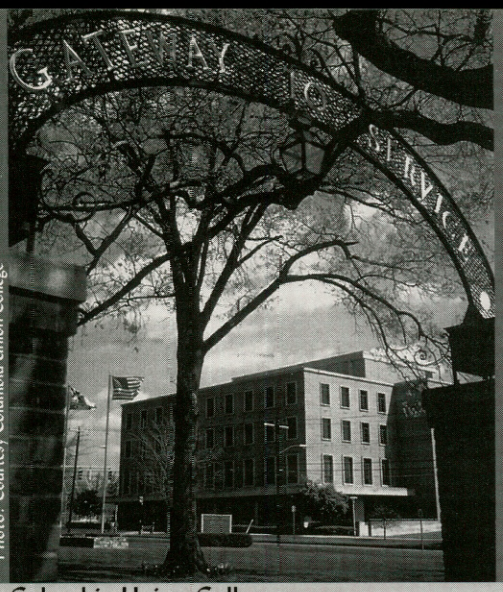

Photo: Courtesy Columbia Union College

Columbia Union College campus.

Debating the CUC Case

A Question of Equity: Columbia Union College and the Pursuit of Fairness

By Mitchell A. Tyner

The outcome of a lawsuit often depends on how you frame the question to be answered, and that was certainly true in the Columbia Union College case. If the question had been "Shall we revise a precedent and force a state to give money to a school whose very existence reflects its religious purpose?" then the answer would have been in the negative. But the college asked, "In light of the historic, fundamental doctrine that government must treat all religions equally, was it proper for the state of Maryland to concoct a system that allows it to give financial support to the secular operations of religious schools affiliated with a politically popular and powerful denomination and at the same time deny the same support to a school operated by a politically powerless denomination?"

The second question is the correct one, and it received the correct answer. The decision was the proper one. It properly applied the law. It properly required equal treatment of all religions, not just a politically powerful one. The result is properly synchronous with the overall history of Seventh-day Adventist government relations.

One's assessment of this decision hinges on the meaning one assigns to ten words: "Congress shall make no law respecting an establishment of religion," the Establishment Clause of the First Amendment to the U.S. Constitution. What does this require? So-called "strict separation"? "Accommodation" of religion? Hostility to religion?

Although popular mythology depicts America's earliest settlers as coming to these shores for religious freedom, the truth is that although some did, others came for economic opportunity. Of those who came for religious reasons, it must be said that they came to set up a society in which they could worship according to the dictates of conscience, yet also prevent others from doing the same. Early New England witnessed the same type of religious persecution that the religiously motivated settlers had fled. Wiser heads gradually came to understand that the only way to preserve the peace and prevent religious hostility was to require government to be neutral and evenhanded in its dealings with all religions. The history of the interpretation of the Establishment Clause has been the history of an effort to understand and achieve that neutrality.

In early America, neutrality was understood to mean neutrality among the various forms of Protestantism. Jews were barely tolerated in the colonies, as were Roman

Catholics. Indeed, the colony of Maryland was founded in large part to allow Catholics the same opportunities afforded Protestants.

In the nineteenth century, patterns of immigration began to change, and far more Catholics began to arrive. They encountered a de facto Protestant establishment, nowhere more visible than in the public schools. The Bible was read, and it was the King James version. Prayers were said, and always in Protestant form. Catholics began to allege that neutrality to all religions might be the ideal, but the reality was something different. Therefore, they said, government should either make the public schools truly neutral or it should provide equal funding for Catholic schools to redress the discrimination.

The height of the opposition to this Catholic challenge came in the 1880s and 1890s—the period of the nativist movement—not coincidentally the time when Senator H. W. Blair introduced a series of proposed amendments to the U.S. Constitution that rightly provoked much alarm from the young Seventh-day Adventist Church.[1] In that milieu the phrase "pervasively sectarian" was first used in the context of government aid to religiously affiliated schools. Thus Justice Clarence Thomas was not so wide of the mark when he labeled it as a tainted remnant of bigotry. It comes down to us with at least a compromised pedigree.[2]

Meaningful response to the Catholic challenge did not to take place until the mid-twentieth century, when the U.S. Supreme Court finally got around to requiring true religious neutrality in public schools by forbidding the practices of staff-lead Bible reading and prayer.

Application of the idea of neutrality in the public school setting was made more complicated by societal change in the early twentieth century. Previously, the American government had constituted a rather thin layer of society. Its functions were primarily in the realm of foreign affairs. But with industrialization and the effort to pull the country out of the Great Depression of the 1930s, the federal government became something hardly imaginable to the founders: a pervasive influence in virtually every phase of American life.

In previous decades, neutrality meant no federal funding for Catholic schools, because no schools of any sort received federal funding. With the advent of federal aid to the states, specifically aimed to enhance the school systems, neutrality became a more difficult matter. By the late twentieth century, the question was being phrased much differently: When government funds all other actors in a specific endeavor, is nonfunding of religious actors neutrality—or hostility?

Consider a hypothetical: Government undertakes to subsidize all providers of preschool child care. Because of the Establishment Clause, it funds all providers except those sponsored by churches. The result is that church-sponsored child care must charge substantially higher rates than other day care providers, rendering them noncompetitive. Eventually church-sponsored day care centers are driven out of business. Is this neutrality toward religion? With the expansion of the role of government, neutrality has taken on a new meaning.

A series of U.S. Supreme Court decisions beginning in the 1980s has reflected this changed reality. A school district that provided a hearing interpreter for every deaf student was told that providing such an interpreter for a student who chose to attend a Christian school was permissible, because the aid was available to all, not just parochial school students.[3] The state of Washington was told that if it funded the higher education of blind students to pursue the career of their choice, equal funding for a blind student who wished to attend a seminary was not a violation of the Establishment Clause.[4] Programs providing remedial instruction in parochial schools have been approved because they are available to all students.[5] The University of Virginia was told that if it allocated student fees to support a wide array of student organizations, it should treat a Christian student organization as eligible on the same footing as other groups.[6] To do otherwise would be to penalize religion, not treat it neutrally.

As the U.S. Supreme Court clarified this new understanding of the Establishment Clause, Columbia Union College entered the picture. Columbia Union College applied for a grant from Maryland's Joseph A.

"By refusing to fund a religious institution solely because of religion, the government risks discriminating against a class of citizens solely because of faith. The First Amendment requires government neutrality, not hostility, to religious belief." *Columbia Union College v. Clarke*

Sellinger Program. The program, known locally as the "Father Sellinger grants," gives public aid to private colleges within the state. Annual grants are made to eligible institutions in an amount based in large part on enrollment. To be eligible, an institution must be nonprofit, approved by the Maryland Higher Education Commission, be accredited, have previously awarded associate or baccalaureate degrees, maintain at least one program leading to a degree other than seminary or theological programs, and submit each new program or major modification to the commission for approval. The statute also mandates that no Sellinger funds be used for sectarian purposes. All parties agree that CUC meets all criteria for eligibility.

In fiscal year 1997, fifteen institutions received Sellinger funds. Twelve had no religious affiliation, and three were affiliated with the Roman Catholic Church. The recipients' eligibility had been tested in a 1976 case in which the U.S. Supreme Court ruled that the Maryland colleges in question, though affiliated with the Catholic Church, were entitled to government funds because they were not so pervasively sectarian that secular activities could not be separated from sectarian ones.[7] This case was the genesis of the modern doctrine that prohibited governmental funding of "pervasively sectarian" institutions, the reasoning being that the institution must be of such a nature that government could fund the secular programs and aspects–not the sectarian ones–and therefore must be able to delineate clearly one from the other. Thus the issue is not state funding of religion, but rather the ability of the state to fund the secular functions of an educational institution without funding religious functions.

In 1990, CUC applied for Sellinger funds. In 1992, that application was denied. In 1995, CUC requested reconsideration of its application in view of the U.S. Supreme Court decisions discussed previously. The motion for reconsideration was also denied. The college reapplied in 1996, and was once again denied. Columbia Union College then filed a complaint in federal court against the director of the commission in his official capacity for relief of both constitutional and statutory violations.

The U.S. District Court for Maryland heard the case and held that the Establishment Clause prohibits any state from directly funding any pervasively sectarian institution and that CUC was such an institution.[8] Since a trial court must follow the law as it exists, the district court was correct to follow precedent. Such was exactly the anticipated result. All involved knew that a different result based on the U.S. Supreme Court's new direction in Establishment Clause interpretation would have to come from an appellate court, and perhaps from the Supreme Court itself.

The Court of Appeals for the Fourth Circuit, which was more sympathetic to CUC's position, then heard the case. It ruled that the denial of funds to CUC "infringed on Columbia Union's free speech rights" because the state rejected the application solely because of CUC's religious viewpoint.[9] Such an infringement, said the court, could only be justified as a means of complying with the dictates of the Establishment Clause. The appellate court remanded the case to the trial court because the record had not been fully developed on the issue of CUC's pervasively sectarian status. It gave a broad hint to the trial court on remand by observing that "a careful reading of *Roemer* [the case that held state aid could not be given to pervasively sectarian schools] leads to the inescapable conclusion that even colleges obviously and firmly devoted to the ideal and teachings of a given religion are not necessarily so permeated by religion that the secular side cannot be separated from the sectarian."

On remand, the district court supervised an extensive process of reviewing the factual similarities and differences between CUC and the other Maryland schools that receive Sellinger funds. Based on the criteria given to it by the appellate court, the district court ruled that CUC is not pervasively sectarian, meaning that the state can safely fund its secular programs without funding its religious programs.[10] In doing so, the court found that the differences separating CUC from the other schools were not sufficient to justify denying it equal access to the Sellinger Program.

The state then appealed once again to the Fourth Circuit, challenging the trial court's decision that CUC is not pervasively sectarian. Columbia Union College responded by arguing that a U.S. Supreme Court decision, *Mitchell v. Helms*, handed down during the course of the CUC litigation, makes clear that the pervasively sectarian inquiry is no longer relevant, or, in the alternative, that the college was not pervasively sectarian.[11]

In *Mitchell v. Helms*, the U.S. Supreme Court upheld a Louisiana program that provided various teaching and study aids to all schools, with approximately 30

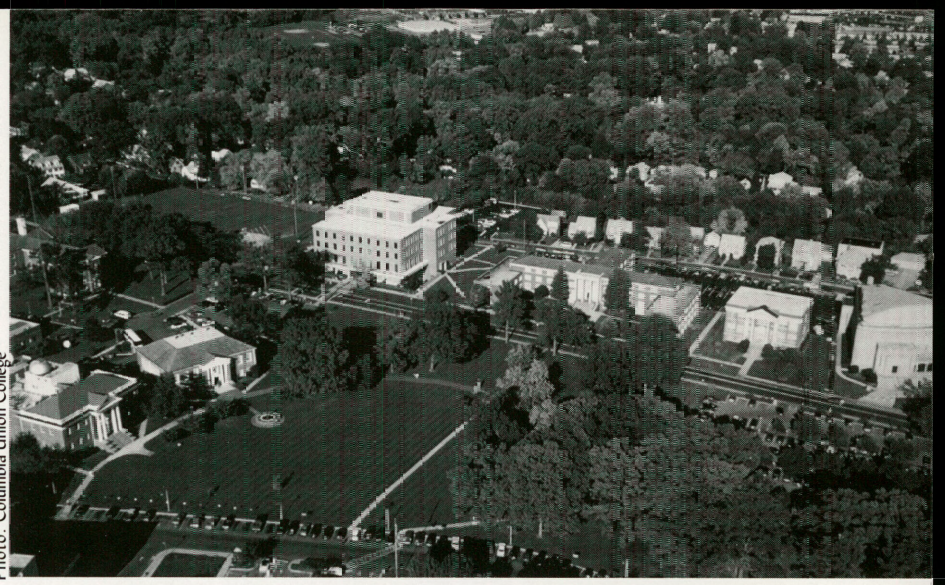

Photo: Columbia Union College

Columbia Union College campus

percent going to parochial schools. The Supreme Court reasoned that as long as all students were eligible for the assistance, and the aid did not result in indoctrination fairly attributable to the state, no constitutional violation had occurred. Said the Supreme Court, "If aid to schools, even 'direct aid,' is neutrally available and, before reaching or benefiting any religious school, first passes through the hands (literally or figuratively) of numerous private citizens who are free to direct the aid elsewhere, the government has not provided any 'support of religion.'"[12]

In *Mitchell v. Helms*, a plurality of four justices abandoned the "pervasively sectarian" language. Justice Sandra Day O'Connor wrote a separate concurrence to explain why she did not fully join the plurality opinion. Her explanation had nothing to do with the"pervasively sectarian" language. She is therefore assumed to agree with the plurality on this point.

The following quote, from Justice Thomas's opinion, states the plurality's position on this issue:

> One of the dissent's factors deserves special mention: whether a school that receives aid (or whose students receive aid) is pervasively sectarian. The dissent is correct that there was a period when this factor mattered, particularly if the pervasively sectarian school was a primary or secondary school. . . . But that period is one that the Court should regret, and it is thankfully long past.
>
> There are numerous reasons to formally dispense with this factor. First, its relevance in our precedents is in sharp decline. Although our case law has consistently mentioned it even in recent years, we have not struck down an aid program in reliance on this factor since 1985. . . . Second, the religious nature of a recipient should not matter to the constitutional analysis, so long as the recipient adequately furthers the government's secular purpose. If a program offers permissible aid to the religious (including the pervasively sectarian), the areligious, and the irreligious, it is a mystery which view of religion the government has established, and thus a mystery what the constitutional violation would be. The pervasively sectarian recipient has not received any special favor, and it is most bizarre that the Court would, as the dissent seemingly does, reserve special hostility for those who take their religion seriously, who think that their religion should affect the whole of their lives, or who make the mistake of being effective in transmitting their views to children.
>
> Third, the inquiry into the recipient's religious views required by a focus on whether a school is pervasively sectarian is not only unnecessary but also offensive. It is well established, in numerous other contexts, that courts should refrain from trolling through a person's or institution's religious beliefs. Yet that is just what this factor requires, as was evident before the District Court. Although the dissent welcomes such probing, we find it profoundly troubling. In addition, and related, the application of the "pervasively sectarian" factor collides with our decisions that have prohibited governments from discriminating in the distribution of public benefits based upon religious status or sincerity.
>
> Finally, hostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow. Although the dissent professes concern for "the implied exclusion of the less favored," the exclusion of pervasively sectarian schools from government-aid programs is just that, particularly given the history of such exclusion. Opposition to aid to "sectarian" schools acquired prominence in the 1870's with Congress's consideration (and near passage) of the Blaine Amendment, which would

have amended the Constitution to bar any aid to sectarian institutions. Consideration of the amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that "sectarian" was code for "Catholic." Notwithstanding its history, of course, "sectarian" could, on its face, describe the school of any religious sect, but the Court eliminated this possibility of confusion when, in *Hunt v. McNair,* 413 U.S., at 743, it coined the term "pervasively sectarian"—a term which, at that time, could be applied almost exclusively to Catholic parochial schools and which even today's dissent exemplifies chiefly by reference to such schools.

In short, nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs, and other doctrines of this Court bar it. This doctrine, born of bigotry, should be buried now.[13]

The appellate court responded to CUC's reliance on the new U.S. Supreme Court precedent by observing that *Mitchell v. Helms* had "significantly altered the Establishment Clause landscape by addressing the circumstances under which sectarian schools may be eligible for government aid," and that it understood the Supreme Court to emphasize that "the neutrality of aid criteria is the most important factor in considering the effect of a government aid program."[14] It then examined the structure of the Sellinger Program, including the safeguards to prevent funding of religious programs, observed that the Supreme Court "has never struck down a government aid program to a religiously-affiliated college or university" [as opposed to aid to an elementary or secondary school], and concluded, "Columbia Union argues that it is entitled under *Mitchell* to Sellinger Program funds without resort to examining the college's pervasively sectarian status. We agree."[15]

To bolster its conclusion, the court then examined the factors considered by the trial court in deciding that CUC is not so pervasively sectarian as to preclude funding. It reached this conclusion: "Looking at all the evidence, we fail to see any disqualifying difference between Columbia Union College and the colleges [previously granted Sellinger funds]. Religion certainly plays a prominent role at Columbia Union, but no more so than the colleges [examined in *Roemer* and found to be acceptable for funding.][16]

The bottom line for the court of appeal: "By refusing to fund a religious institution solely because of religion, the government risks discriminating against a class of citizens solely because of faith. The First Amendment requires government neutrality, not hostility, to religious belief."[17] To prevent such discrimination, CUC should be given access to the Sellinger Program on the same basis as other religiously affiliated schools. The State of Maryland did not appeal that decision.

Was it the proper decision? If you believe the question concerned the propriety of the state of Maryland concocting a system that allowed it to give financial support to the secular operations of religious schools affiliated with a politically popular and powerful denomination and at the same time deny the same support to a school operated by a politically powerless denomination, then the answer must be yes. Under the interpretation of the Establishment Clause currently used by the U.S. Supreme Court, which has the last word on the subject, it was the proper decision. The result continues to require that government deal with religion evenhandedly.

Those who oppose this decision are really not interested in fairness and equality arguments, for they wish to oppose any governmental funding of religious schools, no matter what disadvantages result. In their zeal to oppose any such funding they resort to trying to make a moral argument, citing Jefferson's statement that "to compel a man to furnish contributions of

"The neutrality of aid criteria is the most important factor in considering the effect of a government aid program." *Columbia Union College v. Clarke*

Photo: Columbia Union College

Wilkinson Hall at Columbia Union College.

money for the propagation of opinions which he disbelieves, is sinful and tyrannical."[18]

Sinful? Not in the Seventh-day Adventist tradition. For a century, there have been those among us who have tried to steer the Church into a position of absolute separationism, but to no avail. A century ago, A. T. Jones tried to prevent the Church from accepting a gift from the government of Rhodesia, using just such a separationist argument. Ellen G. White disagreed, counseling Jones not to reject a gift that might well prove to be a great blessing to the Church.[19] We gratefully accepted the gift, the campus of Solusi University, which has indeed been a boon to the work of the Church in Africa.

Will those who oppose CUC argue that accepting that gift was sinful? They argue that the Solusi grant was "different" because it did not involve an ongoing relationship with government. Other instances are not so easily dismissed. For instance on December 12, 1971, the General Conference Church-State Relationship Committee voted to approve a federally subsidized loan (which constituted not only the loan of governmental credit to make available a lower interest rate, but also involved an outright gift of government funds in the form of the loan subsidy) to rebuild Glendale Adventist Hospital, which most certainly required an ongoing monitoring by the government to insure that the loan was repaid. More recently, the current facility of the Review and Herald Publishing House was built using similar government-backed bonds. Nor has the opposition made any explanation as to why the large amounts of government money flowing annually into Loma Linda University is fundamentally different from the CUC case.

Acceptance of government funds cannot be made into a moral issue—at least not without calling most of the worldwide Seventh-day Adventist Church sinful. In the vast majority of the territories in which the Church operates, gifts are accepted from government if the conditions are acceptable. It is not a doctrinal matter, but a pragmatic decision, as it should be.

Consider the result of calling acceptance of government aid "sinful." Suppose a hundred years ago two brothers settled on farms near the border between North Dakota and Manitoba. When the international boundary was finally demarcated, they found that one lived in Canada and the other in the United States, although their homes were only a half mile apart. Is it reasonable to tell the descendants of one brother that they may accept government aid for their church-operated school, as the Church in Canada has done, but that the descendants of the other brother would be "sinful" to do so? Obviously such a result is ludicrous. Morality exists without reference to international boundaries. If specific conduct is inherently sinful, it is sinful everywhere.

Even so, conduct that is not inherently sinful in all circumstances might be so if illegal in a given situation. But that is not the case in this instance: the court system of the United States has pronounced CUC's receipt of Sellinger funds legally acceptable.

What other reason could there be for refusing generally available state aid for our schools? One perfectly good reason would be that the "strings" attached to the aid were unacceptable. For instance, a movement is being felt in the United States to require that all recipients of government funds should give up the right of preferential hiring—the long-recognized right of churches to hire only those who are in harmony with that church's doctrines. To give up that right in order to receive state funds would be a fool's bargain. But that is not the case with the Sellinger Program. Columbia Union College easily meets the requirements of separate accounting for the funds received and not using the funds to support religious functions. There are no objectionable "strings."

Those who have opposed CUC so vociferously make much of the supposed inevitable loss of exemptions from various governmental controls and requirements, such as the right to hire only members. But the case law does not support such a presupposition. In one such case, Baptist Memorial College of Health Sciences, of Memphis, Tennessee, fired a student service specialist because she accepted ordination in a church with a large gay and lesbian membership. The employee accused the school of religious discrimination, the school answered (properly) that Title VII of the Civil Rights Act of 1964 exempted religious institutions from its reach, and the former employee responded that the school had waived that exemption by accepting government funds and by firing other non-Baptists. The U.S. Court of Appeal for the Sixth Circuit ruled for the school, using the following language:

> [The former employee] contends that even if the College is a religious educational institution, it waived the Title VII exemption for such institutions because it represented itself as being an equal opportunity employer and because it received federal funds. However, the statutory exemptions from such religious discrimination claims under

> Title VII cannot be waived by either party. The exemptions reflect a decision by Congress that religious organizations have a constitutional right to be free from government intervention.[20]

In addition, the First Amendment does not permit federal courts to dictate to religious institutions how to carry out their religious missions or how to enforce their religious practices. In the Baptist Memorial College of Health Sciences case and *Siegel v. Truett-McConnell College* (1994), the courts concluded that exemptions for religious schools could not be waived: they were not conditioned on good behavior or on meeting some arbitrary standard of minimum religiosity, but rather are based on constitutional requirements.[21] To move from these cases of record to an assumption that receipt of government funds will result in the lose of such exemptions is a stretch, indeed.

Still another recent decision undermines the "sky is falling" hysteria of CUC's opponents. They argue that, among other evils, acceptance of government money will subject the college to labor union efforts to organize college employees. But the U.S. Court of Appeals for the District of Columbia Circuit just rejected that exact argument, in a case of which the opposition is well aware.

For several years, the National Labor Relations board has sought to obtain jurisdiction over the University of Great Falls, a Roman Catholic school in Montana. The board, by statute, has no jurisdiction over religious entities, but the NLRB has advanced a theory that the school is not religious enough to merit that exemption. It advocated an inquiry into the relative religiosity of the school, much as did the state of Maryland in the CUC case. The District of Columbia Circuit Court would have none of it.

It ruled that in determining NLRB jurisdiction it was inappropriate for the NLRB to inquire into the institution's "substantial religious character"; rather, the appropriate test is whether the institution: (1) holds itself out to the public as a religious institution, even if its principal academic focus is on "secular" subjects; (2) is nonprofit; and (3) is religiously affiliated. The university met those three criteria easily. The court left no doubt as to the reason for its decision: "Our approach avoids the constitutional infirmities of the NLRB's 'substantial religious character' test. It does not intrude upon the free exercise of religion nor subject the institution to questioning about its motives or beliefs. It does not ask about the centrality of beliefs or how important the religious mission is to the institution. Nor should it."[22]

The court also left no doubt as to its opinion of more intrusive inquiry. "Despite its protestations to the contrary, the nature of the Board's inquiry boils down to 'is it *sufficiently* religious?'" That, said the court, is "the exact kind of questioning into religious matters which [prior Supreme Court opinions] specifically sought to avoid." No, the sky is not falling, the wolf is not at the door, the dominoes are secure.

"Finally, hostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow." U.S. Supreme Court Justice Clarence Thomas

That probably will be of little importance to those who have fought so hard to prevent CUC from going forward with this action, even convincing other church entities to file a brief in opposition, even though the action was sited outside their territory, and thus outside their jurisdiction. They stand in a direct line with A. T. Jones and his absolutist positions. Based on past conduct, they will likely ignore the international and rational implications of their position and continue to advocate a stance that is based not on law, not on practicality, but, if anything, on eschatology.

Given Ellen White's counsel not to refuse gifts that may be a blessing to the Church, and the Church's long history of accepting such gifts, the logical sequence of evaluating participation in a given program should start with a presumption that participation is appropriate. Certain questions must then be asked: Is the aid legal? Are the conditions of acceptance, if any, acceptable? What, if anything, must we give up in order to participate? On balance, will participation strengthen or weaken the church institution involved?

In the CUC case, the college board found that (1) the aid is court approved; (2) the conditions are not burden-

some; (3) receipt of the funds will strengthen the institution; and (4) challenging a discriminatory state aid system stands in the long tradition of Adventist witness for governmental neutrality as a means to strengthen and perpetuate religious freedom.

Notes and References

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

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21. *Siegel v. Truett-McConnell College*, 13 F. Supp. 1335, USDC ND GA, 1994; aff'd 73 F. 3d 1108 (11th Cir., 1995).

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