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Through the Front Door

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THROUGH THE FRONT DOOR

By Robert R. Wilson

When American higher education is state supported, the idea appears to dominate the administrative decisions of those who guide many of our colleges and universities that religious courses in those institutions would, as a matter of law, violate the constitutional principal popularly called "separation of Church and State." This idea precipitates one of three general courses of action.[1] The "safest" course of action is total abstinence from offering any courses with even the slightest hint of religious content. The second course, and probably the one most commonly followed, is to limit the religious content of courses to that which can be classified as history, literature or philosophy. The third and most circuitous route is the one in current use at the University of Wyoming and at other tax supported institutions. Under this plan, courses are taught off the campus by teachers who are paid by their respective religious groups. These teachers must meet qualifications laid down by University officials. No University facilities are used. The courses are announced in an insert to the University Bulletin, and under the present system students may enroll in them as part of the regular University registration. In the past the actual process at registration was conducted by non-University personnel.[2] The University later "accepts" the credits earned as "transfer credits", as though earned at some other institution.[3] There is a low ceiling on the number of credits which will be accepted in this way. The student gets credit at the state supported school for a limited number of courses in religion, and the University avoids the possibility of violating constitution or statute.[4]

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1. Bean, *Historical Developments Affecting the Place of Religion in the State University*, 50 Religious Education 275 (1955).
2. Conversation with Mr. Grover, Assistant Registrar, University of Wyoming, March 3, 1965.
3. 1965-66 University of Wyoming Bulletin 33.
4. In Wyoming the following constitutional and statutory provisions are pertinent:
   Article I, § 19: No money of the state shall ever be given or appropriated to any sectarian or religious society.
   Article III, § 36: No appropriation shall be made for charitable, industrial, educational or benevolent purpose to any person, corporation or community not under the absolute control of the state, nor to any denominational or sectarian institution or corporation.
   Article VII, § 8: . . . nor shall any public school fund ever be used to support or assist any private school, or any school, academy, seminary, college or other institution of learning controlled by any church or sectarian organization or religious denomination whatever.
   Article VIII, § 12: No sectarian instruction, qualifications or tests shall be imparted, exacted, or applied or in any manner tolerated in the schools of any grade or character controlled by the state, nor shall attendance be required at any religious service therein, *nor shall any sectarian tenets or doctrines be taught* or favored in any public school or institution that may be established under this constitution. (Emphasis supplied).
   Article XXI, § 28: The legislature shall make laws for the establishment and maintenance of systems of public schools which shall be open to all children of the state and free from sectarian control.
   Wyo. Stats. § 21-353 (1957): . . . The board of trustees shall prescribe the studies to be pursued and the text books to be used, and determine the qualifications of

The wide-spread existence of this third system, or device, testifies to the demand for such courses in religion. It is the purpose of this note to explore the legal necessity of taking such a circuitous route to achieve the end result; would it be legally permissible to come in *through the front door*, by the frank establishment of Departments of Religion at tax-supported colleges and universities?

While (as stated *supra*) some state colleges and universities have either refrained altogether from offering courses in religious subjects, or have carefully limited the content of the courses which are offered, other state institutions of higher learning offer a wide variety of elective courses in religious subjects as part of the regular curriculum.[5] For example, religious courses offered at the University of California include English Bible as Literature, Great Books of Hebrew Literature, Philosophy of Religion, Sociology of Religion (theory, structure, relation to individual life), Religious Doctrines and Social Conduct, Philosophy of Religion (nature of religion, relations to morality and institutions, existence of God, kinds of religious knowledge, concepts of death, survival, etc., relation of church and state).[6] Some state schools have separate Departments of Religion and offer degrees in Religion[7], while the State University of Iowa has a School of Religion and also offers a degree in religion.[8] In all of these schools, the religion courses are taught in state owned facilities by regular members of the faculty who are paid with state funds. In many cases these states have constitutional and statutory provisions essentially the same, if not identical to those of the states in which no or limited religious courses are offered.[9] It should be recognized that the particular approach followed in the various states obviously depends upon many factors, only one of which is the state of the law in the particular jurisdiction.

With respect to federal law, the federal constitutional provision primarily applicable is that contained in the First Amendment: "Congress shall make

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applicants for admission to the various courses of study; but no institution either sectarian in religion or partisan in politics, shall ever be allowed in any department of the University, and no sectarian or partisan test shall ever be exercised or allowed in the appointment of trustees, or in the election or removal of professors, teachers, or other officers of the University, or in the admission of students thereto, or for any purpose whatsoever.

5. *Supra*, Note 1 (Ind., Ky. & Calif.)
6. 1964-65 Univ. of Calif.—Berkeley Bulletin, 393, 479-880, 566.
7. *Supra*, Note 1 (Fla., Ga., Mich., & Ore.); White, *Religion and University Education*, Religion and the State University 89, 99-100 (1958); Michigan and Oregon offer degrees in Religion: 1963-64 Mich. St. Univ. Catalog 125; 1963-64 Univ. of Ore. Bulletin 68-69 & 207.
8. 1964 State University of Iowa Catalog, 85 & 185.
9. *Cf.* Wyoming Constitutional Provisions, Note 4, *supra*, with California Constitution, Art. IV, Section 30: Art. IX, § 8 ". . . . No public money shall be appropriated to support any sectarian school . . . nor shall any sectarian or denominational doctrine be taught . . ."; Cal. Educ. Code § 22605; Indiana Constitution, Art. 10, Michigan Const. Art. 2, Oregon Const., Art. I, § 5; Iowa Const., § 263.1; "The University of Iowa shall never be under the control of any religious denomination"; Iowa Stat. § 348.8: "Public money shall not be appropriated, given or loaned . . . to or in favor of any institution, school, association or object which is under . . . sectarian management or control."

no law respecting an establishment of religion, or prohibiting the free exercise thereof." It is well settled that this guarantee is binding on the states.[10] The meaning of this language with respect to the question of religion in state supported schools has been considered by the U.S. Supreme Court only a dozen or so times.[11] These cases have involved questions, *inter alia*, of releasing

10. Swart v. Burlington School Dist., 167 A.2d 514 (Vt. 1961) cert. den., 366 U.S. 925 (1961); Cantwell v. State of Connecticut, 310 U.S. 296, 60 S. Ct. 900, 84 L. Ed. 1213, A.L.R., 1352 1356 (1940).

11. Pierce v. Society of Sisters, 268 U.S. 510 (1925), holding that Oregon could not constitutionally compel all children to go to public schools, and that parents may send their children to any private (including religious) school meeting prescribed standards.

Cochranv . Louisiana, 281 U.S. 370 (1930), sustaining a Louisiana statute enabling school boards to provide secular books to children attending religious schools as well as those attending public schools.

Washington Ex Rel. Clitherd v. Showalter, 284 U.S. 573 (1931). The Court refused to consider an appeal from a Washington state court ruling which sustained the exclusion of the Bible from the public schools, on the ground that no substantial federal question was raised. ("votes . . . to dismiss for want of a federal question . . . are votes on the merits of the case . . . ." Eaton v. Price, 360 U.S. 246 (1959).

Hamilton v. Regents, 293 U.S. 245 (1934), holding that a state university in California was permitted to make military training mandatory for all students, even those claiming exemption for religious convictions.

Minersville v. Gobitis, 310 U.S. 586 (1940), holding a Pennsylvania school board's compulsory flag salute requirement, objected to on ground of religious scruples, not unconstitutional.

Board of Educ. v. Barnette, 319 U.S. 624 (1947), holding West Virginia's compulsory flag salute requirement constitutional as a violation of First Amendment rights including freedom of religious worship; reversing Minersville v. Gobitis.

Everson v. Board of Educ., 330 U.S. 1 (1947), holding that New Jersey statute authorizing school boards to reimburse parents for the cost of their children's bus transportation, on commercial bus lines, to religious as well as public schools, was not unconstitutional.

McCollum v. Board of Educ., 333 U.S. 203 (1948), finding an Illinois "released time" program to be an unconstitutional use of school premises and school supervision.

Donner v. New York, 342 U.S. 884 (1951), dismissing for want of a substantial federal question an appeal by a parent from a conviction under New York's compulsory school attendance law where parental religious scruples precluded participation by their children in secular schools and required attendance at private schools providing *only* religious education.

Doremus V. Board of Educ., 342 U.S. 429 (1952), refusing to take jurisdiction (on ground of lack of standing to sue) of an appeal from a New Jersey decision sustaining as constitutional a statute requiring Bible reading without comment in the public schools.

Zorach v. Clauson, 343 U.S. 306 (1953), holding a New York program of released time conducted off school premises, and with a minimum of school pressure for pupil participation, not unconstitutional.

Snyder v. Town of Newtown, 365 U.S. 299 (1961), dismissing for want of a substantial federal question, an appeal from a Connecticut decision that public transportation for children attending religious school does not promote an establishment of religion in violation of the First Amendment.

Engle v. Vitale, 370 U.S. 421 (1962), holding that the recitation of a non-denominational prayer composed by the New York Board of Regents and required to be recited at the beginning of each day, is an unconstitutional "establishment of religion", even though participation was not compulsory.

School Dist. v. Schempp, 374 U.S. 203 (1963), holding that the reading of ten verses from the Bible to senior high school students, without comment, at the opening of each day, constitutes an unconstitutional "establishment of religion".

children from regular classes for the purpose of attending classes in religion,[12] reading the Bible, without comment, in class,[13] and the saying of a non-denominational prayer at the beginning of the day.[14] All of these cases have involved children in the first twelve grades; in none has the precise question of religion taught as an elective subject in a state college or university been before the court.

From the language of the Court in its most recent decision involving Bible reading, an indication of the present Court's feeling toward the value of courses involving religion may be obtained:

> In addition it might well be said 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. It certainly may be said that the Bible is worthy of study for its literary and historical qualities. *Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education may not be effected consistent with the First amendment.*[15]
> (Emphasis supplied)

And Mr. Justice Brennan, in a concurring opinion, said:

> The 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. Indeed, whether or not the Bible is involved it would be impossible to teach meaningfully many subjects in the social sciences or the humanities without some mention of religion. To what extent and at what point in the curriculum religious materials should be cited are matters which the courts ought entrust very largely to the experienced officials who superintend our Nation's public schools.[16]

Mr. Justice Goldberg, also concurring, said:

> Neither government nor this court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God and that many of our legal political and personal values derive historically from religious teachings. Government must inevitably take cognizance of the existence of religion and, indeed, under certain circumstances the First Amendment may require that it do so. And it seems clear to me from the opinions in the present and past cases that the court would recognize the propriety of providing military chaplains and of teaching *about* religion, as distinguished from the teaching *of* religion in the public schools.[17]

From this language, and from the general tenor of the few other U.S. Supreme Court cases in the public school area, it appears reasonably clear that the offering of elective courses *about* religion in a state's higher educa-

12. McCollum v. Board of Educ., Zorach v. Clauson, *supra*, Note 11.
13. School Dist. v. Schempp, *supra*, Note 11.
14. Engle v. Vitale, *supra*, Note 11.
15. School Dist. v. Schempp, *supra*, Note 11, at 225.
16. *Id.* at 300.
17. *Id* at 306.

tional institutions would not in any way amount to an establishment of religion by the state. From the language of these opinions (and admittedly much of it is dicta) or from concurring opinions, three basic limitations appear to be imposed by the federal constitution:

(1) Such instruction as there is must be on an elective basis. A student cannot be compelled to study religion, or even study "about" religion.

(2) The program must not be devotional in character. It must present not a worship, but an educational experience.

(3) The instruction must seek to promote understanding, not commitment. It must aim at education, as contrasted with indoctrination.

> "The function of the college teaching of religion is not to propogate faith but to enlighten it where it exists and to create an understanding of the faith of others in those who have none of their own, or who have a different faith."[18]

The authorities who have written on this subject generally agree that beyond these three limitations, the federal constitution poses no serious legal problem with respect to the offering of elective courses in religious subjects at the college level.[19] The apparently unchallenged existence of several De partments of Religion and a School of Religion in state supported schools lends at least some support to this conclusion.

If the federal constitution and the cases construing it present no legal obstacle, what is the law of Wyoming, constitutional, statutory, and judge-made?

The Wyoming Constitution contains several provisions with respect to education and religion. (See footnote 4, *supra.*) Wyoming also has a statutory provision regarding religion in the state university:

> Wyo States § 21-353 (1957) . . . The board of trustees shall prescribe the studies to be pursued and the text books to be used, and determine the qualifications of applicants for admission to the various courses of study; *but no instruction either sectarian in religion or partisan in politics, shall ever be allowed in any department of the university*, and no sectarian or partisan test shall ever be exercised or allowed in the appointment of trustees, or in the election or removal of professors, teachers, or other officers of the university, or in the admission of students thereto, or for any purpose whatsoever. (Emphasis supplied.)

What could be the legal effect of these Wyoming constitutional and statutory provisions upon the establishment of a Department of Religion within the state university? Our Supreme Court has never been confronted with the

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18. Quoted in Katz, Religion and American Constitutions 52 (1964).
19. Louisell and Jackson, *Religion, Theology, and Public Higher Education*, 50 Calif. L. Rev. 751 (1962); Casad, *On Teaching Religion in the public Schools*, 12 Kan. L. Rev. 405 (1964); Griswold, *Absolute in the Dark*, 8 Utah L. Rev. 167 (1963); Bean, *supra*, Note 1; Katz, *supra*, Note 18.

issue, and this research produced no decisions of significant value by any other American court respecting a program of religious or theological study at a state supported college or university.

In 1945, the Attorney General of Wyoming issued an opinion considering a released-time plan whereby high school students would be permitted to receive religious instruction during school hours. The religious study under the contemplated plan would have been under the guidance of ministers or members of the church providing the study or instruction, and Bible study or instruction would conform to the dogmas, creeds, opinions and interpretations of those who supervised the instruction. The Attorney General expressed the opinion that:

> This then constitutes instruction in, or teaching of sectarian tenets and doctrines to those who take advantage of the plan to attend the church of their choice during the period allotted for the purpose . . . The Attorney General held that such plan would not be permissible under

the Wyoming Constitution, and after quoting from Article III, § 36 and Article VII, § 12 of the Wyoming Constitution, said:

> These provisions show quite conclusively a purpose on the part of the delegates to the constitutional convention and of the people of the State in adopting the Constitution, to keep the schools entirely free of denominational instruction or influence.[20]

In a 1955 opinion concerning the legality of the University furnishing secretarial help to an individual engaged in writing a book of historical interest and value, the Attorney General, after quoting Article III, § 36, of the Wyoming Constitution concerning prohibited appropriations, said:

> This provision however, is found in the article dealing with the legislature. The University does not appropriate money in the technical sense but only spends money previously appropriated to it by the legislature. Therefore, this provision imposes no restriction upon the University.[21]

But in a 1963 opinion concerning the payment of "isolation pay" to one who elects to send his children to a parochial school in a different district rather than to a public school, also in a different district, after quoting from Article I, § 19, and Article VIII, § 8, of the Wyoming Constitution, the Attorney General said:

> It is a fundamental principle of law needing no citation of authority that an act which cannot be done directly cannot be done indirectly; nor is it our duty to question the wisdom of the draftsmen of our Constitution. It is obvious, then, that the payment of isolation . . . which would be used indirectly to support a sectarian and religious institution is prohibited.[22]

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20. 1941-1947 Ops. Wyo. Att'y Gen. 702 (1945).
21. 1953-1955 Ops. Wyo. Att'y Gen. 384 (1955).
22. 1963 Ops. Wyo. Att'y Gen. 18 (1963).

While these opinions of the Wyoming Attorney General are not the law, they do represent some authoritative legal thinking on questions closely related to the question at issue. From these three opinions certain conclusions may reasonably be suggested with respect to the state of the law in Wyoming:

(1) No money of the state may be spent for the purpose of aiding a religious or sectarian institution, either directly or indirectly.

(2) The teaching *of* religion in public schools of Wyoming is prohibited.

(3) The University, not being a denominational or sectarian institution, and not in fact making any appropriations, is not restricted in the spending of money previously appropriated by the legislature, by constitutional provisions prohibiting "appropriations" for certain specified purposes.

It is submitted that the soundness of the third conclusion is questionable. The Attorney General's Opinion on which it is based places a narrow construction upon the word "appropriation" as found in Article III, Section 36, especially in view of the 1963 Opinion in which the Attorney General emphasized that an act which cannot be done directly, because of constitutional inhibition, cannot be done indirectly. If a Department of Religion in the University were created, state money would be indirectly (if not directly) "appropriated" to defray its cost.

The argument has been ably made that it should be just as possible to have a Department of Religion at the state university as it is at a privately supported institution, and that prohibition of "sectarian instruction" should no more prevent the objective study of particular theologists than the parallel statutory prohibition of "partisan" political instruction forbids the teaching *about* the programs of Republicans and Democrats or the Communist Party.[23] It would surely come as a surprise to suggest that the Department of Political Science at the University of Wyoming is presently violating Section 21-353.

There are few issues so likely to generate heat rather than light as the question of the proper line to be drawn between the realm of the state and that of the church. Whether the University of Wyoming is legally bound to continue to enter through the back door by offering transfer credit for courses in religious subjects, or whether it may enter through the front door by offering religious courses on campus, taught by University personnel, seems to boil down to the question of whether courses *about* religion are "sectarian". The emphasis in the constitution is on the proscription of "sectarian" instruction; *every one* of the relevant constitutional provisions, plus section 21-353, used this term. What then, is meant by the term "sectarian"?

> Black's Law Dictionary defines the word "sectarian" as; Denominational. Devoted to, peculiar to, or promotive of, the interests of a sect, or sects; in a broader sense, used to describe the activities of

23. *Supra,* Note 18, at 52.

> the followers of one faith as related to those of adherents of another. Gerhardt v. Heid, 66 N.D. 444, 276, N.W. 127, 130.

The term "sectarian" has been judicially defined by many American courts.[24] Their interpretation is virtually unanimous, and the Black's Law Dictionary definition is an accurate reflection of the judicial pronouncements on the subject. According to these decisional definitions, "sect" and "denomination" are synonymous; they refer to the followers of one particular faith. Sectarian instruction has never been judicially defined to include teaching *about* the activities of the followers of a particular faith. "Sectarian" is used to describe the activities of the followers of one faith which are devoted to, peculiar to, or *promotive* of the interest of that faith, or sect. If the language of these Wyoming Constitutional and statutory provisions means that the teaching *about* sectarian tenets and doctrines, the communicating of facts concerning the values, history and mental disciplines connected with those sectarian tenets and doctrines, for the purpose of an intellectual understanding, but not necessarily for personal acceptance, is what is prohibited, then the presently used back door is the only safe course to follow; otherwise, the circuitous route through the back door is no more legally necessary for a Department of Religion than it is for a Department of Political Science. There is little doubt that if the *promotive* type of instruction were avoided, a Department of Religion could be legally established at the University of Wyoming.

The American Association of School Administrators several years ago appointed a "Commission on Religion in the Public Schools", and assigned to the Commission the task (among others) of studying and making recommendations concerning the extent to which (if at all) religion could enter into the curriculum. Although the Commission did not concern itself with higher education, it is believed that one of the conclusions contained in the Commission's report[25] is also valid at the college level:

> A curriculum which ignored religion would itself have serious religious implications. It would seem to proclaim that religion has not been as real in men's lives as health or politics or economics. By omission it would appear to deny that religion has been and is important in man's history—a denial of the obvious. In day-by-day practice, the topic cannot be avoided. As an integral part of man's culture, it must be included.

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24. Gordon v. Board of Educ., 78 Cal. App 464, 178 P2.d 488, 490 (1947); Gerhardt v. Heid 66 N.D. 444, 267 N.W. 127, 130 (1936); Bennett v. City of LaGrange, 153 Ga. 428, 112 S.E. 482, 485, 22 A.L.R. 1312 (1922); Evans v. Selma Union High School Sch. Dist., 193 Cal. 54, 222 P. 801, 802, 31 A.L.R. 111 (1924); Doremus v. Board of Educ., 7 N.J. Super. 442, 71 A.2d 732, 740 (1950); Doremus v. Board of Educ., 5 N.J. 435V 75 A.2d 880, 886 (1950); Balantine's Law Dictionary (1948), "sect", & 1954 supplement, & cases there cited; Black's Law Dictionary, 4th Ed. 1957), "sect", "sectarian", and cases there cited.
25. *Religion in the Public Schools,* American Association of School Administrators, 55 (1964).