

Yet the story of graduate education in religion in the 1960s and 1970s is not finally to be told in confessional or even in ecumenical terms, but rather more and more in relation to common scholarly endeavors cutting across and even independent of the lines of religious traditions.

84. See Bass, *supra* note 75, at 222 ("Moreover, the scholarly approach adopted in state universities was having an impact in departments of 'theology' or 'Bible' in nonsectarian and liberal Protestant colleges as well."); see also WELCH, *supra* note 18, at vii ("In what Robert Michaelsen has aptly called a 'quiet revolution,' departments of religion and interdepartmental programs have multiplied and expanded in both private and public institutions of higher learning.").

85. Wilson, *supra* note 62, at 18.

86. See, e.g., JESSE H. CHOPER, SECURING RELIGIOUS LIBERTY 9 (1995) ("[A]lthough some content must be given to the term 'religion' for purposes of the First Amendment, since most judges are neither theologians nor philosophers, I think it would be most undesirable to construct a judicial definition whose administration would require a deep understanding of these disciplines."); RONALD F. THIEMANN, CONSTRUCTING A PUBLIC THEOLOGY: THE CHURCH IN A PLURALISTIC CULTURE 142 (1991) ("[T]he distinctions commonly drawn between theological and religious studies are conceptually confused. These distinctions result either from a faulty understanding of the concept 'religion' or from the political effort to justify the study of religion within the context of the university.").

descriptive; located in divinity schools, not universities; religious, not secular. Those characteristics raise the spectre of the Establishment Clause in a way that the secular detached professor of religious studies does not—at least in the eyes of the religion professors.

Under these criteria, our hypothetical Professors One and Four are clearly theologians. Professor Two is the quintessential religious studies professor. Professor Three may be a religious studies professor, if he is sufficiently detached in his analysis and presentation of the believing visitors. A zoo of Professor Three's visitors would be a Department of Theology or a Divinity School, but not a Department of Religious Studies.

II. THE SUPREME COURT'S INSTITUTIONAL PRINCIPLE

Religion scholars were confident in identifying and applying the about/of, religious studies/theology constitutional standard. It is not, however, the Court's own standard. In practice, the Supreme Court never did compress religious studies and theology into a constitutional test. In concurrence in *Schempp*, Justice Brennan agreed that "[t]he holding of the Court today plainly does not foreclose teaching *about* the Holy Scriptures or about the differences between religious sects in classes in literature or history."⁸⁷ Yet he observed that this distinction between teaching *about* and *of* religion was too difficult for courts to interpret. "To what extent, and at what points in the curriculum, religious materials should be cited are matters which the courts ought to entrust very largely to the experienced officials who superintend our Nation's public schools. *They are experts in such matters, and we are not.*"⁸⁸ Brennan urged the Court to "heed Mr. Justice Jackson's caveat" (in *McCollum*) and not "announce curricular standards."⁸⁹

In *McCollum*, one of the early cases about religion in the schools, Mr. Justice Jackson had stated that: "When instruction turns to proselyting and imparting knowledge becomes evangelism is, except in the crudest cases, a subtle inquiry."⁹⁰ Such subtlety is the professional obligation of religious studies. However, this inquiry has been too subtle for the Supreme Court, and so its First Amendment decisions

87. *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 300 (1963).

88. *Id.* (emphasis added).

89. *Id.*

90. *McCollum v. Board of Educ.*, 333 U.S. 203, 236 (1948) (Jackson, J., concurring).

have been based on other grounds. Curricular matters, including fine academic points about theology and religious studies, have usually been beyond the Court's expertise and interest. Justice Jackson warned of the Court's minimal expertise in religious education: "[i]t is a matter on which we can find no law but *our own prepossessions*."⁹¹

Instead of focusing on the curriculum, in the First Amendment religion cases set in schools, the justices have been attentive to institutional status, examining the nature of the schools instead of the content of the courses. If they could not interpret about and of, they could distinguish a religious from a public school. By 1963 (i.e., *before Schempp*) the analytical framework for First Amendment jurisprudence—the institutional principle—had already been set in *Everson v. Board of Education*⁹² and *McColum*. Scholars looked past their public or private school setting to a common discipline, but the public/religious school distinction was the justices' bright line for resolving First Amendment cases. Although religion programs converged in different types of institutions, on the Court the differences in institutions were accentuated.

In *Everson*, a New Jersey statute provided transportation for students to public as well as non-public schools (in Justice Black's expression, "church schools").⁹³ The Court acknowledged that these schools provide "secular education" but emphasized their "religious" nature.⁹⁴ In dissent, Justice Jackson explained the difference between secular and religious schools:

*Our public school . . . is organized on the premise that secular education can be isolated from all religious teaching so that the school can inculcate all needed temporal knowledge and also maintain a strict and lofty neutrality as to religion. The assumption is that after the individual has been instructed in worldly wisdom he will be better fitted to choose his religion The function of the Church school is a subject on which this record is meager. . . . But we know that such schools are parochial only in name they, in fact, represent a world-wide and age-old policy of the Roman Catholic Church. . . . Catholic education is the rock on which the whole structure rests, and to render tax aid to its Church school is *indistinguishable* to me from rendering the same aid to the Church itself.*⁹⁵

91. *Id.* at 238 (emphasis added).

92. 330 U.S. 1 (1947).

93. *Id.* at 3.

94. *Id.*

95. *Id.* at 22-24 (emphasis added).

The significant point about the schools is not their role in secular education; religious schools remain religious (like churches) no matter how secular their curriculum. (And public schools secular no matter how religious?) The result in *Everson* is that all students may receive the (neutral) bus ride (which occurs neither on public nor church school grounds) but the secular public school versus church school distinction has been established for future cases.

The institutional focus of the Court's analysis is evident in the different outcomes of the two "released-time" cases, *McCullum* and *Zorach v. Clauson*.⁹⁶ In Illinois,

religious teachers, employed by private religious groups, were permitted to come weekly into the [public] school buildings during the regular hours set apart for secular teaching, and then and there for a period of thirty minutes substitute their religious teaching for the secular education provided under the compulsory education law.⁹⁷

The Court ruled in *McCullum* that this program violated the Establishment Clause.

Many readers have reiterated Justice Reed's complaint in dissent that it is difficult to state the holding of *McCullum*.⁹⁸ The difficulty of interpreting *McCullum* became clearer four years later, when the Court upheld a New York released time program in *Zorach*.

New York City has a program which permits its public schools to release students during the school day so that they *may leave the school buildings and school grounds and go to religious centers for religious instruction or devotional exercises*. A student is released on written request of his parents. Those not released stay in the classrooms. The churches make weekly reports

96. 343 U.S. 306 (1952).

97. *McCullum v. Board of Educ.*, 333 U.S. 203, 205 (1948).

98. *See id.* at 240.

I find it difficult to extract from the opinions any conclusion as to what it is in the Champaign plan that is unconstitutional. Is it the use of school buildings for religious instruction; the release of pupils by the schools for religious instruction during school hours; the so-called assistance by teachers in handing out the request cards to pupils, in keeping lists of them for release and records of their attendance; or the action of the principals in arranging an opportunity for the classes and the appearance of the Council's instructors? None of the reversing opinions say whether the purpose of the Champaign plan for religious instruction during school hours is unconstitutional or whether it is some ingredient used in or omitted from the formula that makes the plan unconstitutional.

Id.

to the schools, sending a list of children who have been released from public school but who have not reported for religious instruction.⁹⁹

The Court upheld the New York program, with Justice Douglas distinguishing Illinois from New York: "This 'released time' program involves neither religious instruction in public school classrooms nor the expenditure of public funds."¹⁰⁰

The instruction is no different in *McCollum* and *Zorach* (it is religious), but the location is. In dissent in *Zorach*, Justice Black complained: "I see no significant difference between the invalid Illinois system and that of New York here sustained. *Except for the use of the school buildings* in Illinois, there is no difference between the systems which I consider even worthy of mention."¹⁰¹ Years later, in *Schempp*, Justice Brennan explained why he thought that the institutional setting mattered in the released-time cases:

The deeper difference was that the *McCollum* program placed the religious instructor in the public school classroom in precisely the position of authority held by the regular teachers of secular subjects, while the *Zorach* program did not. The *McCollum* program, in lending to the support of sectarian instruction all the authority of the governmentally operated public school system, brought government and religion into that proximity which the Establishment Clause forbids. To be sure, a religious teacher presumably commands substantial respect and *merits attention in his own right*. But the Constitution does not permit that prestige and capacity for influence to be augmented by investiture of all the symbols of authority at the command of the lay teacher for the enhancement of secular instruction.¹⁰²

99. *Zorach*, 343 U.S. at 308 (emphasis added).

100. *Id.* at 308-09; see also Jesse H. Choper, *Religion in the Public Schools: A Proposed Constitutional Standard*, 47 MINN. L. REV. 329, 379-80 (1963).

[T]he Court [in *Zorach*] has made clear that the establishment clause forbids governmental indoctrination of religious beliefs and public school religious instruction. Under the proposed constitutional standard, this effort to inculcate religious beliefs would unquestionably be a solely religious activity likely to influence and compromise the students' freedom of conscientious choice. However, it is totally inaccurate to conclude, as many have done, that this rejection "sanctions [the public schools'] utilization for the purposes of atheists." This would be correct only if the public schools were either constitutionally permitted or forced to teach that there is *no* God.

Id.

101. *Zorach*, 343 U.S. at 316 (emphasis added).

102. *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 262-63 (1963) (emphasis added).

Religion scholars focus, not on the location, but on the content and quality of the instruction, which *merits attention in its own right*. Their course and their authority can be the same in the two settings. After *Schempp*, the religious and public universities converged on religious studies without regard to institution.

The institutional view has not always commanded five votes on the Court. (Nor is First Amendment jurisprudence coherent enough to be explained by one theory.) For example, in upholding a law providing secular (but not religious) books to religious schools, Justice White stated in *Board of Education v. Allen*¹⁰³ that “religious schools pursue two goals, religious instruction and secular education.”¹⁰⁴

[We] cannot agree with appellants either that all teaching in a sectarian school is religious or that the processes of secular and religious training are so intertwined that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion. . . . Nothing in this record supports the proposition that all textbooks, whether they deal with mathematics, physics, foreign languages, history, or literature, are used by the parochial schools to teach religion. No evidence has been offered about particular schools, particular courses, particular teachers, or particular books.¹⁰⁵

103. 392 U.S. 236, 245 (1968).

104. *Id.*

105. *Board of Educ. v. Allen*, 392 U.S. 236, 248 (1968); *see also* Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 133 (1992).

In *Board of Education v. Allen*, for example, the Supreme Court permitted the state to provide textbooks to parochial school students only if they used the same secular textbooks that the public schools used. This holding effectively required the parochial schools to secularize their curriculum if they wished to receive assistance.

Id.; *see also* DRINAN, *supra* note 13, at 65-66; Rosenfield, *supra* note 16, at 563 (citing *Cochran v. Louisiana*, 281 U.S. 370 (1930) (“In 1930, the Court sustained a Louisiana decision enabling school boards to provide secular school books to children attending religious schools.”)).

In all the agonizing efforts over the course of two or three generations by the members of these four groups to control public education, the center of the stage has always been courses *on* religion, instruction *about* religion, training in character development or admittedly sectarian indoctrination by way of released time. Seldom, if ever, have any of the interested groups approached the real heart of the matter: the faith of the teachers and the ideological outlook of the textbooks. It is, after all, hardly worthwhile to protest the presence or absence of such religious symbols as Bible-reading, nonsectarian prayers and even released time if the teacher and the textbook he employs are, consciously or otherwise, working on behalf of one of the “conspiracies.”

DRINAN, *supra* note 13, at 155.

Yet *Allen* is atypical; *Lemon v. Kurtzman*¹⁰⁶ has provided the influential First Amendment standard. The Pennsylvania *Lemon* law provided a salary supplement to nonpublic school teachers who taught secular courses, but did not allow funding to teachers of religion. The Rhode Island statute allowed reimbursements to nonpublic schools for salaries of teachers, textbooks and instructional materials. The Court summarized the state laws this way:

Pennsylvania has adopted a statutory program that provides financial support to nonpublic elementary and secondary schools by way of reimbursement for the cost of teachers' salaries, textbooks, and instructional materials in specified secular subjects. Rhode Island has adopted a statute under which the State pays directly to teachers in nonpublic elementary schools a supplement of 15% of their annual salary.¹⁰⁷

The course material was secular. Indeed, in Rhode Island teachers had to "agree in writing 'not to teach a course in religion for so long as or during such time as he or she receives any salary supplements'"¹⁰⁸ In Pennsylvania, reimbursement was permitted only for "'secular' subjects: mathematics, modern foreign languages, physical science, and physical education,"¹⁰⁹ and was explicitly prohibited for Latin, Hebrew, and classical Greek.¹¹⁰

The Court ruled according to its three-part test that both statutes were unconstitutional because of the difficulty of monitoring the secular subjects. "Under the *Lemon* test, the government violates the establishment clause if the government's primary purpose is to advance religion, or if the principal effect is to aid or inhibit religion, or if there

John C. Bennett confesses to a change of mind on the matter of the validity of free textbooks to nonpublic school children. He writes: 'I once thought that the provision of transportation was more readily defensible than the provision of school books, but the following considerations cause me to change that view: (1) School books which are the same as those used in the public schools do not aid religious education. (2) The cost is equivalent to the cost of such books if children went to the public schools which they have every right to do, whereas in the case of buses not only extra seats but extra routes may be involved. (3) The use of these books in both systems of schools is in the interest of the unity of the community.

Id.

106. 403 U.S. 602 (1971).

107. *Id.* at 606-07.

108. *Id.* at 608.

109. *Id.* at 610.

110. *Lemon*, 403 U.S. at 610 n.4.

is excessive government entanglement with religion.”¹¹¹ “Church schools” can be entirely secular yet not receive aid under *Lemon* because the state supervision of the secularity creates an “excessive entanglement” between church and state, a prong three violation. Justice Rehnquist has criticized this prong as “the ‘Catch-22’ paradox of [the Court’s] own creation . . . whereby aid must be supervised to ensure no entanglement but the supervision itself is held to cause an entanglement,”¹¹² and Justice White dubbed it an “insoluble paradox.”¹¹³

The institutional analysis reached its apex in 1985 in *Aguilar v. Felton*¹¹⁴ and its companion case, *School District of Grand Rapids v. Ball*.¹¹⁵ Both cases involved remedial education and services that the states provided by sending public school teachers into parochial schools. The course content was secular: “remedial reading, reading skills, remedial mathematics, English as a second language, and guidance services.”¹¹⁶ In *Ball*, the Court expressed its fear that *persons*, namely public school teachers, are not able to withstand the influence of religious *institutions*; “[t]eachers in such an atmosphere may well subtly (or overtly) conform their instruction to the environment in which they teach.”¹¹⁷ Because Grand Rapids did not supervise the program for such influence, the Court ruled that their program was unconstitutional. New York did superintend, but the Court ruled that the New York program was unconstitutional because monitoring the program entangled church and state. *Lemon*, Catch-22. In response to *Aguilar*, New York developed the ultimate institutional response: because public school teachers were not permitted to enter private school classrooms, vans—“mobile instruction units [MIU’s]”—were set up next door to the private schools.

The institutional principle has been important to First Amendment jurisprudence, but it stops at the university door. On the same day in 1973 that the Court struck down state reimbursement to nonpublic

111. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 969 (1997); see also *Lemon*, 403 U.S. at 612-13.

112. *Aguilar v. Felton*, 473 U.S. 402, 420-21 (1985) (citation omitted).

113. *Lemon*, 403 U.S. at 668 (White, J., concurring).

114. 473 U.S. 402 (1985).

115. 473 U.S. 373 (1985).

116. *Aguilar*, 473 U.S. at 406.

117. *Ball*, 473 U.S. at 388; see also *Agostini v. Felton*, 521 U.S. 203, 209 (1997) (In *Ball*, “a majority found a ‘substantial risk’ that teachers—even those who were not employed by the private schools—might ‘subtly (or overtly) conform their instruction to the [pervasively sectarian] environment in which they [taught].’”).

elementary and secondary schools in *Lemon*,¹¹⁸ it upheld in *Tilton v. Richardson*¹¹⁹ the Higher Education Facilities Act of 1963, which provided construction grants to nonpublic colleges and universities, including Sacred Heart University, Annhurst College, Fairfield University, and Albertus Magnus College. Justice Brennan protested that "a sectarian university is the equivalent in the realm of higher education of the Catholic elementary schools in Rhode Island."¹²⁰ He joined

Brother WHITE['s] cogent[] comment[] . . . Why the federal program in the *Tilton* case is not embroiled with the same difficulties (as the Rhode Island program) is never adequately explained.' . . . I do not see any significant difference in the Federal Government's telling the sectarian university not to teach any nonsecular subjects in a certain building, and Rhode Island's telling the Catholic school teacher not to teach religion.¹²¹

In *Roemer v. Board of Public Works*,¹²² the Court upheld a Maryland

statute which, as amended, provides for annual noncategorical grants to private colleges [including Western Maryland College, College of Notre Dame, Mount St. Mary's, St. Joseph College and Loyola College], among them religiously affiliated institutions, subject only to the restrictions that the funds not be used for 'sectarian purposes' [including seminary and theological students].¹²³

What is noteworthy about *Tilton* and *Roemer* for our purposes is that in those cases the Court mentioned the academic study of religion. In *Tilton*, the opponents of state aid had argued that the private colleges should not receive funds because they were pervasively religious. One important indicator of a school's religiosity was its *theology* department; the funded schools had such departments. From the characteristics of a *theology department*, the parties and the Court drew conclusions about the nature of the *institution*. The Court observed that the Catholic colleges required courses in theology, but noted that the parties had stipulated that:

118. 403 U.S. 602 (1971).

119. 403 U.S. 672 (1971).

120. *Lemon*, 403 U.S. at 659.

121. *Id.* at 660.

122. 426 U.S. 736, 739 (1976).

123. *Id.*

these courses are taught according to the academic requirements of the subject matter and the teacher's concept of professional standards. The parties also stipulated that the courses covered a range of human religious experiences and are not limited to courses about the Roman Catholic religion. The schools introduced evidence that they made no attempt to indoctrinate students or to proselytize. Indeed, some of the required theology courses at Albertus Magnus and Sacred Heart *are taught by rabbis*.¹²⁴

Thus, in *Tilton*, "the evidence show[ed] institutions with admittedly religious functions but whose predominant higher education mission is to provide their students with a *secular* education."¹²⁵

In *Roemer*, however,

[t]he District Court did not make the same finding with respect to theology and religion courses taught at the appellee colleges. It made no contrary finding, but simply was "unable to characterize the course offerings in these subjects." There was a "possibility" that "these courses could be devoted to deepening religious experiences in the particular faith rather than to teaching theology as an academic discipline." The court considered this possibility sufficient to require that the Council for Higher Education take steps to insure that no public funds would be used to support religion and theology programs.¹²⁶

To religion scholars, the departments and courses appear different (or at least susceptible of characterization). The *Tilton* courses could be theology or religious studies. The *Roemer* courses are possibly theology. The Court allowed funding to both sets of schools, but to neither theology department because the state may not fund "religious instruction, training, or worship."¹²⁷ Note that religion scholars might be more critical of the *Tilton* courses than the Court was; religious studies opposes theology. Religious studies would certainly disapprove of those *Roemer* "classes [that] are begun with prayer."¹²⁸ The Court did not address the possibility that the *Tilton* courses were secular religious studies offerings and so worthy of funding.¹²⁹

124. *Tilton*, 403 U.S. at 686-87 (emphasis added).

125. *Id.* at 687 (emphasis added).

126. *Roemer v. Board of Pub. Works*, 426 U.S. 736, 756 n.20 (1976); *see also* *Hunt v. McNair*, 413 U.S. 734 (1973).

127. *Tilton*, 403 U.S. at 679-80.

128. *Roemer*, 426 U.S. at 757.

129. For some effects of *Tilton* and *Roemer*, see EDWARD MCGLYNN GAFFNEY JR. & PHILIP R. MOOTS, *GOVERNMENT AND CAMPUS: FEDERAL REGULATION OF RELIGIOUSLY AFFILIATED HIGHER EDUCATION* 102 (1982).

The Court's standard of secularity in *Tilton* and *Roemer* is not clear. Justice Stewart, in dissent in *Roemer*, argued that the nature of the theology department was determinative and was reason to distinguish *Roemer* from *Tilton*. "In *Tilton* the Court emphasized that the theology courses were taught as academic subjects. Here, by contrast, the District Court was unable to find that the compulsory religion courses were taught as an academic discipline."¹³⁰ Because the religion courses were required, they might indoctrinate or foster "religious experience," funding of which is clearly barred by the Establishment Clause. Justice Stewart observed that in the *Roemer* schools the religion and theology departments were staffed "chiefly with clerics of the affiliated church," and at two schools all department members were clerics.¹³¹ Accordingly, the classes might be spiritual as well as academic.

Religion scholars can agree with Justice Stewart about the affiliation of the professor. Claude Welch opposed the "confessional principle" according to which only members of a faith can teach it.¹³² In his opinion, as we have seen, "[n]o department should be regarded as a

For example, the president of a major Roman Catholic university in the Midwest reported that its "Department of Religious Studies" (which does not train or educate for theological degrees [sic]) is prohibited from conducting courses in a building partially funded by federal loans and grants. In a subsequent telephone conversation this university administrator expressed the view that the federal statute should not be interpreted to prohibit this kind of use, but stated that the university had declined to press the matter with federal officials lest it risk losing the loan. That complaint was echoed by a Lutheran college in the Midwest, and a small Roman Catholic college in the Southwest reported that offices of faculty persons who taught religious studies were required to be moved out of a federally funded building that housed all of the other members of the humanities faculty of that college. The president of a small, two-year United Methodist college in the South wondered why his institution was unable to use a building partially funded with federal funds for "religious instruction" when a neighboring state university uses its publicly funded buildings for that purpose.

Id.

130. *Roemer*, 426 U.S. at 773 (Stewart, J., dissenting)

131. *Id.*

132. Welch, *supra* note 76, at 11 ("I mean the notion that only a Protestant can teach about Protestantism, a Jew about Judaism, a Catholic about Catholicism, a Buddhist about Buddhism, and by implication, a Hegelian about Hegel."); *see also* WELCH, *supra* note 18, at 16 (rejecting the "zoo" theory, "according to which religion can be dealt with only by exhibiting representative members of the various species," as well as the "insider theory," "according to which no one except an adherent can legitimately interpret or even understand a religious tradition").

museum or a zoo, responsible for exhibiting all species of believers.”¹³³ Although Welch acknowledged that “other things being equal, an articulate representative of a religion will be better able to convey the facts and various nuances of that religion than a man who is not affiliated with it,” he insisted that scholarly credentials, not confessional affiliation, were the most important attribute of the professor of religion. Clerical faculty might be confessional, not scholarly. The primacy of scholarly over confessional commitment is a core characteristic of religious studies. Justice Stewart speaks in the religious studies tradition when he criticizes the clerical status of the *Roemer* faculty. Of course, Professor Welch might not be content that the *Tilton* majority praised the presence of a rabbi at Albertus Magnus and Sacred Heart. Was the rabbi a good scholar?

In any event, the content of the courses did not determine the Court’s decisions, which rested instead on the distinction between college students and the lower grades. In *Tilton* the Court concluded: “There is substance to the contention that college students are less impressionable and less susceptible to religious indoctrination.”¹³⁴ The

133. Hartzell, *supra* note 3, at 62; Richard Schlatter, *The Nature and Formulation of Academic Disciplines*, in *THE STUDY OF RELIGION ON THE CAMPUS OF TODAY* 16, 21 (Karl D. Hartzell & Harrison Sasscer eds., 1967) (“We want scholar-teachers, but what we have available is a roster of liberal Protestant apologists and evangelists with an occasional Jew or Jesuit thrown in to make it appear respectably broad-minded.”).

134. *Tilton v. Richardson*, 403 U.S. 672, 686 (1971); see also ROBERT GORDIS ET AL., *RELIGION AND THE SCHOOLS* 28-29 (1959).

It is generally agreed that whatever difficulties inhere in the teaching of religion they are minimal on the college level. Here the relative maturity of the students and the atmosphere of free intellectual inquiry offer assurance that not indoctrination but education will be the guiding principle, both in the discussion of the religious factor in history and in special courses in religion offered in the curriculum.

Id.; see also Choper, *supra* note 100, at 383 (“Thus, it may be argued that the establishment clause demands that the objective study of religion or the Bible be confined to those higher grades where the influencing or compromising of religious beliefs would not occur because the audience is adult enough to distinguish between indoctrination and academic discussion.”). But see *Lemon v. Kurtzman*, 403 U.S. 602, 668 (1971) (White, J., concurring) (“Surely the notion that college students are more mature and resistant to indoctrination is a makeweight.”); Daniel Patrick Moynihan, *What the Congress Can Do When the Court is Wrong*, in *PRIVATE SCHOOLS AND THE PUBLIC GOOD: POLICY ALTERNATIVES FOR THE EIGHTIES* 79, 80 (Edward McGlynn Gaffney Jr. ed., 1981).

I would maintain that the Court has been egregiously wrong in much of the reasoning it has employed in defense of its decisions concerning public aid for nonpublic education. For example, the Court was reduced to saying in *Tilton* that a federal statute that provided aid to a Catholic college was constitutional, but that

Court later summarized the differences between colleges and high schools in *Roemer*: "College students are less susceptible to religious indoctrination; college courses tend to entail an internal discipline that inherently limits the opportunities for sectarian influence; and a high degree of academic freedom tends to prevail at the college level."¹³⁵

In these cases, then, the Court did not resolve our specific questions about the teaching of religion in state universities. The professors were free to develop their own constitutional standard. They selected about/of, religious studies/theology.

III. THE CRITICS: THEOLOGIANS, THEISTS, JURISTS

There the story might end, with religious studies in the schools and the institutional principle on the Court. However, by the 1980s discontent with the status quo simmered in the universities and on the Court as theologians and theists questioned their exclusion from the schools and jurists questioned the Court's First Amendment jurisprudence.

A. Neglect of Theology

Within the academic world of religious studies in the 1980s, some scholars began to identify an "identity crisis."¹³⁶ This crisis had many dimensions, but one aspect is a complaint about exclusion and hostility: the exclusion of theology from academic religion because of hostility from religious studies scholars. Perhaps Wilson's 1968 prediction about

similarly direct subventions to a Catholic high school would be unconstitutional, because of a presumably well known difference in religious impressionability as between college freshmen and high school seniors. If you'll say that, you'll say anything.

Id.

135. *Roemer*, 426 U.S. at 750.

136. Claude Welch used this expression before the 1980s. See WELCH, *supra* note 18, at 13; see also Darlene Juschka, *Religious Studies and Identity Politics: Mythology in the Making*, 26 BULLETIN/CSSR 8 (Feb. 1997).

Religious Studies has suffered from an identity crisis since its conception. This crisis has meant that it has cloistered itself from other university disciplines. Neither theology nor a Humanity or Social Science, it stands alone, and will, in the face of downsizing, fall alone. It would be to the benefit of Religious Studies, if it is to survive as a discipline, to understand itself as having data in common with theology, but as employing an interpretive method of analysis, like other Humanity or Social Sciences disciplines.

Id.

the decline of theological traditions had come true by 1989, when Van Harvey commented on the “intellectual marginality of American theology.”¹³⁷ In a 1992 presidential address to the American Academy of Religion (the professional association of scholars in religion, whose 1964 founding and journal “called attention to, and in some ways even created, the academic field of ‘religious studies’”),¹³⁸ Robert Cummings Neville stated that “[t]he visible part of the crisis is the feeling of many people engaged in theological studies, particularly those who themselves are committed to the practice of religion, that they are not welcome in the Academy.”¹³⁹ Some theologians raised a different question, suggesting that the academic study of religion had declined in influence (and perhaps as an academic discipline) because of the neglect of theology.¹⁴⁰

Neville’s speech echoed some of the conclusions of the 1991 Hart Report on the status of religious studies and theology in American universities, a successor to the Welch report of another era.¹⁴¹ One Hart report finding was that many religion faculty members—especially those at public universities—state that theology does not belong in the public school.¹⁴² Hart observed

137. Van A. Harvey, *On the Intellectual Marginality of American Theology*, in RELIGION AND TWENTIETH-CENTURY AMERICAN INTELLECTUAL LIFE 172 (Michael J. Lacey ed., 1989).

138. CHERRY, *supra* note 73, at 114.

139. Robert Cummings Neville, *Religious Studies and Theological Studies*, 61 J. AM. ACAD. RELIGION 185, 185 (1993). *But see id.* at 186 (“The life of the Academy is by no means in crisis but is flourishing. The crisis is in the sense of identity.”).

140. *See, e.g.*, GEORGE LINDBECK, THE NATURE OF DOCTRINE: RELIGION AND THEOLOGY IN A POSTLIBERAL AGE 124 (1984).

Perhaps the last American theologian who in practice (and to some extent in theory) made extended and effective attempts to redescribe major aspects of the contemporary scene in distinctively Christian terms was Reinhold Niebuhr. After the brief neoorthodox interlude (which was itself sometimes thoroughly liberal in its theological methodology, as in the case of Paul Tillich), the liberal tendency to redescribe religion in extrascriptural frameworks has once again become dominant.

Id.

141. Ray L. Hart, *Religious and Theological Studies in American Higher Education: A Pilot Study*, 59 J. AM. ACAD. RELIGION 715 (1991).

142. *See id.* at 731-32. At the two public universities with small departments, every faculty member identified her/himself in RS and rejected ThS as appropriate to such a department (the only type in the sample to be unanimous on this matter).

In the second category of public universities with a large department having both undergraduate and graduate programs, a clear majority of faculty identified themselves in RS and indicated antipathy toward ThS (at one, 85% in RS, 15% rejecting the distinction as pertinent to their work; at the other, 58% clearly in RS, 17% rejecting the distinction, and 25% saying they were in “neither.”

[a] sharp distinction between RS and ThS, with ThS the *bête noire* within RS: this appears to be the passion of public institutions, and is especially strong in those with graduate programs (as it is in private universities with graduate programs). . . . The majority of faculty in public and private universities with graduate programs oppose ThS in their programs, under whatever self-construal of "theology." . . . The younger the scholar and the more recently out of graduate school, the more evident is the *antipathy* to "theology" in RS in this sector of higher education.¹⁴³

Charles Kegley is more pointed in his description of the controversy: "[R]eligious studies specialists (not to mention philosophers) have come to look upon association with theologians as a mark of intellectual degeneration. They are not inclined to go on any academic slumming."¹⁴⁴

Theologians were not alone in their criticism; some Christian professors argued that universities had become the home of "established nonbelief" (perhaps part of a broader "culture of disbelief").¹⁴⁵ On the religious studies front, in the 1980s Professor Smith suggested that the extensive debate by religion scholars about the religious studies standard was a *political* battle within the academy, not an academic or constitutional one.

As usually understood, the distinction between religion and religious studies reduces to some version of the duality between "being religious" or "doing religion" and the study of the same. . . . It is a preeminently political contrast, one of value in carving out a place for the study of religion within the

Id.

143. *Id.* at 732. For an early diagnosis of the problem, see MICHAELSEN, *supra* note 9, at 157.

In America, . . . theology has been at most a peripheral enterprise in the life of the university. And it continues to be regarded with suspicion by many in the university—because of its historic association with a community of faith and its presumed unscientific nature. Thus the questions of whether theology is a legitimate academic discipline and of whether it should have a place in a curricular program in religion can be and sometimes are hotly debated. And theological studies are largely untouched in most state universities.

Id.

He left his readers with the unanswered question: should theologians be included on the faculty of the state university?

144. Charles W. Kegley, *Theology and Religious Studies: Friends or Enemies?*, 35 THEOLOGY TODAY 273, 277 (1978) ("Curiously, many of their colleagues in the faculty, for example, physical and social scientists, have the same misgivings about the work of those engaged in religious studies. The latter are suspect and often treated as second class citizens in academia.").

145. See, e.g., STEPHEN CARTER, *THE CULTURE OF DISBELIEF* (1993); MARSDEN, *supra* note 4.

university, but of dubious value beyond. It is, quite frankly, a ploy. . . . *The political distinction was, at heart, a counsel to passivity and integration, not to interesting thought.*

As a sheerly political move, analogous to other self-justifications from other fields who sought recognition and legitimation from centers of articulate power, the distinction can be applauded. Raised to the level of theory, it has proved mischievous, especially when confused with other sorts of distinctions such as those between the "insider" and the "outsider"—the "emic" and the "etic" in contemporary jargon. Its most current formulation is that between the normative and the descriptive.¹⁴⁶

In the religious studies battle of the 1960s, the religion scholars had found a powerful ally in the Supreme Court of the United States. In the 1980s, however, the Court also confronted serious criticism for its hostility to religion.

B. Discrimination Against Religious Viewpoints

Beginning in 1981, in the law, *students* (not faculty) brought their complaints about the schools to the Supreme Court. Starting with

146. Smith, *supra* note 74, at 232; *see also* THIEMANN, *supra* note 86, at 142.

Though the distinction is not conceptually justifiable, it has had an important political function in the struggle to establish the intellectual viability of the study of religion within American universities. That vital struggle continues, and thus it is important to ask whether this conceptually illusionary distinction has an enduring political function.

Id.; Jonathan Z. Smith, *Here and Now: Prospects for Graduate Education*, in *NEW HUMANITIES AND ACADEMIC DISCIPLINES* 40, 42 (Jacob Neusner ed., 1984).

First, the debates over the nature of the academic study of religion have rarely been substantive; they have been largely political and tactical. That is to say, they have been informed by concerns not so much indigenous to the academy as appropriate to legislative bodies and legal questions of the relationship between church and state. Second, until recently, the graduate study of religion was preceded, in the typical student's career, by a course of postbaccalaureate professional study within a theological faculty.

Id.; Juschka, *supra* note 136, at 8.

Caught between ecumenicism (which is possibly disguised colonialism) and value-neutral objective study (which posits scientific epistemology as Truth), Religious Studies doesn't know just what it is. It suffers from the Jekyll/Hyde syndrome—either the cold observer or the impassioned participant. It is this identity crisis that is indicative of a pathology, but a pathology that is reflective of events beyond the boundaries of Religious Studies.

Id.

Widmar v. Vincent,¹⁴⁷ evangelical Christian students won victories in the Supreme Court with complaints that they were unfairly excluded from the public schools due to discrimination against their religious viewpoints. These cases involved access to school facilities and use of those facilities for worship and religious discussion groups. In *Widmar*, for example, the Court ruled that the University of Missouri may not bar evangelical Christian student groups from using university buildings for extracurricular religious worship and religious teaching. The students won because their free *speech* rights protected them from (religious) viewpoint discrimination. In one sense, too much religion had been excluded from these public schools and the Court moved to right the balance. This line of cases culminated in the 1995 *Rosenberger* decision.

Moreover, in the 1980s and 1990s, the *justices* began to express their own dissatisfaction with the Court's hostility to religion. Their favorite target was *Lemon*, and their criticism challenged the institutional principle. For example, in *Board of Education v. Grumet*,¹⁴⁸ three justices (Kennedy, Scalia and Thomas) joined two of the original dissenters (O'Connor and Rehnquist) to encourage reconsideration of *Aguilar v. Felton*. Those justices suggested that the institutional principle was not neutral but instead was anti-religious. From Justice Scalia ("I heartily agree that these cases, so *hostile to our national tradition of accommodation*, should be overruled at the earliest opportunity.")¹⁴⁹ to Justice O'Connor ("It is the Court's insistence on *disfavoring* religion in *Aguilar* that led New York to favor it here.")¹⁵⁰ the institutional principle was under siege. The Court overruled *Aguilar* in *Agostini v. Felton*.¹⁵¹

On the Court, the *Schempp* line was never as important as the institutional principle. Scholars who have relied on *Schempp*, however, should review the Court's 1995 *Rosenberger* decision. On its facts, *Rosenberger v. Rector & Visitors of University of Virginia* is a case about student funding, with no implications for a department of religion. Yet its analysis of religion (especially the disagreement between Justice Kennedy and the dissenting Justice Souter) is noteworthy in the context of the academic and constitutional debates about teaching religion.

147. 454 U.S. 263 (1981).

148. 512 U.S. 687 (1994).

149. *Id.* at 750 (Scalia, J., dissenting) (emphasis added).

150. *Id.* at 716 (O'Connor, J., concurring) (emphasis added).

151. *Agostini v. Felton*, 521 U.S. 203 (1997).

Rosenberger suggests that the *Schempp* distinction between teaching about and of religion has been abandoned.

Taken together, *Agostini* and *Rosenberger* suggest a change in constitutional arguments about teaching religion. We do not yet know how the scholars will respond.

IV. A NEW CONSTITUTIONAL STANDARD: ROSENBERGER AND AGOSTINI

A. *The Erosion of Schempp?*

In *Rosenberger* the Supreme Court ruled that the Free Speech Clause of the First Amendment requires the University of Virginia to fund a student publication, *Wide Awake*. *Wide Awake* has a “two-fold mission: ‘to challenge Christians to live, in word and deed, according to the faith they proclaim and to encourage students to consider what a personal relationship with Jesus Christ means.’”¹⁵² The paper had run articles on a wide range of subjects, including racism, pregnancy, prayer, C.S. Lewis, music, homosexuality and eating disorders. “Each page of *Wide Awake*, and the end of each article or review, is marked by a cross.”¹⁵³

The original University Guidelines barred funding to a “religious activity,” namely “any activity that primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality.”¹⁵⁴ The University denied *Wide Awake*’s request for funds; editor Ronald Rosenberger appealed the denial of funding. The Supreme Court ruled in his favor, concluding that once the state creates a public forum, the First Amendment prohibits it from viewpoint discrimination. The majority opinion stated that in these circumstances religion is a viewpoint, not only a subject matter.¹⁵⁵ The Free Speech Clause prohibits the state from discriminating on the basis of viewpoint in the forum it has created. The state has created a forum in which student groups receive funding for publications; it may not discriminate against

152. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 825 (1995).

153. *Id.*

154. *Id.*

155. See *Rosenberger*, 515 U.S. at 831 (“Religion may be a vast area of inquiry, but it also provides, as it did here, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered.”).

Rosenberger's Christian viewpoint in its award of student activity funds in that forum.

Writing for the majority, Justice Kennedy stated that under the Speech Clause of the First Amendment the government may set the subject matter of a public forum; once it has opened that forum it may not discriminate on the basis of viewpoint. Religion can be both a subject matter and a viewpoint, but in the *Virginia* circumstances the guidelines discriminated against religious *viewpoint* and so violated the First Amendment. We learn in more detail in Justice Kennedy's opinion what is wrong with the regulation:

Were the prohibition applied with much vigor at all, it would bar funding of essays by hypothetical student contributors named Plato, Spinoza, and Descartes . . . undergraduates named Karl Marx, Bertrand Russell, and Jean-Paul Sartre would likewise have some of their major essays excluded from student publications. . . . it is indeed difficult to name renowned thinkers whose writings would be accepted, save perhaps for articles disclaiming all connection to their ultimate philosophy. Plato could contrive perhaps to submit an acceptable essay on making pasta or peanut butter cookies, provided he did not point out their (necessary) imperfections.¹⁵⁶

To Justice Kennedy if one excludes Rosenberger one must exclude Plato; *who* would bar Plato from a student newspaper?

Justice Souter?

No. Justice Souter's standard funds Plato, Spinoza and Descartes but not Rosenberger. In dissent he challenged the majority's broad reading of religious viewpoint. Souter focused on *subject*, not viewpoint; the government (as Justice Kennedy concedes) may set the subject matter of the public forum. According to Justice Souter, however, *Wide Awake's* "*subject* is not the discourse of the scholar's study or the seminar room, but of the evangelist's mission station and the pulpit. It is nothing other than the preaching of the word, which (along with the sacraments) is what most branches of Christianity offer those called to the religious life."¹⁵⁷ The Establishment Clause prohibits government funding of the subject matter of evangelism. Souter suggests a constitutional standard different from Kennedy's: the state may not fund the evangelism or proselyting of Rosenberger but it may fund academic discourse. These are two different subjects. The Establishment Clause permits the funding of the scholar but forbids the

156. *Id.* at 836.

157. *Id.* at 868 (emphasis added).

state to “pay the preacher to preach.”¹⁵⁸ Justice Kennedy does not recognize this distinction, but it is the Court’s own standard, set in *McCullum*, *Engel*, and *Schempp* (the classic First Amendment cases), that has kept “core religious activities,” including prayer and religious instruction, from the nation’s public schools.¹⁵⁹

Perhaps Justice Souter is familiar with religious studies when he mentions “the discourse of *the scholar’s study* or the seminar room.”¹⁶⁰ Professor Smith uses the same expression to explain that

[r]eligion is a creation of *the scholar’s study*. . . . It is created by the scholar’s imaginative acts of comparison and generalization. *Religion has no independent existence apart from the academy*. For this reason, the student of religion must be exquisitely self-conscious. Indeed, this self-consciousness constitutes his primary expertise, his foremost object of study.¹⁶¹

Religious studies is not evangelism; one of its defining characteristics is its *secularity*. “[T]he study of religion is a uniquely Western phenomenon, flourishing in particular under secular auspices on the one side, or under the auspices of religious people attempting to address a secular, or at least an alien, world on the other.”¹⁶² Its secularity is part of its intellectual challenge to scholars, as Justice Jackson recognized: “[t]he task of separating the secular from the religious in education is one of magnitude, intricacy and delicacy.”¹⁶³

In *Rosenberger*, Kennedy acknowledged Souter’s standard but rejected it, and he suggested that the line between “religious speech” and “speech about religion” is too hard to draw.¹⁶⁴ It is beyond judicial competence to administer this test; indeed its application would require “censorship” from the Court.¹⁶⁵ Justice Kennedy sounds the Jackson note—that courts cannot judge curricular requirements, especially

158. Kathleen M. Sullivan, *Parades, Public Squares and Voucher Payments: Problems of Government Neutrality*, 28 CONN. L. REV. 243, 247 (1996).

159. See, e.g., Choper, *supra* note 100, at 335 (“Although these governmental programs aid religion, *they may not be fairly characterized as solely religious activities*. However, other practices, such as prayer recitation and Bible reading, *must be fairly characterized as solely religious activities having no independent primary nonreligious purpose*.”).

160. *Rosenberger*, 515 U.S. at 819 (emphasis added).

161. Jonathan Z. Smith, *No Need to Travel to the Indies: Judaism and the Study of Religion*, in TAKE JUDAISM, FOR EXAMPLE 215, 217 (Jacob Neusner ed., 1983).

162. Neusner, *supra* note 81, at 49.

163. *McCullum v. Board of Educ.*, 333 U.S. 203, 237 (1948) (Jackson, J., concurring).

164. See *Rosenberger*, 515 U.S. at 845.

165. See *id.* at 844.

matters concerning religion. However, in response to this traditional problem, Kennedy offered a solution not envisioned by Jackson (who stated that “we . . . can at all times prohibit teaching of creed and catechism and ceremonial and can forbid forthright *proselyting* in the schools”¹⁶⁶): to fund evangelism itself. Because the about/of standard is too hard to decipher, the state must fund everything. If “of religion” is now a viewpoint, not a subject, then it must always be included, must always receive funding.

Once religious speech cannot be distinguished from speech about religion, we have lost the line of *Schempp*, the legal distinction that influenced the fate of religious studies. So what? It was always dicta. The loss of the *Schempp* standard may pose a hardship to religious studies but should be insignificant to jurisprudence; about/of was never central to the Court’s decisions. Those justices who disregarded the *Schempp* line had depended on an alternative test, the institutional principle, which was within judicial competence to administer. Justice Kennedy can still refuse funding to private schools under the Court’s old institutional principle. Or can he? That old institutional line is blurred by *Agostini*.

B. The Erosion of the Institutional Principle

The Court had already strayed from the institutional principle before *Agostini* was decided in 1997. In 1985, the Court ruled that the Establishment Clause did not prevent the State of Washington from providing vocational rehabilitative assistance to Larry Witters, a blind student who was studying to become a pastor at the Inland Empire School of the Bible.¹⁶⁷ The funding of ministerial training appears to violate both the Court’s institutional principle (ministerial schools are “church schools”) and the scholars’ subject matter standard (divinity schools are the location from which religious studies initially departed). The Washington Supreme Court had ruled that the program violated prong two of the *Lemon* test because its primary effect was to advance religion. The United States Supreme Court reversed because the aid was paid directly to the student and not to the institution:

Any aid provided under Washington’s program that ultimately flows to religious institutions does so only as a result of the genuinely independent and

166. *McCollum*, 333 U.S. at 235 (Jackson, J., concurring) (emphasis added).

167. *See* *Witters v. Washington Dept. of Servs. for the Blind*, 474 U.S. 481 (1985).

private choices of aid recipients. . . . In this case, the fact that aid goes to individuals means that the decision to support religious education is made by the individual, not by the State.¹⁶⁸

On these facts, the Court found no subsidy or sponsorship of religious institutions by the state. Three years later, in a non-school case, the Court upheld the Adolescent Family Life Act, which granted money for premarital adolescent sexual relations and pregnancy services and counseling to private institutions, including “pervasively sectarian” ones.¹⁶⁹

In 1993, the Court ruled that the Establishment Clause did not forbid an Arizona school district to provide a sign-language interpreter for James Zobrest, a deaf student at Salpointe Roman Catholic High School, where, the parties stipulated, “[t]he two functions of secular education and advancement of religious values or beliefs are inextricably intertwined.”¹⁷⁰ The Ninth Circuit had found a prong two violation of *Lemon* and a “symbolic union” of church and state (the public interpreter on private school grounds) under *Ball*. The Court, however, following *Witters* and *Bowen*, upheld this “neutral” program because it was based on a private choice of schooling by the parents. Once again, the Court found no subsidy to religious institutions in these circumstances.

A dissenting Justice Blackmun observed that Salpointe is a “pervasively religious” institution where “[r]eligion is a required subject” and where an “interpreter would be required to communicate the material covered in religion class, [and] the *nominally secular*

168. *Id.* at 480.

169. See *Bowen v. Kendrick*, 487 U.S. 589 (1988); William D. Anderson, Jr., *Religious Groups in the Educational Marketplace: Applying the Establishment Clause to School Privatization Programs*, 82 GEO. L.J. 1869, 1874 (1994).

But if a more rigorous standard once did exist for education, a recent case may have obliterated it. In *Bowen v. Kendrick*, the Court upheld a statute that allowed—even encouraged—religious organizations to participate as grantees in programs directed at educating and counseling adolescents in reproductive matters. That religiously affiliated institutions were receiving state money to educate adolescents *alone* was not sufficient to invalidate the program, because its governing statute appeared to be neutral on its face and did not have the primary effect of advancing religion. Instead of focusing on the service being provided (education) or on the type of groups receiving grants (religious), the Court’s Establishment Clause analysis looked to the *manner in which the group delivered the government funded service*.

Id.

170. *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 2 n.1 (1993).

subjects that are taught from a religious perspective.”¹⁷¹ Never before had the Court “authorized a public employee to participate directly in religious indoctrination.”¹⁷²

Then in *Agostini* (the 1997 mobile instruction units case), Justice O'Connor more directly questioned numerous aspects of the institutional standard. Under *Aguilar* and *Ball*, public school teachers could not enter religious schools. In overruling *Aguilar*, O'Connor first disputed as unsupported by any evidence the *Ball* assertion that public school teachers may be swayed by their work in the private school and so conform to their religious environment.¹⁷³ To the dissenting Justice Souter (who defends the old institutional line), she described the weaknesses of the institutional distinction:

Taking this view, the only difference between a constitutional program and an unconstitutional one is the *location of the classroom*, since the degree of cooperation between Title I instructors and parochial school faculty is the same no matter where the services are provided. We do not see any perceptible (let alone dispositive) difference in the degree of symbolic union between a student receiving remedial instruction in a classroom on his sectarian school's campus and one receiving instruction in a van parked just at the school's curbside. To draw this line based solely on the *location of the public employee* is neither “sensible” nor “sound”¹⁷⁴

Justice Souter defended the institutional principle in *Agostini* because of a new skepticism of the subject matter standard; he resisted the implications of his *Rosenberger* test. In *Rosenberger*, in the state university, he could distinguish preaching from studying. In the private school, however, he thought it difficult to distinguish religious from secular teaching. Souter echoed the logic of Justice Douglas's institutional argument in *Lemon* (“It is well known that *everything* taught in most parochial schools is taught with the ultimate goal of religious education in mind.”)¹⁷⁵

171. *Id.* at 19-20. (Blackmun, J., dissenting) (emphasis added).

172. *Id.* at 18 (Blackmun, J. dissenting).

173. See *Agostini v. Felton*, 521 U.S. 203, 219 (1997) (In *Ball*, “a majority found a ‘substantial risk’ that teachers—even those who were not employed by the private schools—might ‘subtly (or overtly) conform their instruction to the [pervasively sectarian] environment in which they [taught].’”).

174. *Agostini*, 521 U.S. at 227-28 (emphasis added).

175. *Lemon v. Kurtzman*, 403 U.S. 602, 635 (1971) (Douglas, J., concurring) (emphasis added).

Another Douglas argument from *Lemon* was also re-emphasized by Souter: funding any part of the religious school (even its secular features) is a subsidy to the religious whole. According to Douglas,

[a] history class, a literature class, or a science class in a parochial school is not a separate institute; it is part of the organic whole which the State subsidizes. . . . The school is an organism living on one budget. What the taxpayers give for salaries of those who teach only the humanities or science without any trace of proselyting enables the school to use all of its own funds for religious training.¹⁷⁶

According to Souter, funding remedial subjects supports the school's entire mission. Thus remedial math is part of the general subject of mathematics; teaching remedial math and reading is part of the school's general obligation to teach its students. "What was so remarkable [in *Aguilar* and *Ball*] was that the schemes in issue assumed a teaching responsibility indistinguishable from the responsibility of the schools themselves."¹⁷⁷ What is remarkable in *Agostini* is that Souter (echoing Blackmun's "nominally secular" language in *Zobrest*) now describes some subjects as "ostensibly secular":

There is simply no line that can be drawn between the instruction paid for at taxpayers' expense and the instruction in any subject that is not identified as formally religious. *While it would be an obvious sham, say, to channel cash to religious schools to be credited only against the expense of "secular" instruction, the line between "supplemental" and general education is likewise impossible to draw.* If a State may constitutionally enter the schools to teach in the manner in question, it must in constitutional principle be free to assume, or assume payment for, the entire cost of instruction provided in any *ostensibly secular* subject in any religious school. . . . [T]here was *no stopping place in principle* once the public teacher entered the religious schools to teach their secular subjects.¹⁷⁸

Subject matter distinctions work in the public but not the private school setting. Under Souter's *Agostini* standard, no course of any variety, let alone the religion course, may receive funding in the private school.

Note that Justice O'Connor, who challenged the institutional standard in *Agostini*, wrote a separate concurrence in *Rosenberger*. Perhaps she realized that the Court should not erase both institutional

176. *Id.* at 641 (Douglas, J., concurring).

177. *Agostini*, 521 U.S. at 245 (Souter, J., dissenting).

178. *Id.* at 246 (emphasis added).

and subject matter lines; she insisted that the Court must draw *some* line.

When two bedrock principles so conflict, understandably neither can provide the definitive answer. Reliance on categorical platitudes is unavailing. Resolution instead depends on the hard task of judging—sifting through the details and determining whether the challenged program offends the Establishment Clause. Such judgment requires courts to *draw lines, sometimes quite fine, based on the particular facts of each case.*¹⁷⁹

Our own prepossessions?¹⁸⁰

While Souter defends the institutional principle and Justice Kennedy appears to erase all lines, O'Connor's favorite test is "endorsement." "This test asks whether a reasonable observer would perceive or interpret government sponsorship of private religious speech as, in effect, the government speaking, and sending a message of inclusion to co-religionists and exclusion to non-adherents."¹⁸¹ In the university setting, the endorsement test likely reverts to the status of the faculty. Do faculty in religion departments at state universities speak for the government so that through their speech they "send[] a message of inclusion to co-religionists and exclusion to non-adherents"?¹⁸²

Religion professors who look to the Court for guidance confront a new constitutional standard in the 1990s. Without the subject matter standard and the institutional principle, the most important remaining legal question for religion professors may be whether they speak for the government.

V. WHAT SHOULD RELIGION PROFESSORS TEACH?

A. *The Legal Standard*

We return to our hypothetical Professors One through Four. Does the First Amendment permit them to teach at a state university in 2000? The answer is not easy. The professor of religion presents a hard case,

179. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 847 (1995) (emphasis added).

180. See John Courtney Murray, *Law or Prepossessions?*, 14 LAW & CONTEMP. PROB. 23 (1949); see also *McCollum v. Board of Educ.*, 333 U.S. 203, 236 (1948) (Jackson, J., concurring).

181. Sullivan, *supra* note 158, at 252.

182. *Id.*

because he stands at the intersection of the Speech and Religion clauses of the First Amendment.

As we have seen, in *Rosenberger* the Supreme Court ruled that the Free Speech Clause of the First Amendment requires the University of Virginia to fund *Wide Awake*. The Court concluded that once the state creates a public forum, the First Amendment prohibits it from viewpoint discrimination. The majority opinion stated that in these circumstances religion is a viewpoint, not only a subject matter.¹⁸³ The Free Speech Clause prohibits the state from discriminating on the basis of viewpoint in the forum it has created.

Is a university religion department a public forum for First Amendment purposes?¹⁸⁴

Under *Rosenberger*, if the University does not exclude religion as a subject matter, it may not discriminate against religious editorial viewpoints.¹⁸⁵ Under *Schempp*, public schools may offer the subject of religion as part of their curriculum.¹⁸⁶ A state university funds religion as a subject matter in a department of religion. After *Rosenberger*, we may ask if the department of religion is like a student activity fund. A broad reading of *Rosenberger* suggests that the state violates the free speech rights of the individual professor if it prevents him from expressing a religious viewpoint in his classes. Thus *Rosenberger* can be used to support a faculty zoo of professors who proclaim their faith, a faculty of Professor Three's visitors, a faculty that includes Professors One through Four.

However, the First Amendment also requires that one examine "who is speaking."¹⁸⁷ Government speech is not the same as private speech; the "University's own favored message" is different from "the private speech of students."¹⁸⁸ When Professor Michael McConnell represented Ronald Rosenberger in oral argument before the Supreme Court, he noted that "even within the context of a State university, the State university is in some cases speaking itself, and in other cases it is

183. See *Rosenberger*, 515 U.S. at 831 ("Religion may be a vast area of inquiry, but it also provides, as it did here, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered.").

184. See *Bishop v. Aronov*, 926 F.2d 1066, 1071 (11th Cir. 1991) ("We disagree with the district court's conclusion that a university classroom is an open forum during instructional time.").

185. See *Rosenberger*, 515 U.S. at 831.

186. See, e.g., *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963).

187. Sullivan, *supra* note 158, at 251.

188. *Rosenberger*, 515 U.S. at 834.

providing a *platform* or a means for private speakers to be able to speak their own minds.”¹⁸⁹ Kathleen Sullivan also identifies the important First Amendment distinction between “when government speaks” and “when it serves as a *conduit* for the speech of others.”¹⁹⁰ In *Rosenberger*, when the university funded student publications it was providing a conduit or platform for the (private) speech of students. The government itself was not speaking. As the Court stated: “The program respects the critical difference ‘between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.’”¹⁹¹

Is the religious studies department in the state university government speech or the conduit or platform for the private speech of individual professors? There are enough differences between *Wide Awake* and the University of Virginia Department of Religious Studies to suggest that in the religion department the government speaks. One is student speech; the other is faculty speech. When the Court has permitted religious speech in universities, it has been for student-run, extracurricular activities, not for faculty speech in the curriculum. Student and faculty speech are different in the appearance that they give of state endorsement of their message. In the student cases, the Court has emphasized that no one believes that the state or the university speaks through its students. In *Widmar*,¹⁹² the Court stated that “an open forum in a public university does not confer any imprimatur of state approval on religious sects or practices.”¹⁹³ Thus there was no appearance of sponsorship of religion by the University of Missouri.¹⁹⁴ In *Rosenberger*, the University of Virginia required the student journals to include a written disclaimer that the organizations did not speak for the university.¹⁹⁵

The distance of faculty speech from government speech is not as apparent. Faculty who are hired and paid by the university, who speak

189. Transcript of Petitioners’ Oral Argument at 20, *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995), *reprinted in* Sullivan, *supra* note 158, at 255 n.58 (emphasis added).

190. *Id.* at 244 (emphasis added).

191. *Rosenberger*, 515 U.S. at 841 (quoting *Board of Educ. v. Mergens*, 496 U.S. 226, 250 (1990)).

192. *Widmar v. Vincent*, 454 U.S. 263 (1981).

193. *Id.* at 274.

194. *See id.* at 281 (Stevens, J., concurring).

195. *See Rosenberger*, 515 U.S. at 849.

in the state classroom, as part of the university's official curriculum, give more appearance of government sponsorship than students involved in associations outside the classroom. Numerous First Amendment cases have recognized that "[p]ublic education . . . is a form of government speech in which government is exercising a massive degree of content control."¹⁹⁶ Government speech in public education is limited by the requirements of the Establishment Clause. The Court has held that religious instruction may not be offered in the public schools¹⁹⁷ and has stated that the "force of the public school"¹⁹⁸ must not be used to promote religious teaching.

However, there are also persuasive arguments that the university professor does not speak for the government. Many of the cases that identify the government as speaker in the public schools involve the elementary and secondary school curricula. Different rules may apply to the university professor, because the Court has frequently distinguished university from elementary and secondary school education. In *Tilton*, the Court stated that "by their very nature, college and postgraduate courses tend to limit the opportunities for sectarian influence by virtue of their own internal disciplines."¹⁹⁹ In *Roemer*, the Court concluded that "[c]ollege students are less susceptible to religious indoctrination; college courses tend to entail an internal discipline that inherently limits the opportunities for sectarian influence; and a high degree of academic freedom tends to prevail at the college level."²⁰⁰

Both *Tilton* and *Roemer* permitted funding for Catholic schools, where the Court has often assumed that students are indoctrinated into the teachings of the church. If students in religious colleges and universities are able to avoid indoctrination, then state professors appear unlikely to coerce belief in a manner that triggers the Establishment Clause. College students can presumably distinguish their professors from the state government and from the university administration. Moreover, an individual professor can easily present disclaimers. Perhaps the university professor does not really speak for the government.

The professor's expression of religious viewpoints in the classroom may also find some support in the First Amendment significance of

196. Sullivan, *supra* note 158, at 255.

197. See, e.g., *McColum v. Board of Educ.*, 333 U.S. 203 (1948).

198. *Zorach v. Clauson*, 343 U.S. 306, 315 (1952).

199. *Tilton v. Richardson*, 403 U.S. 672, 686 (1971).

200. *Roemer v. Board of Pub. Works*, 426 U.S. 736, 750 (1976).

academic freedom. "Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment."²⁰¹ One of the reasons that nonpublic colleges and universities received funding in *Tilton* and *Roemer* was that the schools "subscribe[d] to a well-established set of principles of academic freedom."²⁰² The Supreme Court has recognized that the First Amendment protects professors' academic freedom. In *Epperson v. Arkansas*,²⁰³ the Court noted that the teacher had a right "to engage in any of the common occupations of life" and recognized the "freedom of teachers to teach."²⁰⁴ The Court has also stated that decisions about curricula and faculty are to be made by universities and not by courts. When it struck down the University of Missouri ban on student religious worship in *Widmar*, the Court did not "question the right of the University to make academic judgments as to how best to allocate scarce resources or 'to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.'"²⁰⁵ These are the "four essential freedoms" of the university.²⁰⁶ In his concurrence in *Widmar*, Justice Stevens emphasized that university curricular as well as extracurricular decisions are better made by academicians than by judges.²⁰⁷ We have seen that Justice Jackson doubted the ability of the courts to decide educational questions.

Thus "[i]t is much too late to argue that the State may impose upon the teachers in its schools any conditions that it chooses, however restrictive they may be of constitutional guarantees."²⁰⁸ However, in the

201. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978).

202. *Tilton*, 403 U.S. at 687.

203. 393 U.S. 97 (1968).

204. *Id.* at 105.

205. *Widmar v. Vincent*, 454 U.S. 263, 276 (1981) (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957)).

206. *Bakke*, 438 U.S. at 312 (quoting *Sweezy*, 354 U.S. at 263) (Frankfurter, J., concurring).

207. *See Widmar*, 454 U.S. at 270-79.

208. *Epperson*, 393 U.S. at 107 (citing *Keyishian v. Board of Regents*, 385 U.S. 589, 605-06 (1967)). *But see Epperson*, 393 U.S. at 113-14 (Black, J., concurring).

I am also not ready to hold that a person hired to teach school children takes with him into the classroom a constitutional right to teach sociological, economic, political, or religious subjects that the school's managers do not want discussed. . . . I question whether it is absolutely certain, as the Court's opinion indicates, that 'academic freedom' permits a teacher to breach his contractual agreement to teach only the subjects designated by the school authorities who hired him.

area of religion, it is much too early to tell how much academic freedom the First Amendment protects.

The First Amendment protects academic freedom. This simple proposition stands explicit or implicit in numerous judicial opinions, often proclaimed in fervid rhetoric. Attempts to understand the scope and foundation of a constitutional guarantee of academic freedom, however, generally result in paradox or confusion. The cases, shorn of panegyrics, are inconclusive, the promise of their rhetoric reproached by the ambiguous realities of academic life. The problems are fundamental: There has been no adequate analysis of what academic freedom the Constitution protects or of why it protects it. Lacking definition or guiding principle, the doctrine floats in the law, picking up decisions as a hull does barnacles.²⁰⁹

If in general academic freedom's range is untested or unknown, then its place in the contested area of religion is even more uncertain.²¹⁰

We have identified some of the constitutional concerns surrounding a Department of Religion in 2000: The professors' classes look unconstitutional because the government is speaking; the department is not a public forum; and the speakers are faculty and not students. On the other hand, the university setting is not coercive to students; students can distinguish government from faculty speech; the professors possess First Amendment academic freedom; and *Rosenberger* can be read quite broadly to protect *all* the professors from discrimination against their religious viewpoints.

These considerations do not exhaust the available constitutional standards. Sometimes the Court decides Establishment Clause cases according to the *Lemon* test.²¹¹ The *Lemon* case involved aid to nonpublic schools; its test is better suited to hypotheticals set in private rather than public schools. The Court did not apply *Lemon* in *Rosenberger*, but did use it to uphold New York aid to *religious* schools in *Agostini*.²¹² "Under the *Lemon* test, the government violates the establishment clause if the government's primary purpose is to advance religion, or if the principal effect is to aid or inhibit religion, or if there is excessive government entanglement with religion."²¹³

Id.

209. J. Peter Byrne, *Academic Freedom: A "Special Concern Of The First Amendment,"* 99 YALE L.J. 251, 252-53 (1989).

210. See generally *Burnham v. Ianni*, 119 F.3d 668 (8th Cir. 1997).

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

212. See *Agostini v. Felton*, 521 U.S. 203 (1997).

213. CHEMERINSKY, *supra* note 111, at 969; see also *Lemon*, 403 U.S. at 612-13.

Under *Lemon*, the Court could easily rule that state aid to *private* university religion departments violates all three prongs. The test is harder to apply to the religion department in the state university. Indeed, it is not clear how the Court itself applies the test. As the petitioners' (victorious) lawyers in *Agostini* argued:

The fact is that although the three-part *Lemon* test has not been formally repudiated by the Court as a whole, it appears to have been abandoned—at least as a unitary test for determining Establishment Clause violations. Cases that might have been decided through application of the test have instead been decided based on notions of neutrality, endorsement, or coercion.²¹⁴

Erwin Chemerinsky offers a similar summary of the Court's Establishment Clause jurisprudence:

There are three major competing approaches to the establishment clause [strict separation, neutrality theory, accommodation]. Each has adherents on the Court and each is supported by a body of scholarly literature. The theory chosen determines the approach used and often the result.²¹⁵

On a very strict theory of separation, any government funding of religion, including religion departments, is prohibited. Even Professor Two might not receive funding because he teaches religion! Professor Two and the department with Professor Three's visitors might pass the neutrality test, if all religions are equally represented. However, monitoring the zoo's neutrality might unduly entangle the government with religion. If the neutrality standard instead applies to the individual professor, the zoo is unconstitutional, as are the courses of Professors One and Four, for individual professors are probably endorsing or advocating one religion. Yet funding religion departments is a good accommodation of religion; moreover the court's view of university

214. Petitioners' Brief for a Writ of Certiorari, *Agostini v. Felton* (No. 96-552), *see also* Brief Amicus Curiae of Pacific Legal Foundation in Support of Petitioners, On Writ of Certiorari, *Agostini v. Felton* (No. 96-552).

Instead of applying the *Lemon* analysis in cases raising the Establishment Clause, this Court has instead asked whether the governmental action is neutral towards religion, whether the government's action coerces anyone to support or participate in a religious exercise, or whether the government's action could be viewed as an endorsement of a particular religious belief or message.

Id.

215. CHEMERINSKY, *supra* note 111, at 977.

students suggests that the professor of religion is not coercive. “*The theory chosen determines the approach used and often the result.*”²¹⁶

The cases’ focus on the government’s speech and funding is familiar to, even adequate for, constitutional scholars, who are accustomed to analyzing questions of state action and public and private institutions.²¹⁷ Yet it is an oddity to religion professors. From their perspective, such a standard assigns undue emphasis to the public/private distinction, a distinction, as we have seen, that has not been significant to the development of the academic study of religion. The academic discussions crossed institutional lines. Many religious studies scholars think that they have achieved *neutrality* by rejecting theology. *Endorsement* may be meaningless in the actual setting of the religion department, where it may not occur to faculty that they speak for the government. Whither academic freedom (and academic judgment about disciplines) if the most important question left within the academic study of religion after *Rosenberger* and *Agostini* is whether faculty speak for the government? If the Court’s focus is on government speech, in 2000 the religion professors may prefer an academic to a constitutional standard.

B. The Academic Standard

As we have seen, the religion professors resolved these dilemmas in the 1960s by deciding that the Establishment Clause forbids the teaching of theology in state departments of religion. They concluded that Professors One and Four may not teach in state universities and that a zoo composed of the believing visitors is also unconstitutional. They were wrong about Professor Four. *Schempp* never barred theology from state universities.

In 1976, in his report on university divinity schools, Yale professor George Lindbeck provided a typology of theology and religious studies that identified “four enterprises” for the student of religion.

216. *Id.* (emphasis added).

217. *But see* Mark Tushnet, *Public and Private Education: Is There a Constitutional Difference?*, 1991 U. CHI. LEGAL F. 43, 43-44 (1991).

[T]he federal Constitution does not impose different constraints on public and private schools. . . . [T]he distinction between public and private schools that is part of the standard conceptual apparatus of constitutional lawyers turns out to be substantially thinner than many would find comfortable.

Id.

First, religion may be approached either particularistically or generically: primary attention can be given either to religions in their specificity, or to features common to all religions. Second, one can pursue each of these approaches in either a theological or a religious-studies mode. "Theology," . . . is concerned with the *transmission and development of religious outlooks*, while "religious studies" refers to nontheological descriptive and explanatory investigations.²¹⁸

In this classification, the two types of religious studies (particular and generic) present no constitutional problems; both are "descriptive" and "explanatory" and constitute the classic teaching *about* religion.²¹⁹ One may offer a religious studies course on, e.g., Christianity or the phenomenology of religion. Professor Two combines both religious studies features in his course. He describes particular religious traditions and then seeks features common to all religions—both in the religious studies mode. We can interpret Professor Three in the same way, *if* he uses his visitors to give descriptions of particular religious traditions and then tries to understand the generic phenomenon of

218. GEORGE LINDBECK, UNIVERSITY DIVINITY SCHOOLS: A REPORT ON ECCLESIASTICALLY INDEPENDENT THEOLOGICAL EDUCATION 1 (1976) (emphasis added); see also THIEMANN, *supra* note 86, at 145.

Christian theology does not have contrasting or contrary aims; it is rather a particular instance of religious studies' generic concern with the meaning and truth of religion. Christian theology, the appropriate form of reflection within the Christian religion, poses "the reflective question as to the meaning and truth of the Christian witness as an answer to our own question of faith as human beings." Theology and religious studies are thus bound together by their common constitutive concern "to ask about the meaning and truth of religion" and share as their common constitutive experience "our basic faith in the ultimate worth of life." Both fields appeal to general criteria of meaning and truth, because both seek to address a "universal question" of human existence. Are these deep similarities sufficient to obliterate all distinctions between theology and religious studies? No, answers Ogden, because the distinctive attention given by theology to the witness of the Christian faith "is not in the least among the necessary conditions of the possibility of the field of religious studies." The constitutive question of Christian theology concerning the meaning and truth of the Christian faith is among the questions properly asked by religious studies but is not that field's constitutive question. Thus the distinction between theology and religious studies remains.

Id. (quoting Schubert Ogden, *Theology and Religious Studies: Their Difference and the Difference It Makes*, in ON THEOLOGY 102-20 (1986)).

219. See LINDBECK, *supra* note 218, at 1-2 ("History of religions and linguistic-analytic philosophical theology, for example, are typically particularistic, while phenomenological, sociological, psychological, anthropological and metaphysical theories of religion are generally, though not always, generic in their approach.").

religion.²²⁰ Given the suspicion of theology, however, in a religious studies department Professor Three would have to be very careful to show that he was not endorsing the belief of the visitors. Moreover, as a practical matter it is easier to find readings about than representatives of *all religions*.

The third category—generic theology—should not present a constitutional problem. Lindbeck describes this third approach as “theological work in reference to religion generically considered, that is, *without attachment to any specific heritage*. This involves exploring and developing new outlooks oriented toward human religiousness in general.” Professor Three’s course may also be categorized this way—as long as he is not attached to any one tradition. With diverse speakers, the course has no apparent attachment to a particular tradition, even though the subject is committed religious belief. If funding of generic theology were barred by the Establishment Clause, then Justice Kennedy would be correct to complain about a First Amendment that censors too much religion. To bar generic theology from the university might be an establishment of non-belief. Justices Jackson and Brennan envisioned that students would learn about human religiousness. Moreover, even the most secular religion scholar can acknowledge that part of religion’s history is *committed* religious belief.²²¹ Generic theology is an important dimension of the phenomenology of religion; as an academic matter, the study of religion is incomplete if it is ignored.

The legal analysis of the fourth category—particular theology—is more difficult; it is the theology that religion scholars have typically excluded from state universities. According to Lindbeck, it transmits

220. See Jonathan Z. Smith, *Are Theological and Religious Studies Compatible?*, 26 BULLETIN/CSSR 60 (Sept. 1997) (“In what I freely acknowledge to be a necessarily imperializing move, theology is one appropriate object of study for religious studies. From the perspective of the academic study of religion, theology is a datum, the theologian is a native informant.”); Smart, *supra* note 50, at 66 (“I once told a group of mainly Barthian theologians what I thought of them; I said: ‘You are wonderful phenomena.’ They were, of course, not pleased.”).

221. See LINDBECK, *supra* note 140, at 46.

It is not the business of a nontheological theory of religion to argue for or against the superiority of any one faith, but it does have the job, if it is to be religiously useful, of allowing the possibility of such a superiority. It must not, in other words, exclude the claims religions make about themselves, and it must supply some interpretation of what these claims mean. If it cannot do this, it is at most of interest to purely scholarly students of religion and cannot be used by theologians and others who are religiously concerned.

Id.

and develops particular traditions;²²² it is “*intratextual* interpretation of religion.”²²³ Its insider’s commitment to a particular tradition renders it constitutionally suspect, even after *Rosenberger* and *Agostini*. “Although Establishment Clause jurisprudence is characterized by few absolutes, the Clause does absolutely prohibit government-financed or government-sponsored *indoctrination* into the beliefs of a *particular* religious faith.”²²⁴

One does not have to evangelize or indoctrinate, however, in order to transmit and develop a religious tradition (or any intellectual tradition). In my hypotheticals, Professor Four transmits and develops a tradition. As the pre-eminent scholar of religious studies, Jacob Neusner reminds us, “[t]he nature of religions is to be traditional,” and within traditions one must interpret and evaluate texts.²²⁵ Neusner argues that

[i]t is not merely an evasion but deliberate fraud to claim that only people outside of a tradition, who cannot be suspected of advocacy thereof, are capable of scholarship and therefore of truly academic teaching about said tradition.²²⁶

Academic teaching about theology does not have to be indoctrination into particular religious beliefs. Neusner explains this intellectual process as it works in the case of Judaism:

When philosophers move from the descriptive to the normative task, they do not abandon philosophy but in a fresh way define their work within philosophy. For they are always philosophers, but shift to philosophy in a different mode. The historian or theologian who, through the criticism of the

222. LINDBECK, *supra* note 218, at 1.

223. LINDBECK, *supra* note 140, at 124 (emphasis added).

224. *Agostini v. Felton*, 521 U.S. 203, 219 (1997) (emphasis added).

225. Neusner, *supra* note †, at 16.

226. *Id.* at 3; see also Gordon D. Kaufman, *Critical Theology as a University Discipline*, in *THEOLOGY AND THE UNIVERSITY: ESSAYS IN HONOR OF JOHN B. COBB, JR.* 35, 36 (David Ray Griffin & Joseph C. Hough, Jr. eds., 1991).

[C]ritical theology does have important contributions to make to university studies; that critical theology should, therefore, be recognized as a legitimate discipline even in entirely secular institutions; and that it would be desirable for persons practicing this discipline to be appointed to full-time positions in departments of religious studies or even in independent departments of theology. It is important for Christian (and other) theologians to address themselves more self-consciously than has often been the case in the past to the cultivation and development of the critical potential of theological symbols and modes of reflection.

Id.

thought of important figures out of the past, undertakes to give expression to an autonomous and fresh theological position, remains in the same continuum of theological study, but at a different point on that continuum. That historian of theology expresses an educated judgment not about but within theology. *The same perspective, the same informed, experienced intellect prevails.* And so too, when a scholar in the academic study of religion moves from the descriptive to the interpretive task, and when, further, that scholar presents interpretation as a legitimate position within the religion under discussion, that 'doing of religion' remains a dimension of the study of religion. The reason, as in the case of philosophy and theology, is that *the method and the intellect remain constant*, while the purpose and frame of discourse shift. The method of the study of religion yields descriptive results, but it also produces ideas relevant to the life of the faith or tradition that is studied. When, therefore, a scholar who studies about religion takes the step beyond the study, that *scholar remains a person of learning, critical judgment, and substantial intellectual experiences and attainment: a scholar.* So we may invert the received program, faith seeking understanding, to a contemporary plan: understanding seeking faith.²²⁷

Neusner's argument erodes the academic claim that religion professors must not be insiders, committed or normative. Neusner is consistent with Lindbeck and Welch: in theological faculties "there are not creedal or religious tests for . . . faculty or students."²²⁸ The true test

227. Jacob Neusner, *Understanding Seeking Faith: The Case of Judaism*, 71 SOUNDINGS 329, 329 (1988) (emphasis added); see also Kaufman, *supra* note 226.

Theology, as "faith seeking understanding," may be seen as an inquiry into the role of faith-commitments in human existence, an inquiry into the significance of believing (or "faithing") in human life. In this reading, "faith" is taken in a generic sense (rather than the particular sense just mentioned), as pointing to fundamental features of human existence: that men and women live out of and on the basis of their trust in and loyalty to what they take to be most meaningful, precious, and important in life; that human lives are always oriented by some (perhaps implicit) "center of value" . . . and that it is out of underlying faith-commitments such as these that humans act and live in face of the unknown future into which they must inexorably move.

Id.

228. LINDBECK, *supra* note 218, at 6-7. This academic test was one of the three features of theology that Lindbeck argued make it an appropriate subject for state universities. First is its affirmation of freedom.

To most theological educators [freedom] is a *sine qua non* of the intellectually responsible transmission of a religious tradition, and thus part of the essence of what they mean by theological education. This insistence on the autonomy of the scholarly study of religion explains why it was *largely within university theological faculties that religious studies as we now know them first developed* and still continue to prosper.

Second was the academic requirement. Lindbeck's third point was that universities may "sponsor theological education in as many religious traditions as they wish."

is not ecclesial, but academic, i.e., the quality of scholarship.²²⁹ Yet the academic standard does not proscribe creedal commitment. Creedal commitment is not a requirement for scholarship, but it need not prevent good scholarship within a tradition.

Lindbeck also commented that universities may “sponsor theological education in as many religious traditions as they wish.” He concluded that “even public universities can legitimately participate in theological education without violating the principle that no religion should be given legally preferential treatment.”²³⁰ Lindbeck’s academic statement is an important constitutional point: a state university department of religion may not favor one theology over another. “There should be, e.g., . . . no discrimination against students on religious grounds; no religious conditions on employment or student status; no compulsory religious services or courses; and *equality of opportunity* (i.e., *all religions should be taught*).”²³¹

229. McLean and Kimber’s study of state universities had captured the dilemma of creedal commitment by theologians; see McLean & Kimber, *supra* note 62, at 5.

The Achille’s [sic] heel of this approach [is] in the phrase “without regard for creedal commitment.” Can religion be so taught? The answer is a “yes” and a “no.” Competent scholars can and do teach the history and dogma of various religious traditions from a relatively objective perspective, just as various philosophical, political or psychological systems and traditions are or may be so taught. . . . Those, however, who hold that at present these conditions cannot be met believe that the answer lies in other approaches.

Id.

230. LINDBECK, *supra* note 218, at 8.

231. Kauper, *supra* note 67, at 92 (emphasis added).

The teaching of religion in state universities is constitutional as long as it meets certain conditions. There should be, e.g., no discrimination against students on religious grounds; no religious conditions on employment or student status; no compulsory religious services or courses; and equality of opportunity (i.e., all religions should be taught). [Moreover,] the distinction should be observed between the teaching of religion to promote knowledge and understanding and that type aimed deliberately at indoctrination and commitment to religious faith. The teaching of religious ideas in an objective and fair way is appropriately a state university function. To win converts and seek commitment is outside its function and violates the separation principle.

Id.

While the major religious traditions generally receive adequate treatment in the curricula of Departments of Religion, it should be noted that this is not always true of the minority faiths. Though overt prejudice is rarely the cause, the lesser sects do run the risk of having their viewpoint overlooked or minimized or distorted by inexperienced or unsympathetic instructors.

GORDIS ET AL., *supra* note 134, at 29.

VI. CONCLUSION

The religion scholars drew the constitutional/academic line in the wrong place when they excluded Professor Four from the academy because of his normative arguments within a tradition. What about Professor One and the individual professors in the zoo? Neusner once again is instructive when he contrasts the intellectual environment of the classroom with religious practice:

We do not pray in classrooms. We do not advocate that students adopt belief in God, let alone specific theological positions. Our lectern is not confused with a pulpit. We do not preach. We teach. We do not teach religion, moreover, but we teach *about* religion, a distinction absolutely fundamental to our work. . . .

The academic world is made of words, not supernatural experience. We do not sing, we do not pray, we do not meditate, we do not repeat sacred formulas, we do not fast, burn incense, dance or otherwise move or control our bodies and attain visions. *All we do is talk and think.*²³²

Professor One advocates belief in God when he urges the students to conclude that Jesus Christ is our Lord and Savior. Professor Three will probably have a mix of advocates and non-advocates when he

232. Neusner, *supra* note †, at 2, 5 (emphasis added); see also Schubert M. Ogden, *Theology in the University: The Question of Integrity*, in *THEOLOGY AND THE UNIVERSITY: ESSAYS IN HONOR OF JOHN B. COBB, JR.* 67, 78 (David Ray Griffin & Joseph C. Hough, Jr. eds., 1991).

My contention is that when Christian theology is understood and practiced as it should be, it is not just another form of bearing Christian witness, which is rightly subject to the teaching office of the church, but, rather, a distinctive form of essentially the same process of critical reflection embodied in one way or another in all the other academic fields and disciplines.

Id.

Religion is an objective study. "[S]uch study is not carried on for the purposes of evangelism: it is not aimed at persuading students to adopt any religious or ethical position or posture nor is it intended to 'nourish faith.'" Welch, *supra* note 76, at 9-11. Professors are not "intended to encourage religion or to cultivate morals." *Id.* The study of religion "must not be defined as the care of souls or as catechetical instruction in the faith." *Id.* The student does not learn faith in the curriculum; "the task is not one of reduplicating in the learner a religious experience or of transmitting an esoteric understanding or truth available only to the 'insider.'" *Id.*

chooses believers who proclaim their faith; so too, for a departmental zoo.²³³

From the earliest days of *Religionswissenschaft*, the fundamental professional commitment of the religion professors has been to distinguish their academic enterprise from religious practice, core religious activities, and evangelism. The turmoil about the identity of religious studies has focused on the Professor Four-style theologians in the academy. Some religious studies professors excluded Professor Four because they confused his normative arguments about a tradition with proselyting. The religion professors may continue to agree about Professor One; his enterprise is not academic and so remains a questionable enterprise in the university setting. Professor Four instructs but Professor One proselytizes. Under a revised academic standard, the professors may continue to distinguish between the scholar's study and the evangelist's mission station, the seminar room and the pulpit, teaching and preaching, i.e., between religious studies/theology and evangelism.²³⁴

What would happen if the academic standard became the constitutional standard? In the professors' view, the First Amendment also permits distinctions between Professor Four and Professor One. Although evangelism is a subject whose funding is prohibited by the Establishment Clause, theology is a viewpoint protected by the Speech Clause of the First Amendment.²³⁵

Identifying theology as the viewpoint clarifies that Plato, Sartre et al. would not have been silenced by the University of Virginia regulation. Once teachers begin to evangelize, the Establishment Clause

233. See Robert R. Hann, *Commitment, Theology, and the Dilemma of Religious Studies at the State University*, 19/2 HORIZONS 263, 270 (1992).

"Theology" meant the received doctrines of a particular denomination, and "Religious Studies" was catechesis, the transmission of that faith to the next generation. Theology understood in this way was properly excluded from the practice of modern Religious Studies: it was, as its critics knew, often intellectually uncritical and, if attempted in a state university, it would have violated the most elementary notions of separation between church and state.

Id.

234. See MILNER BALL, *THE WORD AND THE LAW* 2 (1993) ("Instead of arguing that theology is relevant to law, I shall do theology and either perform its relevance or fail to do so. I am clearly eager to engage others in conversation about these matters, but, equally clearly, I do not intend to proselytize or give religious instruction.").

235. See Hann, *supra* note 233, at 270 (writing of "an understanding of theology as the articulation of a comprehensive worldview, a worldview with no rights over other worldviews, but one which claims for itself the same rights which other worldviews and their adherents enjoy in the university.").

should prohibit the state from subsidizing their speech. Theological and philosophical viewpoints, however, are protected speech under the First Amendment. The Marxist may select Mao or Lenin; the philosopher may reflect on the continuity of Rawls (or Kierkegaard) with Kant; the theologian may prefer Barth to Rahner or Pelagius to Augustine.²³⁶ Viewpoint discrimination occurs when one censors the theologian; Establishment Clause violations arise when the state funds the evangelist.

"To what extent, and at what points in the curriculum, religious materials should be cited are matters which the courts ought to entrust very largely to the experienced officials who superintend our Nation's public schools. *They are experts in such matters, and we are not.*"²³⁷ The religion experts know that in the 1990s, the institutional location does not determine the content of the instruction. Their professional expertise is to distinguish between proselyting and imparting knowledge. Accordingly, scholars in religion would be wise this time to ignore the Court's *Rosenberger* dicta, and to demonstrate that, along with Justice Souter and Professor Smith, "in the scholar's study" they remain capable of distinguishing between "religious speech" and "speech about religion."

236. See RONALD M. GREEN, *KIERKEGAARD AND KANT: THE HIDDEN DEBT* (1992); see also Delwin Brown, *Academic Theology and Religious Studies*, 26 BULLETIN/CSSR 64, 65 (Sept. 1997).

I mean that the humanities and the social sciences in the academy are replete with investigations and evaluations of particular communal beliefs and practices that are fundamentally analogous to what I have called academic theology. To illustrate I could point to the work of a political scientist examining the claims of the Black Panthers, or an historian examining the impact of cultural pluralism on the idea of America. Both examine ideas in context, both trace the relationship of the ideas to other discursive and non-discursive features of the context, both may facilitate the assessment of those rooted ideas in terms of any number of norms both internal and external to the community, and both allow their interpretations and assessments to be examined and criticized not only within the community they are studying but also, and most especially, within their own scholarly community.

Id.

Christian theology is basically a denominational and community activity: it is not a secular activity. It is imperfectly scholarship. Its analogues are Marxist philosophy in Moscow in the old days, some ideological philosophy (in fact most Western philosophy, notably analytic philosophy, expounding a version of scientific humanism), Islamic theology, Black studies, and Chicano studies (within them, often not well displayed, a political core. Religious Studies, in principle, is impartial and given to informed empathy.)

Smart, *supra* note 50, at 67.

237. *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 300 (1963) (Brennan, J., concurring) (emphasis added).

