INDIVIDUAL AND INSTITUTIONAL ACADEMIC FREEDOM AT RELIGIOUS COLLEGES AND UNIVERSITIES

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Academic freedom is essential in higher education. At the same time, individual academic freedom is limited at every college and university. Academic freedom has two dimensions: individual academic freedom, which is the freedom of the individual faculty member; and institutional academic freedom, which is the freedom of the institution to pursue its mission and to be free from outside control. Academic freedom issues can be particularly complicated at religious colleges and universities, which have a mission to provide a college or university education that is consistent with the ideals and principles of the sponsoring religion.

This article will discuss individual and institutional academic freedom and will analyze the relationship between the two freedoms. The article will then address institutional academic freedom at religious colleges and universities. The article will also discuss *Ex Corde Ecclesiae*,[1] the Catholic Church's affirmation of the institutional academic freedom of Catholic colleges and universities. The article will argue that the institutional academic freedom of religious colleges and universities should be respected and that this freedom is protected by the Free Speech and Free Exercise Clauses of the First Amendment. Lastly, the article will address other legal and accreditation issues relating to institutional academic freedom.

I. INDIVIDUAL ACADEMIC FREEDOM

Individual academic freedom involves the freedom of an individual faculty member to teach, to research, and to speak as a citizen. The concept of individual

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1. John Paul II, *The Apostolic Constitution on Catholic Universities*, *Ex Corde Ecclesiae*, 20 ORIGINS 265 (1990), *available at* http://www.vatican.va/holy_father/john_paul_ii/apost_constitutions/documents/hf_jp-ii_apc_15081990_ex-corde-ecclesiae_en.html (last visited Oct. 6, 2003) [hereinafter *Ex Corde Ecclesiae*].

academic freedom came to the United States from the German universities.[2] The rationales for individual academic freedom are that scholars should be free to pursue truth and to transmit truth to students, and that students should be free to learn.[3] The most important statement on academic freedom in the United States is the 1940 Statement on academic freedom[4] of the American Association of University Professors ("AAUP"). The principles of the 1940 Statement are widely accepted. The 1940 Statement provides: "Academic freedom is essential . . . and applies to both teaching and research. Freedom in research is fundamental to the advancement of truth. Academic freedom in its teaching aspect is fundamental for the protection of the rights of the teacher in teaching and of the student to freedom in learning."[5] The 1940 Statement identifies three aspects of the individual academic freedom of faculty members: "full freedom in research and in the publication of the results," "freedom in the classroom in discussing their subject," and freedom from "institutional censorship or discipline" when they "speak or write as citizens."[6]

II. INSTITUTIONAL ACADEMIC FREEDOM

Institutional academic freedom is the freedom of a college or university to pursue its mission[7] and "the freedom of the academic institution from outside control."[8] The Supreme Court and other courts have repeatedly recognized

2. WALTER P. METZGER, ACADEMIC FREEDOM IN THE AGE OF THE UNIVERSITY 93–133 (1955); *see* Ralph F. Fuchs, *Academic Freedom–Its Basic Philosophy, Function, and History*, 28 LAW & CONTEMP. PROBS. 431, 435 (1963); David M. Rabban, *A Functional Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment*, 53 LAW & CONTEMP. PROBS. 227, 232 (1990).

3. *See* Fuchs, *supra* note 2, at 435; METZGER, *supra* note 2, at 112–13.

4. AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, *1940 Statement of Principles on Academic Freedom and Tenure With 1970 Interpretive Comments*, *in* POLICY DOCUMENTS & REPORTS 3 (9th ed. 2001) [hereinafter *1940 Statement*].

5. *Id.*

6. *Id.* at 3–4.

7. In *Sweezy v. New Hampshire*, Justice Frankfurter's concurring opinion cited "the four essential freedoms of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may admitted to study." 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (quoting THE OPEN UNIVERSITIES IN SOUTH AFRICA 10–12 (Albert van de Sandt Centlivres et al. eds., Johannesburg: Witwatersrand Univ. Press 1957)). (internal quotation marks omitted). These freedoms involve the freedom of a college or university to determine and pursue its educational mission. In *Regents of the University of California v. Bakke*, Justice Powell's opinion recognized "[t]he freedom of a university to make its own judgments as to education." 438 U.S. 265, 312 (1978). In *Widmar v. Vincent*, the Court observed: "A university's mission is educational, and decisions of this Court have never denied a university authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities." 454 U.S. 263, 268 n.5 (1981). In *Piarowski v. Illinois Community College*, the court noted that academic freedom includes "the freedom of the academy to pursue its ends without interference from the government." 759 F.2d 625, 629 (7th Cir. 1985). Institutional academic freedom "recognizes the *institution's* right to establish and maintain a distinctive academic identity." ROBERT K. POCH, ACADEMIC FREEDOM IN AMERICAN HIGHER EDUCATION: RIGHTS, RESPONSIBILITIES, AND LIMITATIONS 60 (1993).

8. Michael W. McConnell, *Academic Freedom in Religious Colleges and Universities*, 53

institutional academic freedom, which is grounded in the Free Speech Clause of the First Amendment.[9] Universities are formed for the purposes of educating students and advancing and communicating knowledge, and therefore, the Free Speech Clause protects them from governmental interference in academic matters.[10]

In *Sweezy v. New Hampshire,*[11] Justice Frankfurter's concurring opinion cited "the four essential freedoms of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may admitted to study."[12] Justice Powell quoted Justice Frankfurter's language from *Sweezy* in his pivotal opinion in *Regents of the University of California v. Bakke*:[13]

> "'It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail "the four essential freedoms" of a university—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.'"[14]

LAW & CONTEMP. PROBS. 303, 305 (1990); *see also Piarowski*, 759 F.2d at 629 (stating that academic freedom includes "the freedom of the academy to pursue its ends without interference from the government").

For criticisms of institutional academic freedom, see Matthew W. Finkin, *On "Institutional" Academic Freedom*, 61 TEX. L. REV. 817 (1983), and Richard H. Hiers, *Institutional Academic Freedom vs. Faculty Academic Freedom in Public Colleges and Universities: A Dubious Dichotomy*, 29 J.C. & U.L. 35 (2002). The former argues against institutional academic freedom, and the latter argues that colleges and universities have no constitutional right of academic freedom apart from the academic freedom of their faculty. However, organizations as well as individuals have free speech rights. *See, e.g.*, Pac. Gas & Elec. Co. v. Pub. Util. Comm'n, 475 U.S. 1 (1986) (corporations have a free speech right not to be associated with the speech of others); Consol. Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 533 (1980) (corporations have free speech rights); First Nat'l Bank of Boston v. Belotti, 435 U.S. 765, 775–86 (1978) (corporations have free speech rights).

9. In *Grutter v. Bollinger*, the Court stated:

> In announcing the principle of student body diversity as a compelling state interest [in *Bakke*, 438 U.S. 265 (1978)], Justice Powell invoked our cases recognizing a constitutional dimension, grounded in the First Amendment, of educational autonomy: "The freedom of a university to make its own judgments as to education includes the selection of its student body."

123 S.Ct. 2325, 2339 (2003) (quoting *Bakke*, 438 U.S. at 312 (Powell, J.)).

10. "[I]nstitutional academic freedom protects the private school from an overreaching government authority" and "tends to diminish the ability of government to suppress competing ideas and ideologies." Mark. G. Yudof, *Three Faces of Academic Freedom*, 32 LOYOLA L. REV. 831, 852–53 (1987).

11. 354 U.S. 234 (1957) (overturning a contempt judgment against a professor who refused to answer questions about a lecture he had delivered and his knowledge of the Progressive Party).

12. *Id.* at 263 (Frankfurter, J., concurring) (quoting THE OPEN UNIVERSITIES IN SOUTH AFRICA 10–12 (Albert van de Sandt Centlivres et al., eds., Johannesburg: Witwatersrand Univ. Press 1957) (a statement of a conference of senior scholars from the University of Cape Town and the University of Witwatersrand)) (internal quotation marks omitted).

13. 438 U.S. 265 (1978) (state medical school may consider race as a factor in student admissions).

14. *Id.* at 312 (quoting *Sweezy*, 354 U.S. at 263 (1957) (Frankfurter, J., concurring)).

The Court again quoted the *Sweezy* language in *Widmar v. Vincent*.[15] The Court observed that a state university's educational mission can justify "reasonable regulations compatible with that mission upon the use of its campus and facilities."[16] However, the Court held unconstitutional a public university's rules prohibiting use of its facilities by a student religious group. The Court reasoned that the university did not have a compelling state interest which would justify content-based discrimination against religious speech.[17] In a concurring opinion, Justice Stevens also quoted the *Sweezy* language,[18] and he explicitly mentioned the academic freedom of universities: "In my opinion the use of the terms 'compelling state interest' and 'public forum' to analyze the question presented in this case may needlessly undermine the academic freedom of public universities."[19]

In *Regents of the University of Michigan v. Ewing*,[20] the Court alluded to the tension between individual and institutional academic freedom: "Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students but also, and somewhat inconsistently, on autonomous decisionmaking by the academic institution itself."[21]

In *Board of Regents of the University of Wisconsin System v. Southworth*,[22] Justice Souter's concurring opinion noted the two dimensions of academic freedom: "Our understanding of academic freedom has included not merely liberty from restraints on thought, expression, and association in the academy, but also the idea that universities and schools should have the freedom to make decisions about how and what to teach."[23]

In *Grutter v. Bollinger*,[24] the Court reinforced Justice Powell's invocation of institutional academic freedom in *Bakke*. The *Grutter* Court stated:

> In announcing the principle of student body diversity as a compelling state interest, Justice Powell invoked our cases [including *Sweezy*] recognizing a constitutional dimension, grounded in the First Amendment, of educational autonomy: "The freedom of a university to make its own judgments as to education includes the selection of its student body."[25]

Other federal courts have also recognized institutional academic freedom. For

15. 454 U.S. 263, 276 (1981).

16. *Id.* at 268 n.5.

17. *Id.* at 276–77.

18. *Id*. at 279 n.2 (Stevens, J., concurring).

19. *Id*. at 277–78. (Stevens, J., concurring).

20. 474 U.S. 214 (1985) (upholding state university's decision to dismiss student on academic grounds).

21. *Id.* at 226 n.12 (internal citations omitted).

22. 529 U.S. 217 (2000) (public university may charge students an activity fee used to fund a viewpoint-neutral program to facilitate extracurricular student speech).

23. *Id.* at 237 (Souter, J., concurring).

24. 123 S.Ct. 2325 (2003) (upholding affirmative action at state universities).

25. *Id*. at 2339 (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (Powell, J.)).

example, in *Feldman v. Ho*,[26] the Seventh Circuit stated: "A university's academic independence is protected by the Constitution, just like a faculty member's own speech."[27] In *Piarowski v. Illinois Community College*,[28] the Seventh Circuit observed that academic freedom has an "equivocal" meaning: "It is used to denote both the freedom of the academy to pursue its ends without interference from the government . . . and the freedom of the individual teacher (or in some versions—indeed in most cases—the student) to pursue his ends without interference from the academy . . . ."[29] In *Edwards v. California University of Pennsylvania*,[30] the Third Circuit held that the institution, not the individual teacher, has the academic freedom to decide which curriculum materials would be used in a course.[31] In *Sola v. Lafayette College*,[32] the Third Circuit held that a judicial evaluation of the wisdom of a college's tenure quota could threaten the college's institutional academic freedom.[33] In *Urofsky v. Gilmore*,[34] the Fourth Circuit *en banc* held that "to the extent the Constitution recognizes any right of 'academic freedom' above and beyond the First Amendment rights to which every citizen is entitled, the right inheres in the University, not in individual professors . . . ."[35]

Institutional academic freedom does not protect institutional autonomy in all cases. For example, in *University of Pennsylvania v. EEOC*,[36] the Supreme Court held that institutional academic freedom does not protect a university from disclosing confidential peer evaluations in its tenure files to the Equal Employment Opportunity Commission in a discrimination investigation.[37] In *Powell v.*

26. 171 F.3d 494 (7th Cir. 1999) (upholding university's decision not to renew the contract of a professor who made accusations against a colleague).

27. *Id.* at 495.

28. 759 F.2d 625 (7th Cir. 1985) (upholding state college's decision to relocate to a less conspicuous location a professor's art works which were objected to as sexually explicit and racially offensive).

29. *Id.* at 629. *See also* Webb v. Bd. of Trs., 167 F.3d 1146, 1149 (7th Cir. 1999) (stating that a university's "ability to set a curriculum is as much an element of academic freedom as any scholar's right to express a point of view"); Keen v. Penson, 970 F.2d 252, 257 (7th Cir. 1992) ("[T]he asserted academic freedom of a professor can conflict with the academic freedom of the university to make decisions affecting that professor."); Wirsing v. Bd. of Regents, 739 F. Supp. 551, 554 (D. Colo. 1990) ("Teacher evaluation is part of the University's own right to academic freedom."), *aff'd without opinion*, 945 F.2d 412 (10th Cir. 1991); Cooper v. Ross, 472 F. Supp. 802, 813 (E.D. Ark. 1979) (recognizing "a fundamental tension between the academic freedom of the individual teacher to be free of restraints from the university administration, and the academic freedom of the university to be free of government, including judicial, interference").

30. 156 F.3d 488 (3d Cir. 1998).

31. *Id*. at 491–92.

32. 804 F.2d 40 (3d Cir. 1986).

33. *Id*. at 43.

34. 216 F.3d 401 (4th Cir. 2000) (upholding Virginia statute providing that no state employee could use computers owned or leased by the state to access sexually explicit material without an agency head's prior written approval).

35. *Id.* at 410.

36. 493 U.S. 182 (1990).

37. *Id.* at 195–201.

Syracuse University,[38] the Second Circuit held that institutional academic freedom does not include the freedom to engage in illegal racial or gender discrimination.[39] In *George Washington University v. District of Columbia*,[40] the D.C. Circuit held that institutional academic freedom does not protect against requirements by the zoning board of adjustments that George Washington University provide enough housing for seventy percent of its 8,000 undergraduates, plus enough housing for every full-time undergraduate over 8,000, in order to preserve the surrounding neighborhoods.[41] In *State v. Schmid*,[42] the New Jersey Supreme Court held that Princeton University's standardless regulations which required permission for the on-campus distribution of materials by off-campus organizations violated the Free Speech and Assembly Clauses of the state constitution. Princeton appealed to the U.S. Supreme Court, arguing that the decision infringed on Princeton's First Amendment right to institutional academic freedom and its Fifth Amendment property rights.[43] However, because Princeton had revised its regulations, the Court dismissed the appeal as moot.[44]

III. THE RELATIONSHIP BETWEEN INDIVIDUAL AND INSTITUTIONAL ACADEMIC FREEDOM

At all colleges and universities, a tension exists between individual and institutional academic freedom.[45] A college's or university's mission includes educating students and advancing knowledge. Because individual academic freedom is essential to accomplishing these purposes, a college or university must grant broad individual academic freedom to its faculty. At the same time, a college or university has the institutional academic freedom to determine its own educational mission and to make decisions that it believes best further that mission.

38. 580 F.2d 1150 (2d Cir. 1978).

39. *Id.* at 1153–54.

40. 318 F.3d 203 (D.C. Cir. 2003).

41. *Id.* at 211–12.

42. 423 A.2d 615, 624–33 (N.J. 1980), *appeal dismissed for want of jurisdiction sub nom.* Princeton Univ. v. Schmid, 455 U.S. 100 (1982) (per curiam). In *Commonwealth v. Tate*, 432 A.2d 1382 (Pa. 1981), the Pennsylvania Supreme Court held that a private college's standardless requirement of permission for the on-campus distribution of leaflets by off-campus persons violated the Free Speech, Assembly, and Petition Clauses of the state constitution. *Id*. at 1387–91. However, the court did not address the issue of institutional academic freedom.

43. WILLIAM A. KAPLIN & BARBARA A. LEE, THE LAW OF HIGHER EDUCATION 655 (3d ed. 1995).

44. *Princeton Univ.*, 455 U.S. at 103.

45. *See* Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 226 n.12 (1985) ("Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students but also, and somewhat inconsistently, on autonomous decisionmaking by the academic institution itself.") (internal citations omitted); Keen v. Penson, 970 F.2d 252, 257 (7th Cir. 1992) ("[T]he asserted academic freedom of a professor can conflict with the academic freedom of the university to make decisions affecting that professor."); Cooper v. Ross, 472 F. Supp. 802, 813 (E.D. Ark. 1979) (recognizing "a fundamental tension between the academic freedom of the individual teacher to be free of restraints from the university administration, and the academic freedom of the university to be free of government, including judicial, interference").

A college or university should be able to make these decisions largely free from control by the government, the government's judiciary, and the government's gatekeepers—the accrediting bodies.

While broad individual academic freedom is consistent with a university's mission, unlimited individual academic freedom is not. Some expression which injures or fails to advance the university mission is not protected. For example, individual academic freedom does not include the freedom to determine course content irrespective of the curriculum, to harass students in ways that interfere with their education, or to engage in substandard teaching or scholarship. The very notion of a university "mission" necessarily entails channeling and evaluating faculty expression. Individual academic freedom is essential to accomplishing the university mission of educating students and advancing knowledge. However, individual academic freedom exists within the context of the university mission.[46] The university mission, not individual academic freedom, is by definition the reason for the university's existence.[47]

To pursue their missions, all institutions of higher education place some limits on individual academic freedom. In general, colleges and universities have at least seven categories of official limitations on individual academic freedom. They are: (1) the curriculum; (2) the academic discipline; (3) institutional judgments about grading; (4) institutional judgments about the quality of teaching and scholarship; (5) certain obligations when faculty speak or write as citizens; (6) hate speech; and (7) religious expression.

A. The Curriculum

First, the curriculum is a limitation, and this limitation involves judgments about course content and germaneness. The institution may determine what material should be covered in a course. A course fits into a curriculum, and the institution and students rightfully expect that students who take the course will obtain certain knowledge and skills necessary to succeed in higher level courses or

46. The accreditation standards of the Middle States Commission on Higher Education illustrate this principle. They provide that an accredited institution is characterized by "adherence to principles of academic freedom, within the context of institutional mission." Middle States Commission on Higher Education, Characteristics of Excellence in Higher Education: Eligibility Requirements and Standards for Accreditation, Standard 10, at 29 (2002), *available at* http://www.msache.org/charac02.pdf (last visited Sept. 3, 2003).

47. Anthony J. Diekema, former president of Calvin College, has written:

> Academic freedom, then, is clearly a means to other ends; namely, the pursuit, discovery, and promotion of truth within the context of the academy and for the benefit of society. Thus, academic freedom is a means that is limited by both its context and by the ends it seeks. The academy, in turn, is limited by mission statements and worldviews. Within them, however, the academy's pervasive ethos is one of freedom; freedom for institutions to seek and promote truth, freedom for scholars to pursue their disciplines and to interrelate them in pursuit of a unity of all knowledge, freedom to serve, and freedom from all restraint in the process. Thus, it is freedom to (pursue truth) and freedom from (interference) at both the individual and institutional level.

ANTHONY J. DIEKEMA, ACADEMIC FREEDOM AND CHRISTIAN SCHOLARSHIP 72 (2000).

after graduation. In *Edwards v. California University of Pennsylvania*,[48] the Third Circuit held that a professor did not have the right to choose curriculum materials in contravention of the university's decision about which syllabus would be used.[49] In *Clark v. Holmes*,[50] the Seventh Circuit stated that academic freedom was not "a license for uncontrolled expression at variance with established curricular contents and internally destructive of the proper functioning of the institution."[51]

The issue of germaneness involves judgments about what is relevant to the subject matter. For instance, in *Martin v. Parrish*,[52] the Fifth Circuit upheld the dismissal of an instructor for use of vulgar and profane language in the classroom, noting that "such language was not germane to the subject matter in his class and had no educational function."[53] The AAUP's 1940 Statement provides that faculty members "should be careful not to introduce into their teaching controversial matter which has no relation to their subject."[54] The 1970 Interpretive Comment 2 explains:

> The intent of this statement is not to discourage what is "controversial." Controversy is at the heart of the free academic inquiry which the entire statement is designed to foster. The passage serves to underscore the need for teachers to avoid persistently intruding material which has no relation to their subject.[55]

The institution may determine not only the course content, but also the teaching methods to be used. In *Hetrick v. Martin*,[56] the Sixth Circuit upheld a state university's refusal to renew a professor's contract because of a disagreement over teaching methods.[57] The instructor's teaching emphasized "student responsibility and freedom to organize class time and out-of-class assignments in terms of student interest."[58] However, the university expected professors to "teach on a basic level, to stress fundamentals and to follow conventional teaching patterns—in a word, to 'go by the book.'"[59] The court stated:

> We do not accept plaintiff's assertion that the school administration abridged her First Amendment rights when it refused to rehire her because it considered her teaching philosophy to be incompatible with the pedagogical aims of the University. Whatever may be the ultimate

48. 156 F.3d 488 (3d Cir. 1998).

49. *Id*. at 493.

50. 474 F.2d 928 (7th Cir. 1972) (upholding state university's refusal to rehire a teacher who overemphasized sex in his health survey class, counseled an excessive number of students instead of referring them to the university's professional counselors, counseled students with his office door closed, and belittled staff members in discussions with students).

51. *Id.* at 931.

52. 805 F.2d 583 (5th Cir. 1986).

53. *Id.* at 584 n.2.

54. *1940 Statement*, *supra* note 4, at 3.

55. *Id*. at 5.

56. 480 F.2d 705 (6th Cir. 1973).

57. *Id*. at 708.

58. *Id.* at 707.

59. *Id.*

> scope of the amorphous "academic freedom" guaranteed to our Nation's teachers and students, it does not encompass the right of a nontenured teacher to have her teaching style insulated from review by her superiors when they determine whether she has merited tenured status just because her methods and philosophy are considered acceptable somewhere within the teaching profession.[60]

A college or university also has the institutional academic freedom to make teaching assignments regarding courses. In *Webb v. Board of Trustees of Ball State University*,[61] the Seventh Circuit declined to grant a professor's request for a preliminary injunction regarding teaching assignments because of the issues raised and because the request was made at an early stage of the litigation.[62] The court reasoned that the university's "ability to set a curriculum is as much an element of academic freedom as any scholar's right to express a point of view."[63]

B. The Academic Discipline

The second limitation is the academic discipline itself. As Isaac Kramnick and R. Laurence Moore have observed, "disciplines are disciplines because they don't encourage every point of view."[64] Teaching and publications which are contrary to certain accepted views in the discipline are likely to be evaluated negatively. This limitation can present difficult issues, because the disciplines are not value-free.[65] George M. Marsden has noted that there is a "widespread recognition today that all science operates within boundaries of precommitments shaped by interpretive traditions."[66] David M. Rabban has written: "To a significant extent, the very definition of a discipline and its standards for determining professional competence are themselves based on conventional wisdom."[67] He has also observed: "It is often impossible . . . to separate ideological from disciplinary objections to academic work."[68] The AAUP has acknowledged that questions about what constitutes scholarly work worth doing and the importance of a particular approach to a subject inevitably involve value judgments.[69]

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60. *Id.* at 709 (internal citations omitted).

61. 167 F.3d 1146 (7th Cir. 1999).

62. *Id*. at 1150.

63. *Id.* at 1149.

64. Isaac Kramnick & R. Laurence Moore, *The Godless University*, ACADEME, Nov.–Dec. 1996, at 18, 23.

65. *See, e.g.*, HILARY PUTNAM, REASON, TRUTH, AND HISTORY 139–41 (1981); LEO STRAUSS, NATURAL RIGHT AND HISTORY 52 (1953); JOEL C. WEINSHEIMER, GADAMER'S HERMENEUTICS: A READING OF TRUTH AND METHOD 15–32 (1985).

66. George M. Marsden, *The Ambiguities of Academic Freedom*, 62 CHURCH HISTORY 221, 232 (1993) [hereinafter *Ambiguities*].

67. David M. Rabban, *Does Academic Freedom Limit Faculty Autonomy?*, 66 TEX. L. REV. 1405, 1426 (1988).

68. Rabban, *supra* note 2, at 291.

69. American Association of University Professors, Committee A on Academic Freedom and Tenure, *Some Observations on Ideology, Competence, and Faculty Selection*, ACADEME, Jan.–Feb. 1986, at 1a, 2a. David M. Rabban has noted:

C. Institutional Judgments about Grading

The third limitation involves institutional judgments about grading. In *Lovelace v. Southeastern Massachusetts University*,[70] the First Circuit upheld a university's decision not to renew the contract of a teacher who rejected the university's requests to change his grading standards.[71] The court held that grading is subject to the university's policy decisions about its standards and educational mission.[72] Similarly, in *Wozniak v. Conry*,[73] the Seventh Circuit held that a professor does not have the freedom to refuse to comply with a university's grading policies.[74] In *Brown v. Armenti*[75] (Third Circuit) and *Hillis v. Stephen F. Austin State University*[76] (Fifth Circuit), the courts held that the institution, rather than the professor, has the freedom to assign a grade.[77] In *Parate v. Isibor*,[78] the Sixth Circuit held that while a university could not force a professor to change a grade because it would unconstitutionally compel the teacher's speech, the university administration could itself change the grade.[79]

D. Institutional Judgments about the Quality of Teaching and Scholarship

Fourth, institutional judgments about the quality of teaching and scholarship impose limits on academic freedom. A professor's teaching and scholarship are evaluated throughout his or her career—in decisions regarding hiring, tenure, promotion, awards, annual salary increases, appointments to influential committees and administrative positions, and termination. These qualitative judgments are based on certain conventional standards and values. They include, among other things, judgments about: whether a professor's teaching and scholarship are of high quality; whether the professor's courses are academically rigorous, well organized, and presented at an appropriate level of difficulty; and whether a scholarly work is a significant contribution. These judgments are based on conceptions about what the relevant standards are, what kinds of teaching and

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> Recent controversies over the value of "critical legal studies" in law schools prompted the AAUP to address these issues. Though the AAUP admonished departments to base decisions on the professional competence and integrity of candidates rather than on disciplinary orthodoxies, it did not address the extent to which standards of competence within disciplines themselves reflect conventional wisdom. The AAUP concluded that departments do not abridge individual academic freedom as long as they make academic judgments in good faith, a permissive though largely undefined standard.

Rabban, *supra* note 2, at 291.

70. 793 F.2d 419 (1st Cir. 1986).
71. *Id.* at 426.
72. *Id.*
73. 236 F.3d 888 (7th Cir.), *cert. denied*, 533 U.S. 903 (2001).
74. *Id.* at 891.
75. 247 F.3d 69, 75 (3d Cir. 2001).
76. 665 F.2d 547 (5th Cir. 1982).
77. *Brown*, 247 F.3d at 75; *Hillis*, 665 F.3d at 552–53.
78. 868 F.2d 821 (6th Cir. 1989).
79. *Id*. at 828–29.

scholarship meet the standards, and what measures of quality are appropriate. A professor who disagrees with those conceptions will find that his or her own approach is not protected by academic freedom. For example, in *Wirsing v. Board of Regents of University of Colorado*,[80] the U.S. District Court for the District of Colorado held that academic freedom did not entitle a professor to refuse to administer the university's standardized teacher evaluation forms in class on the ground that the forms were contrary to her theory of education.[81] The court observed that "[t]eacher evaluation is part of the University's own right to academic freedom."[82]

E. Certain Obligations When Faculty Speak or Write as Citizens

The fifth limitation involves certain obligations when faculty speak or write as citizens. The 1940 Statement provides:

> When they speak or write as citizens, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution.[83]

The 1940 Interpretation 3 states:

> If the administration of a college or university feels that a teacher has not observed the admonitions of paragraph (c) of the section on Academic Freedom and believes that the extramural utterances of the teacher have been such as to raise grave doubts concerning the teacher's fitness for his or her position, it may proceed to file charges under paragraph 4 of the section on Academic Tenure.[84]

However, Interpretation 3 also cautions: "In pressing such charges the administration should remember that teachers are citizens and should be accorded the freedom of citizens. In such cases the administration must assume full responsibility, and the American Association of University Professors and the Association of American Colleges are free to make an investigation."[85]

The 1970 Interpretive Comment 4 adds a further caution. It states:

> Paragraph (c) of the section on Academic Freedom in the 1940 *Statement* should also be interpreted in keeping with the 1964 "Committee A Statement on Extramural Utterances" (*Policy Documents and Reports,* 32), which states inter alia: "The controlling principle is

80. 739 F. Supp. 551 (D. Colo. 1990), *aff'd without opinion*, 945 F.2d 416 (10th Cir. 1991).
81. *Id*. at 553–54.
82. *Id.* at 554 (citing Sweezy v. New Hampshire, 354 U.S. 234 (1957)).
83. *1940 Statement*, *supra* note 4, at 4.
84. *Id.* at 5.
85. *Id.*

> that a faculty member's expression of opinion as a citizen cannot constitute grounds for dismissal unless it clearly demonstrates the faculty member's unfitness for his or her position. Extramural utterances rarely bear upon the faculty member's fitness for the position. Moreover, a final decision should take into account the faculty member's entire record as a teacher and scholar."[86]

Presumably, a college or university could sanction a faculty member for making public statements that were dishonest, fraudulent, slanderous, or illegal, since such statements can clearly demonstrate a faculty member's unfitness, and since the law does not protect such statements for any citizen.

F. Hate Speech

The sixth limitation involves restrictions on hate speech, including racist and sexist speech. A number of universities have adopted harassment policies or campus speech codes prohibiting faculty and students from engaging in expression that harasses or demeans others because of race, ethnicity, gender, sexual orientation, religion, or disability.[87] These restrictions have generated criticisms that some campus speech codes are used to stifle speech and enforce political correctness.[88] Some university policies and actions have been ruled unconstitutional because they were overbroad or vague or because they constituted a content-based restriction on speech.[89]

Regardless of where and how the lines should be drawn, a university's educational mission justifies some limitations on harassing speech. A faculty member who deliberately harasses students, damaging their educational experience and even driving them from the university, undermines the university mission of educating students. Such a faculty member can be disciplined or dismissed, since the university's educational mission supersedes the faculty member's individual academic freedom. For example, in *Bonnell v. Lorenzo*,[90] the Sixth Circuit held that individual academic freedom did not protect a teacher who was suspended for repeatedly using lewd and vulgar language in class and for circulating certain

86. *Id.* at 6 (quoting American Association of University Professors, *Committee A Statement on Extramural Utterances*, *in* POLICY DOCUMENTS & REPORTS 32 (9th ed. 2001)).

87. *See generally* KAPLIN & LEE, *supra* note 43, at 508–16 (3d ed. 1995); WILLIAM A. KAPLIN & BARBARA A. LEE, YEAR 2000 CUMULATIVE SUPPLEMENT TO THE LAW OF HIGHER EDUCATION THIRD EDITION 333–35 (National Association of College and University Attorneys Supp. 2000) (discussing hate crime examples and the difficult task of formulating hate speech regulations that would survive First Amendment scrutiny).

88. *See, e.g.*, DINESH D'SOUZA, ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS 140–56 (1991); ALAN CHARLES KORS & HARVEY A. SILVERGLATE, THE SHADOW UNIVERSITY: THE BETRAYAL OF LIBERTY ON AMERICA'S CAMPUSES (1998).

89. *E.g.*, Dambrot v. Cent. Mich. Univ., 55 F.3d 1177 (6th Cir. 1995); IOTA XI Chapter of Sigma Chi Fraternity v. George Mason Univ., 993 F.2d 386 (4th Cir. 1993); UWM Post, Inc. v. Bd. of Regents, 774 F. Supp. 1163 (E.D. Wis. 1991); Doe v. Univ. of Mich., 721 F. Supp. 852 (E.D. Mich. 1989).

90. 241 F.3d 800 (6th Cir. 2001).

documents regarding a sexual harassment complaint filed against him.[91] The court observed: "While a professor's rights to academic freedom and freedom of expression are paramount in the academic setting, they are not absolute to the point of compromising a student's right to learn in a hostile-free environment."[92]

G. Religious Expression

The seventh limitation relates to religious expression. State universities typically prohibit the advocacy of religious viewpoints by faculty in the classroom to maintain a separation between church and state. For example, in *Bishop v. Aronov*,[93] the University of Alabama prohibited a professor of exercise physiology from making religious statements in class.[94] Some of his statements concerned his religious beliefs and "his understanding of the creative force behind human physiology."[95] In addition, he gave brief explanations of his philosophical and religious approach to problems and his advice to students about coping with academic stress.[96] He also organized an after-class meeting with students and others in which he discussed evidences of God in human physiology.[97] The university prohibited him from doing these things.[98] Since the university was a state institution, the professor alleged that the prohibitions infringed on his right of free speech.[99]

The Eleventh Circuit agreed with the university. The court held that during instructional time the classroom was not a public forum, and that therefore the university could impose reasonable restrictions on the professor's classroom speech.[100] The court stated: "Tangential to the authority over its curriculum, there lies some authority over the conduct of teachers in and out of the classroom that significantly bears on the curriculum or that gives the appearance of endorsement by the university."[101]

The court did not reach the issue of whether the professor's speech constituted an establishment of religion. The Eleventh Circuit reasoned: "Because of the potential establishment conflict, even the appearance of proselytizing by a professor should be a real concern to the University."[102] It held that "[t]he University can restrict speech that falls short of an establishment violation . . . ."[103]

Other secular universities also prohibit the expression of religious viewpoints in

91. *Id.* at 826–27.
92. *Id.* at 823–24.
93. 926 F.2d 1066 (11th Cir. 1991).
94. *Id*. at 1069–70.
95. *Id*. at 1068.
96. *Id*.
97. *Id*. at 1068–69.
98. *Id*. at 1069–70.
99. *Id*. at 1070.
100. *Id.* at 1071.
101. *Id*. at 1074.
102. *Id.* at 1077.
103. *Id.*

class or on campus.[104] Phillip E. Johnson has written:

> In the minds of some academic authorities and judges, . . . to suggest [the possibility that God might really exist] in a classroom is academic misconduct or even a violation of the Constitution.
>
> At the same time, classroom advocacy of atheism is common and everywhere assumed to be protected by academic freedom. Many philosophy professors make a career of fashioning arguments that support or assume atheism, and students frequently tell me about courses that incorporate heavy-handed ridicule of theistic religion.[105]

Isaac Kramnick and R. Laurence Moore have noted: "The claim by a biologist that Darwinian science leaves no room for God is not a cause for scandal in the modern university, whereas the claim by a professor of English that students ought to believe what the Bible says would be a good reason to deny tenure."[106] Nicholas Wolterstorff has observed that "state universities have severe restrictions on what a professor may and may not teach with respect to religion."[107]

In addition to official limitations, most secular universities have strong cultural prohibitions against the advocacy of religious perspectives.[108] George M. Marsden

104. *See, e.g.*, William Scott Green, *Religion Within the Limits*, ACADEME, Nov.–Dec. 1996, at 24, 26 ("But even academic tolerance has its limits, and religion surely marks one of them."); David A. Hoekema, *Politics, Religion, and Other Crimes Against Civility,* ACADEME, Nov.–Dec. 1996, at 33, 37 ("[I]nstructors may have sound reasons to fear that engagement with religious questions in the classroom will bring the ire of department chairs and administrators."); Carolyn J. Mooney, *Devout Professors on the Offensive*, CHRON. HIGHER EDUC., May 4, 1994, at A18, A21–A22 (citing examples of a teaching assistant at a state university who felt pressured to remove Bible-study literature from his office door and agreed to stop publicizing Christian activities on a department-wide computer network, and an adjunct biology instructor at a state university who was dismissed because he told the students that he was a creationist and asked them to write a paper about whether creationism and evolution were antithetical).

105. Phillip E. Johnson, *What (If Anything) Hath God Wrought? Academic Freedom and the Religious Professor*, ACADEME, Sept.–Oct. 1995, at 16, 18.

106. Kramnick & Moore, *supra* note 64, at 21.

107. Nicholas Wolterstorff, *Ivory Tower or Holy Mountain? Faith and Academic Freedom*, ACADEME, Jan.–Feb. 2001, at 17, 21.

108. George M. Marsden has written:

> Not only has religion become peripheral, there is a definite bias against any perceptible religiously informed perspectives getting a hearing in university classrooms. Despite the claims of contemporary universities to stand above all for openness, tolerance, academic freedom, and equal rights, viewpoints based on discernibly religious concepts (for instance, that there is a created moral order or that divine truths might be revealed in a sacred Scripture), are often informally or explicitly excluded from classrooms.

George M. Marsden, *The Soul of the American University*, FIRST THINGS, Jan. 1991, at 34, 44. Anthony J. Diekema has observed:

> Christian scholars on secular campuses . . . often describe in various ways the anti-religious bias that pervades the academy in general and the specific ways in which it comes to fruition in the discouragement of religious perspectives and worldviews in the scholarly work of Christians. In my own experience as president of a religiously affiliated college, I recall some examples: the junior faculty member who found it impossible to secure a mentor to guide his doctoral dissertation topic that included a

has written:

> In much of academia, explicit religious outlooks are regarded as unacceptable. Sometimes there is outright discrimination. I have seen cases in the field of religion in which applicants for teaching positions or for graduate schools have been dismissed out of hand because they revealed that religious motives would shape their scholarship.[109]

He noted that one political science professor said that "if a professor proposed to study something from a Catholic or Protestant point of view, it would be treated like proposing something from a Martian point of view."[110]

Marsden has also observed:

> While American universities today allow individuals free exercise of religion in parts of their lives that do not touch the heart of the university, they tend to exclude or discriminate against relating explicit religious perspectives to intellectual life. In other words, the free exercise of religion does not extend to the dominant intellectual centers of our culture. So much are these exclusions taken for granted, as simply part of the definition of academic life, that many people do not even view them as strange. Nor do they think it odd that such exclusion is typically justified in the names of academic freedom and free inquiry.[111]

Some religious colleges and universities also have limitations regarding religious expression. In a 1978 survey of church-affiliated colleges, about a third of the responding colleges reported that their faculty employment contracts require adherence to or respect for the beliefs or values taught by the affiliated church.[112]

Consequently, both secular and religious colleges and universities have limitations related to religion. Many secular institutions prohibit the advocacy of religious viewpoints by faculty in the classroom, and some religious institutions prohibit the advocacy of viewpoints which contradict their religious principles.

> Christian worldview; the recent graduate who was confronted by her graduate school mentor and advised to find a "better set of presuppositions" (better than Christian ones) or a different graduate school; the candidate for a faculty position who argued that he needed to "relearn" how to articulate his Christian worldview because it had been entirely unacceptable during his years in pursuit of the doctorate. There are others of a similar nature. The pervasive character of this bias, with its manifestations in the life of the community, makes it very politically correct to keep religious views outside of one's scholarly and teaching activities. In such an environment it is politically correct for Christian scholars to focus on research and projects that avoid worldview issues and to keep their religious views and commitments outside their teaching and analytical tasks.

DIEKEMA, *supra* note 47, at 16.

109. George Marsden, *Pluralism Yes. Religion No!*, 22 PLANNING FOR HIGHER EDUC. 58, 58 (Spring 1994).

110. *Id.*

111. GEORGE M. MARSDEN, THE SOUL OF THE AMERICAN UNIVERSITY: FROM PROTESTANT ESTABLISHMENT TO ESTABLISHED NONBELIEF 6 (1994).

112. PHILIP R. MOOTS & EDWARD MCGLYNN GAFFNEY, JR., CHURCH AND CAMPUS: LEGAL ISSUES IN RELIGIOUSLY AFFILIATED HIGHER EDUCATION 73–74 (1979).

For example, at many secular colleges and universities a professor could not teach that God exists, and at some religious colleges and universities a professor could not teach that God does not exist. The decision regarding which is the greater freedom depends on the particular views that the individual faculty member wants to express. The differences in those freedoms are in part what attract some faculty members and students to secular universities and others to religious universities. For instance, eighty-eight percent of Brigham Young University faculty responding to a survey said that they have more freedom to teach their subject matter in the way that they feel is appropriate than they would have at other universities.[113]

While the precise contours of the limitations vary, every college or university places some limitations on individual academic freedom to protect the school's institutional mission. George Worgul has observed that "'academic freedom' at any university—whether public, private, church-related or church-sponsored—is never unlimited or absolute. Every university has an identity and a mission to which it must adhere. . . . Freedom is always a situated freedom and a responsible freedom."[114]

IV. INSTITUTIONAL ACADEMIC FREEDOM AT RELIGIOUS COLLEGES AND UNIVERSITIES

Like other colleges and universities, religious colleges and universities have an articulated mission. For many religious institutions, the mission is to provide a college or university education that is consistent with the ideals and principles of the sponsoring religion. Religious colleges and universities have the institutional academic freedom to pursue their distinctive missions.

Michael McConnell has identified three reasons why the institutional academic freedom of religious universities should be protected. The first reason is that religious colleges and universities make important contributions to the "ethical, cultural, and intellectual life of our nation."[115]

> [T]hey enrich our intellectual life by contributing to the diversity of thought and preserving important alternatives to post-Enlightenment secular orthodoxy. Their very distinctiveness makes them better able to resist the popular currents of majoritarian culture and thus to preserve the seeds of dissent and alternative understandings that may later be welcomed by the wider society.[116]

Institutional academic freedom thus helps to preserve pluralism and diversity among institutions.

The second reason is that "the insistence on a single model of truth-seeking is

113. Keith J. Wilson, *By Study and Also by Faith: The Faculty at Brigham Young University Responds*, 38 BYU STUDIES 157, 175 (1999).

114. GEORGE S. WORGUL, JR., *Editor's Preface*, *in* ISSUES IN ACADEMIC FREEDOM ix (George S. Worgul, Jr., ed., 1992).

115. McConnell, *supra* note 8, at 312.

116. *Id.*

inconsistent with the antidogmatic principles on which the case for academic freedom rests . . . ."[117] Scholars are granted academic freedom "because we understand the clash of competitive ideas to be the method by which truth is best discovered. But this idea, too, must be subject to testing and falsification."[118] The older religious tradition in American higher education also has its theory of knowledge, with its own propositions:

> (1) truth is unchanging and exists prior to and independent of the process of discovery; (2) truth is only partially discernible through human efforts; indeed, the products of human effort, being a manifestation of a fallen nature, should always be tested against divine authority; (3) truth is imparted to humanity, at least in part, through divine agency, whether this is the Holy Bible, the tradition and teaching authority of the church, or the unaided inner light of conscience; (4) departures from established understandings are as likely to result in error as in the advancement of truth; and (5) the consequences of the spread of error are serious and eternal.[119]

McConnell has argued: "For a limited number of institutions to adhere to the older norm is therefore not antithetical to but rather consistent with the purposes behind the institution of academic freedom. It will increase diversity in the culture as a whole and enable the competition of ideas to continue."[120] He has observed: "Given the antireligious character of modern academic culture, serious religious scholarship would be in danger of extinction if it were not for particular institutions in which it is valued and protected."[121]

The third reason for preserving institutional academic freedom is religious freedom. McConnell has written:

> [O]ur society's commitment to freedom of religion would demand some accommodation of the need of religious colleges and universities to modify the secular principles of academic freedom. These institutions are an important means by which religious faiths can preserve and transmit their teachings from one generation to the next, particularly for nonmainstream religions whose differences from the predominant academic culture are so substantial that they risk annihilation if they cannot retain a degree of separation. The right to develop and pass on religious teachings is at the very heart of the [F]irst [A]mendment, and there should be no doubt that these concerns override whatever exiguous benefit to society might be achieved by forcing religiously distinctive institutions to conform to secular academic freedom.[122]

For the above reasons, the institutional academic freedom of religious colleges and universities promotes some of the same goals that individual academic

117. *Id.*
118. *Id*. at 313.
119. *Id.* at 313–14.
120. *Id.* at 314.
121. *Id*. at 315 (internal footnote omitted).
122. *Id*. at 315–16.

freedom promotes. It creates more choices for students[123] and faculty, and fosters a wider diversity of viewpoints in the pursuit of truth. David M. Rabban has written that private institutions may be granted greater latitude regarding educational policies than state universities because "[t]he resulting pluralism within the academic world . . . may provide more tolerance for diverse and unpopular views than a rule that would subject all universities to the commitment to diversity of thought that the [F]irst [A]mendment imposes on public ones."[124]

The AAUP's 1940 Statement on academic freedom recognizes the right of religious colleges and universities to place limitations on individual academic freedom to preserve their religious mission and identity. The "limitations clause" of the 1940 Statement provides: "Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of appointment."[125] Former AAUP President Ralph F. Fuchs has written:

> The professional charter of academic freedom which is currently followed concedes more generally that a college or university may insist upon "limitations of academic freedom because of religious or other aims of the institution," provided the limits are clearly stated in advance. This concession recognizes the church sponsorship of many institutions in this country and the civil liberty of individuals and groups, including those who form academic institutions, to govern their own affairs.[126]

However, the AAUP, which is strongly committed to protecting individual academic freedom, has been ambivalent regarding the limitations clause of the 1940 Statement. In 1970, the AAUP attempted to back away from the limitations clause by adopting Interpretive Comment 3, which stated: "Most church-related institutions no longer need or desire the departure from the principle of academic freedom implied in the 1940 *Statement*, and we do not now endorse such a departure."[127] Nevertheless, while the 1970 Interpretive Comment 3 did not "endorse" such a departure, neither did it prohibit it. Indeed, it would be an

123. "Simply put, many parents prefer for their children, and many students prefer for themselves, schools that adhere to the ethics of particular religious traditions. The availability of this choice is no trivial freedom." Stephen L. Carter, *The Constitution and The Religious University*, 47 DEPAUL L. REV. 479, 480 (1998).

Eugene Bramhall and Ronald Ahrens have written:

> Religious universities offer diversity to students seeking a different perspective from the secular education they received in high school. Religious universities give students a different perspective by offering them a faithful, nurturing environment in which to learn. Many students attend a religious university because they share the same beliefs and expect to be trained in a particular way. A religious university provides them with a style of living and learning impossible to find at other universities.

Eugene H. Bramhall & Ronald Z. Ahrens, *Academic Freedom and the Status of the Religiously Affiliated University*, 37 GONZ. L. REV. 227, 251 (2002).

124. Rabban, *supra* note 2, at 268–69.

125. *1940 Statement*, *supra* note 4, at 3.

126. Fuchs, *supra* note 2, at 437 (internal citation omitted).

127. *1940 Statement*, *supra* note 4, at 6.

unusual feat of "interpretation" for an interpretive comment to prohibit what the 1940 Statement specifically permits.

The AAUP itself had difficulty understanding what the 1970 Interpretive Comment meant. In 1988, a subcommittee of the AAUP's Committee on Academic Freedom and Tenure ("Committee A") attempted to resolve the issue by recommending that institutions which invoke the limitations clause forfeit "the moral right to proclaim themselves as authentic seats of higher learning."[128] However, Committee A rejected the subcommittee's recommendation:

> The committee declined to accept the subcommittee's invitation to hold that the invocation of the clause exempts an institution from the universe of higher education, in part due to the belief that it is not appropriate for the Association to decide what is and what is not an authentic institution in higher education. The committee did conclude, however, that invocation of the clause does not relieve an institution of its obligation to afford academic freedom as called for in the 1940 *Statement*.[129]

However, Committee A did not interpret the last sentence as resolving the issue. The committee chair wrote:

> I had thought that this would have put the issue to rest, that in Committee A's judgment a church-related institution must afford the same academic freedom that all other accredited degree-granting institutions must observe. At our June meeting, however, I was badly disabused of this simplistic, or perhaps simple-minded, notion, for what I would judge to be a majority of the committee now consider the last sentence to be no more than a truism that begs the question of what obligation a church-related institution has to afford academic freedom. That question will apparently continue to vex us.[130]

In other words, because the 1940 Statement itself permits religious limitations, the observation that a religious university must afford academic freedom as called for in the 1940 Statement is a mere truism that begs the question.

In 1999, Committee A approved some operating guidelines that reaffirm the limitations clause of the 1940 Statement.[131] The guidelines state that, in its 1988 report, Committee A held that the 1970 Interpretive Comment did not read the limitations clause out of the 1940 Statement, but rather held that an institution must disclose its academic freedom limitations to prospective faculty.[132]

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128. American Association of University Professors, Subcommittee of Committee A, *The "Limitations Clause" in the 1940 Statement of Principles*, ACADEME, Sept.–Oct. 1988, at 52, 55.

129. American Association of University Professors, Committee A, *Report of Committee A, 1988-89*, ACADEME, Sept.–Oct. 1989, at 49, 54.

130. *Id.*

131. AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, *The "Limitations" Clause in the 1940 Statement of Principles on Academic Freedom and Tenure: Some Operating Guidelines*, *in* POLICY DOCUMENTS & REPORTS 96 (9th ed. 2001).

132. *Id.*

The guidelines provide that the limitations must be "adequately explicit."[133] The guidelines also give an example of a limitation that Committee A considers adequately explicit: "[A] restriction on any teaching or utterance that 'contradicts *explicit* principles of the [Church's] faith or morals,' for example, is adequately explicit."[134] This example is excerpted from Gonzaga University's limitation, to which the AAUP made no objection in its 1965 report.[135] Gonzaga's limitation stated: "Intelligent analysis and discussion of Catholic dogma and official pronouncements of the Holy See on issues of faith and morals is encouraged. However, open espousal of viewpoints which contradict explicit principles of Catholic faith and morals is opposed to the specified aims of this University."[136]

In summary, religious colleges and universities, with their distinctive educational missions, make important contributions to pluralism in American higher education, as well as to religious freedom. The AAUP's 1940 Statement on academic freedom recognizes the right of religious institutions of higher education to place limits on individual academic freedom to preserve their religious missions. In 1999, the AAUP reaffirmed the validity of the limitations clause of the 1940 Statement.

V. EX CORDE ECCLESIAE

In recent years the Catholic Church has sought to strengthen the Catholic mission and identity of Catholic colleges and universities. In 1990, Pope John Paul II issued *Ex Corde Ecclesiae*,[137] an apostolic constitution stating principles to be followed in Catholic institutions of higher education. *Ex Corde Ecclesiae* specifically invokes the concept of institutional academic freedom, and observes that Catholic universities contribute to cultural diversity:

> Catholic Universities join other private and public Institutions in serving the public interest through higher education and research; they are one among the variety of different types of institution that are necessary for the free expression of cultural diversity . . . . Therefore

133. *Id.* at 98.

134. *Id.* The guidelines also state: "It would . . . be incumbent on an institution adopting such a restriction to show that at the time of appointment, the institution and the faculty member knew precisely what those principles were." *Id.* The guidelines further provide:

> Adequate explicitness is plainly a matter of degree. Some institutions demand faithfulness to future teachings or doctrines that may be unascertained or unascertainable at the time and which may depart, subtly or radically, from those in effect at the time of appointment. A limitation drafted so broadly as to include any teaching, doctrine, or constraint subsequently promulgated would fail to meet the standard of adequate explicitness. But cases may arise where a restriction not imposed in express terms at the time of appointment can be viewed as covered by a broadly drafted rule because the restriction was reasonably anticipated.

Id. at 99.

135. The fact that the 1965 AAUP report made no objection to Gonzaga's limitation was confirmed in *Report of Committee A, 1988–89*, *supra* note 129, at 53.

136. American Association of University Professors, *Academic Freedom and Tenure: Gonzaga University*, 51 AAUP BULL. 8, 17 n.11 (1965).

137. *Ex Corde Ecclesiae*, *supra* note 1.

> they have the full right to expect that civil society and public authorities will recognize and defend their institutional autonomy and academic freedom . . . .[138]

Ex Corde Ecclesiae permits the development of implementing ordinances at local and regional levels by Episcopal Conferences and other Assemblies of Catholic Hierarchy.[139] Consequently, the United States Conference of Catholic Bishops adopted *Ex Corde Ecclesiae: The Application to the United States*.[140] The *Application* applies to all Catholic institutions of higher education in the United States except for ecclesiastical universities and faculties.[141]

Ex Corde Ecclesiae and the *Application* respect individual academic freedom. At the same time, the documents place limits on individual academic freedom in light of the religious missions of Catholic institutions of higher education. For example, *Ex Corde Ecclesiae* provides: "Freedom in research and teaching is recognized and respected according to the principles and methods of each individual discipline, so long as the rights of the individual and of the community are preserved within the confines of the truth and the common good."[142] It also states:

> In ways appropriate to the different academic disciplines, all Catholic teachers are to be faithful to, and all other teachers are to respect, Catholic doctrine and morals in their research and teaching. In particular, Catholic theologians, aware that they fulfill a mandate received from the Church, are to be faithful to the Magisterium of the Church as the authentic interpreter of Sacred Scripture and Sacred Tradition.[143]

Ex Corde Ecclesiae provides that one of the essential characteristics of a Catholic university is "[f]idelity to the Christian message as it comes to us through the

138. *Id*. Part I.B.1, § 37.

139. *Id*. Part II, Art. 1, § 2.

140. United States Conference of Catholic Bishops, *Ex Corde Ecclesiae: The Application to the United States*, *available at* http://www.nccbuscc.org/bishops/excorde.htm (last visited Oct. 6, 2003) [hereinafter *Application*].

141. *See Ex Corde Ecclesiae*, *supra* note 1, Part II, Art. 1, § 2; *Application*, *supra* note 140, Part Two, Art. 1, § 1 n.19. "Ecclesiastical Universities and Faculties are those that have the right to confer academic degrees by the authority of the Holy See." *Ex Corde Ecclesiae*, *supra* note 1, Part II, Art. 1, § 2 n.45. They are governed by the norms of the apostolic constitution, *Sapientia Christiana*. *Ex Corde Ecclesiae*, *supra* note 1, Part II, Art. 1, § 2.

142. *Ex Corde Ecclesiae*, *supra* note 1, Part II, Art. 2, § 5. Similarly, *Ex Corde Ecclesiae* also states: "Every Catholic University . . . guarantees its members academic freedom, so long as the rights of the individual person and of the community are preserved within the confines of the truth and the common good." *Id*. Part I.A.1, § 12. It also provides: "The Church, accepting 'the legitimate autonomy of human culture and especially of the sciences', recognizes the academic freedom of scholars in each discipline in accordance with its own principles and proper methods, and within the confines of the truth and the common good." *Id*. Part I.A.3, § 29 (quoting Second Vatican Council, *Gaudium et Spes* [Pastoral Constitution on the Church in the Modern World] ¶ 59 (1965)).

143. *Id*. Part II, Art. 4, § 3.

Church."[144] It further states, "A Catholic University, as Catholic, informs and carries out its research, teaching and all other activities with Catholic ideals, principles and attitudes."[145]

The *Application* provides: "Academic freedom is an essential component of a Catholic university. The university should take steps to ensure that all professors are accorded 'a lawful freedom of inquiry and of thought, and of freedom to express their minds humbly and courageously about those matters in which they enjoy competence.'"[146] At the same time, the *Application* states that all faculty are expected to exhibit "respect for Catholic doctrine"[147] and that "the university statutes are to specify the competent authority and the process to be followed to remedy the situation" if this quality is lacking.[148]

The *Application* further provides that it is important for Catholic universities to implement "their commitment to the essential elements of Catholic identity," including, among other things, "[c]ommitment to be faithful to the teachings of the Catholic Church;" "[c]ommitment to Catholic ideals, principles and attitudes in carrying out research, teaching and all other university activities, . . . with due regard for academic freedom and the conscience of every individual;" and "[c]ommitment of witness of the Catholic faith by Catholic administrators and teachers, especially those teaching the theological disciplines, and acknowledgment and respect on the part of non-Catholic teachers and administrators of the university's Catholic identity and mission."[149]

The *Application* states that the university and bishops have a right to expect theologians to present "authentic Catholic teaching."[150] Therefore, "Catholic professors of the theological disciplines have a corresponding duty to be faithful to the Church's magisterium as the authoritative interpreter of Sacred Scripture and Sacred Tradition."[151] The *Application* also provides that "'[t]hose who are engaged in the sacred disciplines enjoy a lawful freedom of inquiry and of prudently expressing their opinions on matters in which they have expertise, while observing the submission [*obsequio*] due to the magisterium of the Church.'"[152]

In addition, the *Application* states that Catholic theology professors must have a *mandatum* granted by the bishop of the diocese in which the university is

144. *Id.* Part I.A.1, § 13(3).

145. *Id*. Part II, Art. 2, § 2.

146. *Application*, *supra* note 140, Part Two, Art. 2, § 2 (quoting Second Vatican Council, *Gaudium et Spes* [Pastoral Constitution on the Church in the Modern World] ¶ 44 (1965). The *Application* also states: "With due regard for the common good and the need to safeguard and promote the integrity and unity of the faith, the diocesan bishop has the duty to recognize and promote the rightful academic freedom of professors in Catholic universities in their search for truth." *Id*. Part Two, Art. 2, § 3.

147. *Id.* Part Two, Art. 4, § 4(b).

148. *Id*.

149. *Id*. Part One, § VII (internal citation omitted).

150. *Id*. Part Two, Art. 4, § 4(d).

151. *Id*.

152. *Id*. Part Two, Art. 2, § 2 (quoting 1983 CODE c. 218).

located.[153] The *Application* explains: "The *mandatum* is fundamentally an acknowledgment by Church authority that a Catholic professor of a theological discipline is a teacher within the full communion of the Catholic Church."[154] It also explains: "The *mandatum* recognizes the professor's commitment and responsibility to teach authentic Catholic doctrine and to refrain from putting forth as Catholic teaching anything contrary to the Church's magisterium."[155] The *mandatum* can be denied or removed.[156]

Ex Corde Ecclesiae and the *Application* also contain a number of other provisions intended to preserve and strengthen the mission of Catholic institutions of higher education. Among other things, Catholic schools are to incorporate the *Application's* norms into their governing documents or include them by reference.[157] In addition, each institution has a responsibility to "affirm its essential characteristics, in accord with the principles of *Ex Corde Ecclesiae*, through public acknowledgment in its mission statement and/or its other official documentation of its canonical status and its commitment to the practical

153. *Id*. Part Two, Art. 4, §§ 4(e) and 4(e)(4)(a). Canon 812 provides: "It is necessary that those who teach theological disciplines in any institute of higher studies have a mandate from the competent ecclesiastical authority." 1983 CODE c.812, *quoted in Ex Corde Ecclesiae*, *supra* note 1, at n.50.

154. *Application*, *supra* note 140, Part Two, Art. 4, § 4(e)(1).

155. *Id.* § 4(e)(3).

156. *Id*. §§ 4(e)(4)(b), 4(e)(4)(c). *See also* United States Conference of Catholic Bishops, *Guidelines Concerning the Academic Mandatum in Catholic Universities (Canon 812)*, *available at* http://www.usccb.org/bishops/mandatumguidelines.htm (last visited Oct. 6, 2003). The *Application* states: "If a particular professor lacks a *mandatum* and continues to teach a theological discipline, the university must determine what further action may be taken in accordance with its own mission and statutes (*see* canon 810, § 1)." *Application*, *supra* note 140, at n.41.

Most Catholic colleges, universities, and bishops will not say which theology professors have a *mandatum*, on the ground that it is a private matter between the faculty member and the bishop. However, in choosing a Catholic college or university and specific theology classes, some students and parents would like to know whether the theology faculty are in communion with the church. *See* Tim Drake, *Mandatum Cover-Up?*, NATIONAL CATHOLIC REGISTER, June 1–7, 2003, at 1; Tim Drake, *Parents Take Nothing for Granted*, NATIONAL CATHOLIC REGISTER, July 20–26, 2003, at 1.

157. *Application*, *supra* note 140, Part Two, Art. 1, §§ 2(a)–2(b). Section 2(a) provides:

> Those universities established or approved by the Holy See, by the NCCB, by other hierarchical assemblies, or by individual diocesan bishops are to incorporate, by reference and in other appropriate ways, the general and particular norms into their governing documents and conform their existing statutes to such norms. Within five years of the effective date of these particular norms, Catholic universities are to submit the aforesaid incorporation for review and affirmation to the university's competent ecclesiastical authority.

Section 2(b) provides:

> Other Catholic universities are to make the general and particular norms their own, include them in the university's official documentation by reference and in other appropriate ways, and, as much as possible, conform their existing statutes to such norms. These steps to ensure their Catholic identity are to be carried out in agreement with the diocesan bishop of the place where the seat of the university is situated.

See also Ex Corde Ecclesiae, *supra* note 1, Part II, Art. 1, § 3.

implications of its Catholic identity . . . ."[158] The institution should also take "practical steps to implement its mission statement in order to foster and strengthen its Catholic nature and character."[159] The *Application* further states that the university "shall develop and maintain a plan for fulfilling its mission that communicates and develops the Catholic intellectual tradition, is of service to the Church and society, and encourages the members of the university community to grow in the practice of the faith."[160]

In addition, the *Application* provides that, to the extent possible, the majority of the board of trustees should be Catholics committed to the Church.[161] It states that the university president should be a Catholic,[162] and when a non-Catholic candidate for president is being considered, the institution "should consult with the competent ecclesiastical authority about the matter."[163] The *Application* further provides that "the university should strive to recruit and appoint Catholics as professors so that, to the extent possible, those committed to the witness of the faith will constitute a majority of the faculty."[164] The *Application* also states that "Catholic theology should be taught in every Catholic university,"[165] that "[c]ourses in Catholic doctrine and practice should be made available to all students,"[166] and that "Catholic teaching should have a place, if appropriate to the subject matter, in the various disciplines taught in the university."[167]

Ex Corde Ecclesiae and the *Application* are designed to protect the religious mission and identity of Catholic colleges and universities. These documents respect individual academic freedom. At the same time, they place reasonable limits on individual academic freedom to preserve the Catholic character of those institutions of higher education. John H. Robinson has written that "a principal objective of all the preceding norms, as of *Ex Corde* itself, is to make sure that the

158. *Application*, *supra* note 140, Part Two, Art. 2, § 5 (internal footnote omitted). *Ex Corde Ecclesiae* provides: "Every Catholic University is to make known its Catholic identity, either in a mission statement or in some other appropriate public document, unless authorized otherwise by the competent ecclesiastical authority." *Ex Corde Ecclesiae*, *supra* note 1, Part II, Art. 2, § 3.

159. *Application*, *supra* note 140, Part Two, Art. 2, § 6.

160. *Id*. Part Two, Art. 5, § 1(a).

161. *Id*. Part Two, Art. 4, § 2(b).

162. *Id*. Part Two, Art. 4, § 3(a).

163. *Id*. Part Two, Art. 4, § 3(a) n.36.

164. *Id*. Part Two, Art. 4, § 4(a). *Ex Corde Ecclesiae* provides: "In order not to endanger the Catholic identity of the university or Institute of Higher Studies, the number of non-Catholic teachers should not be allowed to constitute a majority within the Institution, which is and must remain Catholic." *Ex Corde Ecclesiae*, *supra* note 1, Part II, Art. 4, § 4.

165. *Application*, *supra* note 140, Part Two, Art. 4, § 4(c).

166. *Id*. Part Two, Art. 4, § 5(b).

167. *Id*. Part Two, Art. 4, § 5(c). At the same time, the *Application* notes: "Though thoroughly imbued with Christian inspiration, the university's Catholic identity should in no way be construed as an excuse for religious indoctrination or proselytization." *Id.* Part Two, Art. 4, § 5(c) n.27. It also observes: "The Church's expectation of 'respect for Catholic doctrine,' should not . . . be misconstrued to imply that a Catholic university's task is to indoctrinate or proselytize its students. Secular subjects are taught for their intrinsic value, and the teaching of secular subjects is to be measured by the norms and professional standards applicable and appropriate to the individual disciplines." *Id.* Part Two, Art. 4, § 5(c) n.37.

education offered at Catholic colleges and universities is a genuinely Catholic one."[168] *Ex Corde Ecclesiae* and the *Application* constitute a significant affirmation of the institutional academic freedom of the 235 Catholic colleges and universities[169] in the United States.

VI. RESPECTING THE INSTITUTIONAL ACADEMIC FREEDOM OF RELIGIOUS COLLEGES AND UNIVERSITIES

Both individual and institutional academic freedom are indispensable to a college or university. Since neither freedom is absolute, the two freedoms must be mediated, and this mediation requires reasonable limitations on each.[170] Different institutions will naturally select different reasonable mixes of individual and institutional academic freedom. To preserve pluralism, institutional autonomy, and religious freedom, a religious institution should be allowed to determine for itself what its mission is and what reasonable limitations on individual and institutional academic freedom are appropriate to preserve that mission.

This deference to a religious college or university's judgment requires a conscious effort by some secular academics to understand and respect the religious institution's viewpoint. Differences between secular and religious institutions regarding academic freedom sometimes reflect differences in basic assumptions about the pursuit of truth. Michael W. McConnell has observed:

> Academic freedom, as understood in the modern secular university, is predicated on the view that knowledge is advanced only through the unfettered exercise of individual human reason in a posture of analytical skepticism and criticism. In some religious traditions, however, reason is understood to require reference to authority, community, and faith, and not just to individualized and rationalistic processes of thought. If religious ideas and approaches have anything positive to contribute to the sum of human knowledge, we should recognize that secular methodology cannot be universalized. To impose the secular norm of academic freedom on unwilling religious colleges and universities would increase the homogeneity—and decrease the vitality—of American intellectual life.[171]

These differences in views parallel the two competing discourses that Frederick Mark Gedicks has observed in the Supreme Court's interpretation of the religion clauses of the First Amendment.[172] One discourse is a "'secular individualist'

168. John H. Robinson, *A Symposium on the Implementation of Ex Corde Ecclesiae: Introduction*, 25 J.C. & U. L. 645, 651 (1999).

169. 2002 OUR SUNDAY VISITOR'S CATHOLIC ALMANAC 549 (Matthew Bunson ed., 2001).

170. Brigham Young University, *Statement on Academic Freedom at Brigham Young University* §§ II.A-C (1992), *available at* http://ar.byu.edu/catalog/undergrad_cat/1999/info/Statement.html (last visited Oct. 6, 2003).

171. McConnell, *supra* note 8, at 303–04.

172. FREDERICK MARK GEDICKS, THE RHETORIC OF CHURCH AND STATE: A CRITICAL ANALYSIS OF RELIGION CLAUSE JURISPRUDENCE (1995).

discourse."[173] This discourse presumes that "knowledge is discovered by the right application of critical reason, and never by simple appeal to religious authority or tradition."[174] It also emphasizes the "preservation of individual choice through value-neutral procedures, so that individuals remain free to act upon the truths they discover in the exercise of their own reason."[175] The other discourse is a "'religious communitarian' discourse."[176] This discourse "understands religion to be the principal, if not the exclusive, source of certain values and practices that lie at the base of civilized society."[177] These two discourses reflect two distinct traditions and sets of values, and help illuminate some of the differences regarding academic freedom at secular and religious institutions. Both discourses make important contributions to individuals and society, and both should be respected.

Secular academics should not view religious limitations as coercive, and therefore coerce a religious institution to abandon them.[178] Michael W. McConnell has argued:

> But who is coercing whom? A religious college is a voluntary institution, formed by like-minded scholars, benefactors, and students for the pursuit of knowledge within a particular tradition of thought. No one coerces anyone to join. Internal enforcement of the rules of a voluntary association is not "coercion." It more closely resembles freedom of contract.[179]

James Nuechterlein has observed: "No professor, after all, is required to take a job at a religious university, and so long as the university lays out clearly in advance the restrictions it imposes, it should be free to interpret and apply rules of academic freedom according to its lights (which, to recall again, was the original position of the AAUP)."[180]

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173. *Id.* at 12.

174. *Id.*

175. *Id.* at 13.

176. *Id.* at 11.

177. *Id.*

178. For an example of the view that religious limitations are coercive, see Judith Jarvis Thomson & Matthew W. Finkin, *Academic Freedom and Church-Related Higher Education: A Reply to Professor McConnell*, *in* FREEDOM AND TENURE IN THE ACADEMY 419, 421–23, 429 (William W. Van Alstyne ed., 1993).

179. Michael W. McConnell, unpublished manuscript, *quoted in* Douglas Laycock, *The Rights of Religious Academic Communities*, 20 J.C. & U.L. 15, 22 n.13 (1993).

180. James Nuechterlein, *The Idol of Academic Freedom*, FIRST THINGS, Dec. 1993, at 12, 15. Anthony J. Diekema has written:

> The shifting of argument to a moral one, that of "coercion," deserves brief comment. We hear it far too often. It certainly arises out of a kind of warfare mentality–the need to see religion as the enemy. But it betrays a lack of knowledge about most Christian scholars and Christian colleges and universities. It overlooks the fact that most Christian scholars locate in Christian colleges embracing Christian worldviews because they share that worldview. They are there because it facilitates their scholarship and search for truth. It has no resemblance to "coercion" . . . . The scholars are there because they want to be there, they are enhanced by the compatible worldview that they themselves endorse. The worldview may be a limitation to some, but for these faculty it is a limitation they will for themselves and which they find to be

A significant risk exists that some secular accreditors will undervalue a religious institution's mission and the need to maintain an environment consistent with its religious beliefs. Given their secular orientation, they will naturally favor free expression over religious values that they consider at best quaint and at worst pernicious. Some secular academics may conclude that because they personally would not want to associate with a religious college or university, no one else should have the freedom to do so. The conclusion is even more tempting if a secular academic finds the particular religious beliefs at issue repugnant, and strongly adheres to the very viewpoints whose expression is limited because they contradict those religious beliefs. It can be a short step from those premises to the conclusion that the religious institution lacks sufficient academic freedom to qualify for accreditation.

The religious institution, ironically, may offer as much academic freedom as a secular institution does, but on different issues.[181] Most secular academics do not even perceive the limitations at their own institutions as limitations, because those limitations seem natural to them. The limitations exclude viewpoints that are inconsistent with the culture of secular higher education.

For example, suppose that a religious college is sponsored by a church that explicitly teaches that abortion violates God's commandments. The college has published a religious limitation on individual academic freedom that states that faculty cannot advocate positions in class that contradict explicit principles of church doctrine. A faculty member is dismissed, through the appropriate procedures, for repeatedly advocating in class that abortion is not sinful. To some secular academics, the limitation is serious and troubling. The religious belief is inconsistent with secular academic culture. The viewpoint excluded is considered an important one, and so the freedom to express it is deemed essential to academic quality. Consequently, the temptation is great to conclude that the limitation is unacceptable.

Although some secular academics may be drawn to this conclusion largely by the content of the particular viewpoint excluded, they will likely not express their objection in those terms. Rather, they may say that the college lacks sufficient

> an asset rather than a liability in their work. What seems to be ignored by these writers, and by many others in the secular academy, is that a Christian worldview does not represent a coercive constraint on those who agree with it in the first place. Indeed, no one has to teach at a Christian college. Nor does anyone have to teach at any other college or university where any variety of such so-called constraints may exist.
>
> All potential limitations, if self-imposed, do not represent a loss of freedom, but rather an exercise of freedom. For example, those who share the Christian worldview of the Christian college are freed from the political correctness of pervasive opposing ideologies and free of the constraints inherent in the religious intolerance of the secular academy. The message is simple and clear, but many in the secular academy seemingly don't recognize their own intolerance; nor are they ready to acknowledge the orthodoxies from which they come.

DIEKEMA, *supra* note 47, at 70–71 (internal citation omitted).

181. "In a church-related college there is likely to be greater freedom—often explicit encouragement—to explore religious questions in the classroom." Hoekema, *supra* note 104, at 36.

academic freedom, intellectual inquiry, and diversity. They may assert, without empirical evidence, that students who graduate will be unprepared to function in their professions or in society because they do not appreciate diversity and will not be able to give adequate service through their profession (*e.g.*, clinical psychology, social work, law, etc.) to clients who have undergone or who are contemplating an abortion. Thus, the college or university does not prepare students to function competently in their fields, and therefore should be denied accreditation.

However, the tables could be turned on these arguments. Most secular universities prevent faculty from teaching that abortion violates God's commandments. A faculty member who did so would likely be shunned, disciplined, and ultimately dismissed. To most secular academics, the viewpoint excluded is unimportant and inappropriate to express, and therefore the freedom to express it is not essential to academic quality. Consequently, it is easy to conclude that the limitation is appropriate, if it is even recognized as a limitation at all.[182]

One could argue, however, with the same force as above, that the secular institution lacks sufficient academic freedom, intellectual inquiry, and diversity. One could assert that students who graduate will be unprepared to function in their professions or in society because they do not appreciate diversity and will not be able to give adequate service through their profession (*e.g.*, clinical psychology, social work, law, etc.) to the large number of religious people who believe that abortion is sinful. Thus, the university does not prepare students to function competently in their fields, and therefore should be denied accreditation.

This example illustrates that sometimes perceptions and decisions regarding academic freedom are based less on freedom than they are on cultural assumptions. In the example, the limitations at the religious university and the secular university are mirror images of each other, limiting expression advocating the opposite side of the same issue. It is difficult to maintain that the limitation at the religious university destroys academic freedom, but that the limitation at the secular university does not. Unfortunately, the analysis of academic freedom issues sometimes rests on certain secular biases, unexamined assumptions, and political ideologies that prevail in higher education.[183]

Indeed, the fact that the limitations clause of the 1940 Statement is applied primarily to religious institutions pointedly reveals the secular bias in higher education. The limitations clause provides that "[l]imitations of academic freedom because of religious *or other aims* of the institution should be clearly stated in writing at the time of appointment."[184] Analytically, state or other secular institutions that prohibit the advocacy of religious viewpoints also fall within this

182. "As is notorious in many recent criticisms of universities, the academic viewpoints that are the least consistently protected by academic freedom are religiously-based viewpoints. Institutions ought to recognize that religiously-based views may be as intellectually respectable as views based on naturalistic premises and secular moral commitments." *Ambiguities*, *supra* note 66, at 234.

183. "Those who have taught at secular institutions would have to have heads in the sand not to be aware of the extent to which ideological considerations, as distinct from considerations of competence, enter into hiring, promoting, and firing." Wolterstorff, *supra* note 107, at 22.

184. *1940 Statement*, *supra* note 4, at 3 (emphasis added).

provision. However, most secular academics accept limitations on religious perspectives at secular institutions as obvious and natural, and so, those limitations need not be disclosed or adequately explicit. Faculty who desire to express religious viewpoints at those institutions are not entitled to fair notice.

The argument is sometimes made that only those institutions that engage in the untrammelled pursuit of truth qualify as a university. However, as shown above,[185] no institution of higher education permits unlimited academic freedom.[186] Therefore, the argument must be that certain limitations are appropriate and others are not. Unfortunately, decisions about which limitations are appropriate can reflect a secular bias. Most people who choose to work and study at a religious college or university believe in certain religious truths. They also believe that having an institution where such truths are cherished and where knowledge can be discovered in light of those truths will ultimately produce more truth than a secular institution. While the presuppositions of the religious and the secular institutions differ, the objective of pursuing truth is the same.

The argument against religious limitations at religious colleges and universities is really this: to qualify as a college or university, the institution must pursue precisely the same knowledge and use precisely the same methods for discovering it that secular colleges and universities do. This argument, however, is circular and self-contradictory. It is circular because secular academics define what kinds of knowledge and what methods of discovering it qualify an institution as a college or university. Pushed to its logical extreme, the argument is that a religious university is not a real university unless it is completely secular. The argument is self-contradictory because it limits the kinds of truth and the methods for discovering it to a particular model. The argument proclaims that this model has no limitations and it disqualifies alternative models because they have limitations. The argument fails to recognize not only that the secular model itself has limitations, but that the insistence on a single model is itself a limitation. James Nuechterlein has written: "For those of us who . . . are persuaded that the secular enlightenment model does not exhaust authentic ways of knowing, the opportunities for religious universities to define their own norms of academic freedom may be seen not as negative requirements but as positive occasions for affirmation of their distinctive visions and purposes."[187]

The argument also attempts to exclude religious institutions from higher education because they have an accepted conception of certain truths. However, all colleges, universities, and academic disciplines (including disciplines not based on the scientific method) have an accepted conception of certain truths. If they did not, they would not be cohesive enough to be a college, university, or academic

185. *See supra* Part III.

186. "Freedom, after all, is not an absolute. It exists only within a system of restraints and higher values. All educational institutions impose limits on what may be said or taught; religious institutions will simply determine those limits somewhat differently than will nonreligious ones. These are relative differences, not absolute differences in kind between some schools that are 'free' and others that are 'unfree.'" George M. Marsden, *Liberating Academic Freedom*, FIRST THINGS, Dec. 1998, at 11, 13.

187. Nuechterlein, *supra* note 180, at 16.

discipline.[188] The problem is not so much that religious colleges and universities have an accepted conception of certain truths, but rather that the particular truths accepted are disfavored by most secular academics.[189]

VII. FREEDOM OF SPEECH

The institutional academic freedom of colleges and universities is protected by the Free Speech Clause of the First Amendment.[190] As discussed above,[191] the

188. Every community has boundaries; if no boundaries exist, by definition it is not a community. To constitute an intellectual or religious community, the members of the community must hold some intellectual or religious values in common. This necessarily means that opposing values are excluded. "[E]very community has boundaries of what it will tolerate." *Ambiguities*, *supra* note 66, at 233. "[A]t least part of the mission of many colleges and universities is to exalt the good and the true, which means suppressing the bad and the false in the process of constructing hierarchies of intellectual virtue." Randall Kennedy, *Should Private Universities Voluntarily Bind Themselves to the First Amendment? No!*, CHRON. HIGHER ED., Sept. 21, 1994, at 1, 2.

189. Douglas Laycock has written:

> It is often suggested that the academic conception of truth is inconsistent with a religious conception of truth, because the academy requires an objectivity about all possible truth claims, and this universal objectivity is inconsistent with any religious claim of revealed truth.
>
> Certainly there is sometimes a tension between academic and religious conceptions of truth. An absolutist conception of either is inconsistent with preservation of the other. But the religious schools are committed to synthesizing the two and to preserving the essence of both. Such a synthesis may require some internal compromises at those schools. Many academics may not want such explicit compromises at their own schools (although most of them regularly make implicit compromises with the conventional wisdom at their institutions). But whatever the difficulties of synthesizing the two conceptions of truth, that is what the religious schools are striving to do.
>
> To say that the two conceptions are fully inconsistent and that there is no possibility of synthesis is to say that the religious schools are trying to do an impossible thing. It is to say that there can be no such thing as a religious university that does not entirely subordinate its religious commitments to its academic commitments. Secular bodies sometimes say exactly that.
>
> The more accurate response is to recognize that these universities are striving for a difficult synthesis, and the more tolerant response is to let them strive for it.

Laycock, *supra* note 179, at 31–32 (internal citation omitted).

190. In *Grutter v. Bollinger*, the Court stated:

> In announcing the principle of student body diversity as a compelling state interest [in *Bakke*, 438 U.S. 265], Justice Powell invoked our cases recognizing a constitutional dimension, grounded in the First Amendment, of educational autonomy: "The freedom of a university to make its own judgments as to education includes the selection of its student body."

123 S.Ct. 2325, 2339 (2003) (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312). Organizations as well as individuals have free speech rights. *See, e.g.*, Pac. Gas & Elec. Co. v. Pub. Util. Comm'n, 475 U.S. 1 (1986) (corporations have a free speech right not to be associated with the speech of others); Consol. Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 533–34 (1980) (corporations have free speech rights); First Nat'l Bank of Boston v. Belotti, 435 U.S. 765, 775–86 (1978) (corporations have free speech rights).

191. *See supra* Part II.

Supreme Court and other courts have repeatedly recognized the constitutional right of institutional academic freedom. This freedom is not absolute; the government may determine whether an institution meets overall quality standards to qualify for government funding and the professional licensing of graduates. The institution, however, has considerable latitude "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may admitted to study."[192]

Because of the mission of religious colleges and universities, "academic grounds" at those institutions properly include academic grounds related to religion. For example, decisions about including religion courses in the curriculum and religious perspectives in other courses are academic decisions about curriculum structure and course content. Similarly, a decision about what expression is compatible with a school's mission is an academic decision, just as it is at any college or university. To define "academic" as "secular" would deny the mission and historical role of religious colleges and universities. The mission of religious institutions of higher education is premised on the integration of faith and scholarship.[193]

The university acts as a speaker when it employs faculty to convey the university's message or course content to its students,[194] and a religious institution has the freedom to speak in a manner that is consistent with its religious mission. For example, a difference exists between a psychology class that teaches that humans are children of God and that religious faith can aid human development, and a class that teaches that humans are mere animals and that religious faith is simply a psychological delusion. A religious institution should have the freedom of speech to teach psychology in the first way. However, unlimited individual academic freedom can force the institution to teach psychology in the second way instead. Unlimited individual academic freedom can coerce the institution to teach in a manner that attacks the religious faith of its students, and this violates the institution's freedom of speech.[195]

Because the government permits all universities to have limitations on individual academic freedom, the government's refusal to permit religious limitations on academic freedom at religious colleges and universities would violate the Free Speech Clause. For instance, suppose that a religious university provides broad individual academic freedom but also has a religious limitation:

192. Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (quoting THE OPEN UNIVERSITIES IN SOUTH AFRICA 10–12 (Albert van de Sandt Centlivres et al., eds., Johannesburg: Witwatersrand Univ. Press 1957)) (internal quotation marks omitted).

193. In *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987), the Court noted that the line between a religious organization's secular and religious activities is "hardly a bright one." *Id*. at 336. Similarly, in *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002), the court observed that "it is hard to draw a line between the secular and religious activities of a religious organization." *Id*. at 1344.

194. *See* Rosenberger v. Rectors and Visitors of the Univ. of Va., 515 U.S. 819, 833 (1995); Edwards v. Cal. Univ. of Pa., 156 F.3d 488, 491 (3d Cir. 1998).

195. *Cf*. Pac. Gas & Elec. Co. v. Pub. Util. Comm'n, 475 U.S. 1 (1986) (corporations have a free speech right not to be associated with the speech of others).

faculty may not advocate positions in class that contradict church doctrine. An accrediting body denies reaccreditation on the ground that the religious limitation restricts academic freedom. The Department of Education then denies federal funding and state agencies deny professional licensing privileges to the university's graduates. Suppose also that, by all other measures, the overall educational quality of the institution is good, better than many accredited schools.

Because all colleges and universities have limitations on academic freedom, the government's denial of a religious limitation constitutes viewpoint discrimination.[196] Because the institution's overall quality is good, the government's decision means that, solely because of the religious limitation, the university does not meet minimum standards of educational quality to qualify as a university. However, the government permits public and private secular institutions to have limitations that prohibit faculty from advocating religious viewpoints in class, which is the other side of the same issue. Therefore, the government's action constitutes viewpoint discrimination and violates the freedom of speech.

The Supreme Court has left open the question of whether the government's interest in avoiding an Establishment Clause violation justifies viewpoint discrimination.[197] However, even if public colleges and universities had a compelling interest in prohibiting religious advocacy by faculty in class, the compelling interest would not justify viewpoint discrimination by the government regarding accreditation. When the government accredits private speakers, the government is not itself the speaker. In addition, the government does not have a compelling interest in forbidding religious limitations at religious institutions, given that the government permits a variety of limitations on academic freedom at all institutions. The government, moreover, does not have a compelling interest in forbidding limitations on anti-religious advocacy at religious colleges and universities, given that the government permits limitations on religious advocacy at private secular institutions, where the Establishment Clause is not at issue. Therefore, in accreditation decisions, the government does not have a compelling interest to engage in viewpoint discrimination against religious limitations.

VIII. THE FREE EXERCISE OF RELIGION

The institutional academic freedom of religious colleges and universities is also protected by the Free Exercise Clause of the First Amendment. The Supreme Court has held that "[t]he free exercise of religion means, first and foremost, the

196. *See* Good News Club v. Milford Cent. School Dist., 533 U.S. 98 (2001) (public school's refusal to let religious club use school facilities after school hours constituted unconstitutional viewpoint discrimination); *Rosenburger*, 515 U.S. 819 (state university's refusal to fund a student publication which addressed issues from a religious perspective constituted unconstitutional viewpoint discrimination); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) (school district's refusal to let a church present films at the school based on the films' discussions of family values from a religious perspective constituted unconstitutional viewpoint discrimination).

197. *Good News Club*, 533 U.S. at 112–13, 120.

right to believe and profess whatever religious doctrine one desires."[198] This right also belongs to those who join together to profess religious beliefs. Michael W. McConnell has argued that religious universities "are an important means by which religious faiths can preserve and transmit their teachings from one generation to the next."[199] Douglas Laycock and Susan E. Waelbroeck have observed: "To build and run a religious university is an exercise of religion."[200]

The Supreme Court has also held that the government may not regulate religious beliefs by imposing special disabilities on the basis of religious status or views.[201] State action that permits secular limitations on academic freedom but forbids religious limitations at religious schools imposes a special disability on the basis of religious views, and therefore impermissibly discriminates against religion. Since the state permits limitations on religious advocacy in public and private secular institutions, forbidding limitations on anti-religious advocacy in religious institutions is unconstitutional. Because the state permits institutional academic freedom for secular institutions, it must permit it for religious institutions as well. The singling out of limitations that are based on religious belief violates the Free Exercise Clause.[202]

In addition, government refusal to permit religious limitations would fail to meet the compelling state interest test. According to *Employment Division, Department of Human Resources of Oregon v. Smith*,[203] free exercise rights which are combined with free speech rights, as they are in religious colleges and universities, are protected by the compelling interest test.[204] Under this test, the Free Exercise Clause requires an exemption from a law burdening the free exercise of religion unless the law is necessary to the accomplishment of a compelling governmental interest and is the least restrictive means of achieving that interest.[205] While the government's interest in assuring educational quality for funding or licensing purposes is compelling, it is not the government's broad interest in assuring educational quality that counts.[206] Rather, the government must have a compelling interest justifying its refusal to grant a religious exemption.[207] If the

198. Employment Div. v. Smith, 494 U.S. 874, 877 (1991).

199. McConnell, *supra* note 8, at 316.

200. Douglas Laycock & Susan E. Waelbroek, *Academic Freedom and the Free Exercise of Religion*, 66 TEX. L. REV. 1455, 1466 (1988).

201. McDaniel v. Paty, 435 U.S. 618 (1978); Fowler v. Rhode Island, 345 U.S. 67, 69 (1953); *see Smith*, 494 U.S. at 877 (1991); *cf.* Larson v. Valente, 456 U.S. 228, 245 (1982).

202. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) (animal cruelty ordinances which were specifically directed at religious practices violated the Free Exercise Clause); *Smith*, 494 U.S. at 877–78 (a state would violate the Free Exercise Clause if it sought to ban acts or abstentions only when they were engaged in for religious reasons).

203. 494 U.S. 872 (1991).

204. *Id*. at 881–82.

205. Hernandez v. Comm'r, 490 U.S. 680, 698 (1989); Frazee v. Ill. Dep't of Employment Sec., 489 U.S. 829, 835 (1989); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 141 (1987); Thomas v. Review Bd., 450 U.S. 707, 718 (1981); Sherbert v. Verner, 374 U.S. 398, 403 (1963).

206. *See* Wisconsin v. Yoder, 406 U.S. 205, 221 (1972).

207. *Id.*

overall quality of the institution is good, the government's interest in refusing to permit religious limitations is not compelling.[208] Moreover, the government's refusal to permit religious limitations is not the least restrictive means of assuring educational quality, since adequate methods of measuring overall educational quality exist.

Analytically, state action which permits secular limitations on academic freedom but prohibits religious ones cannot pass the compelling interest test.[209] Because the government permits secular academic freedom limitations, it cannot logically argue that its interest in prohibiting all limitations is compelling. If the government permits reasonable limitations except when they are religiously motivated, it shows that the government's real objection is not to reasonable limitations, but rather to the religious motivations.[210] This constitutes intentional persecution of religious beliefs, which violates the Free Exercise Clause.[211] Moreover, state action that permits secular limitations but prohibits religious limitations automatically fails the "least restrictive means" prong of the compelling interest test.[212] A prohibition on conduct only when the conduct is based on religious belief is narrowly tailored—but it is narrowly tailored to suppress religion, not to advance a compelling governmental interest.[213]

The Religious Freedom Restoration Act[214] ("RFRA") also provides a religious exemption from a federal law which substantially burdens the free exercise of religion unless the law is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest.[215] RFRA applies only to the federal government,[216] because the Supreme Court held that Congress lacks

208. "[I]f the authorities are coercing religious schools to abandon their religious commitments, they must have a compelling governmental interest. I do not think they can begin to argue about a plausible compelling interest until the quality of education falls below that of the weakest secular schools." Laycock, *supra* note 179, at 25 (internal footnote omitted).

209. *See* James D. Gordon III, *The New Free Exercise Clause*, 26 CAP. U. L. REV. 65, 89 (1997).

210. *Id.* at 90–91.

211. In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), the Court held that "if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest." *Id*. at 533 (internal citation omitted). The Court also observed: "A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases." *Id*. at 546. In *Employment Division v. Smith*, 494 U.S. 874 (1991), the Court stated: "It would be true, we think (though no case of ours has involved the point), that a State would be 'prohibiting the free exercise [of religion]' if it sought to ban such acts or abstentions only when they are engaged in for religious reasons." *Id*. at 877.

212. *Lukumi*, 508 U.S. at 579 (Blackmun, J., concurring). Law that targets religious practice is by definition not precisely tailored to a compelling governmental interest. Gordon, *supra* note 209, at 89.

213. Gordon, *supra* note 209, at 89–90.

214. 42 U.S.C. § 2000bb (1994).

215. *Id*. at § 2000bb-1(a) & (b).

216. *See, e.g.*, Sutton v. Providence St. Joseph Med. Ctr., 192 F.3d 826, 831–33 (9th Cir. 1999); In re Young, 141 F.3d 854, 858–59 (8th Cir. 1998).

constitutional authority to apply it to the states.[217] RFRA would apply to the Department of Education's termination of a school's eligibility for funding or financial aid. State freedom of religion clauses and state RFRAs may also provide protection from state action.

A religious college or university has free speech and free exercise rights to educate students and pursue knowledge in a manner that is consistent with its religious beliefs. These rights necessarily include the right to limit the advocacy of positions that contradict those religious beliefs. Since a religious institution has a constitutional right to adopt religious limitations on academic freedom, state action may not be based on the mere fact that the institution has adopted religious limitations or that some secular academics believe that a particular limitation is too broad. Rather, the government must demonstrate that it has a compelling interest in disallowing a particular limitation because the limitation renders the overall quality of the institution too low to qualify as an accredited institution. Analytically, this means that the religious institution's overall quality must be worse than the worst secular institution that the government recognizes as accredited.[218]

IX. OTHER LEGAL ISSUES RELATING TO INSTITUTIONAL ACADEMIC FREEDOM

At private colleges and universities, academic freedom issues are governed by contract. Many faculty are attracted to religious colleges and universities because of the religious mission of those institutions. They desire to teach in a manner that is both intellectually enlarging and spiritually strengthening.[219] For those faculty, teaching at a school where they do not have to check their religious identity at the door is a liberating experience. It permits them to be whole persons, to pursue answers to questions that are off limits at other schools, and to talk openly about how their religious principles relate to their academic discipline. They desire to provide a high quality education in an environment that is consistent with the ideals and principles of the church.[220]

Freedom of contract permits people to assent voluntarily to employment terms that promote the mission of a religious college or university.[221] The terms are set

217. City of Boerne v. Flores, 521 U.S. 507 (1997).

218. *See* Laycock, *supra* note 179, at 25. Douglas Laycock has written:

> The standard should not be whether these religious law schools, because of their religious commitments, have departed from the norms we uphold for most of our institutions. The standard should be: have these schools departed in such a way that the education actually delivered is worse than that delivered at the worst secular law school that is currently accredited?

Id.

219. *See, e.g.*, BRIGHAM YOUNG UNIVERSITY, *The Aims of a BYU Education*, *in* BRIGHAM YOUNG UNIVERSITY BULLETIN, 2003-2004 UNDERGRADUATE CATALOG 13 (2003).

220. James D. Gordon III & W. Cole Durham, Jr., *Toward Diverse Diversity: The Legal Legitimacy of* Ex Corde Ecclesiae, 25 J.C. & U.L. 697, 707 (1999).

221. "Contracts may not only specify faculty's duties and rights but also may have additional requirements, such as acceptance of the tenets of a particular religion (if the institution is affiliated with a religious organization)." KAPLIN & LEE, *supra* note 43, at 155.

forth in the offer letter, the annual contract, and university policies. Faculty members assent to these terms when they are hired. Untenured faculty have annual contracts, so their employment terms can be modified yearly. A university can modify the employment terms of tenured faculty if the university's by-laws reserve the authority to amend university policy.[222] A university can also modify the employment terms of tenured faculty if the modifications are reasonable and uniformly applied.[223]

While courts will review academic freedom issues, they tend to give some deference to the university's judgment,[224] particularly regarding course content, teaching methods, grading, and classroom behavior.[225] The Eleventh Circuit

222. Rehor v. Case W. Reserve Univ., 331 N.E.2d 416, 422 (Ohio 1975) (retirement age).

223. Karlen v. N.Y. Univ., 464 F. Supp. 704, 706–07 (S.D.N.Y. 1979) (retirement age); Drans v. Providence Coll., 383 A.2d 1033, 1039 (R.I. 1978) (mandatory retirement); Rehor v. Case W. Reserve Univ., 331 N.E.2d 416, 420–21 (Ohio 1975) (retirement age).

In *Curran v. Catholic Univ. of Am.*, 117 Daily Wash. L. Rep. 656, 660 (D.C. Super. Ct. 1989), the court held that a tenured professor of Catholic theology was bound by a later requirement to hold a canonical mission, which is an ecclesiastical license for faculty who teach in departments conferring ecclesiastical degrees. The court reasoned:

> Both parties to the contract understand that from time to time the university may change its bylaws or other governing documents, which may in turn alter the relationship between the university and its faculty, even those with tenure. If this were not so, the relationship between each faculty member and the university would be defined by whatever the rules and policies were when the faculty member received tenure, with each faculty member enjoying different benefits or bearing different burdens depending on when he or she received tenure.

Curran, 117 Daily Wash. L. Rep. at 660.

224. *See* J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 YALE. L.J. 251, 301–02 (1989); David M. Dumas et al., Comment, Parate v. Isabor*: Resolving the Conflict Between the Academic Freedom of the University and the Academic Freedom of University Professors*, 16 J.C. & U.L. 713, 719–23 (1990). In *Feldman v. Ho*, 171 F.3d 494 (7th Cir. 1999), the court observed:

> [T]he Constitution does not commit to decision by a jury every speech-related dispute. If it did, that would be the end of a university's ability to choose its faculty–for it is speech that lies at the core of scholarship, and every academic decision is in the end a decision about speech.
>
> . . . .
>
> . . . A university is entitled to decide for itself whether a charge [against a faculty member] is sound; transferring that decision to the jury in the name of the first amendment would undermine the university's mission–not only by committing an academic decision to amateurs (is a jury really the best institution to determine who should receive credit for a paper in mathematics?) but also by creating the possibility of substantial damages when jurors disagree with the faculty's resolution, a possibility that could discourage universities from acting to improve their faculty. . . . [T]he only way to preserve academic freedom is to keep claims of academic error out of the legal maw.

Id. at 496–97.

225. "Courts are generally reticent to become involved in academic freedom disputes concerning course content, teaching methods, grading, or classroom behavior, viewing these matters as best left to the competence of the administrators and educators who have primary responsibility over academic affairs." KAPLIN & LEE, *supra* note 43, at 306.

manifested such deference in *Bishop v. Aronov,*[226] discussed above,[227] which involved a University of Alabama physiology professor. The court reasoned that "we cannot supplant our discretion for that of the University. Federal judges should not be ersatz deans or educators."[228] In *University of Pennsylvania v. EEOC*,[229] the Supreme Court observed that "courts have stressed the importance of avoiding second-guessing of legitimate academic judgments."[230] This approach is consistent with the Court's admonition in *University of Michigan v. Ewing*:[231] "When judges are asked to review the substance of a genuinely academic decision, . . . they should show great respect for the faculty's professional judgment."[232] Similarly, in *Grutter v. Bollinger*,[233] the Court noted its "tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits."[234]

In addition, courts generally refrain from adjudicating issues that involve the interpretation of church doctrine or issues of church governance because of Establishment Clause and Free Exercise Clause concerns.[235] For example, some courts are reluctant to judge contract disputes involving theology faculty because those faculty perform ministerial functions.[236] When courts do hear cases that involve the interpretation of church doctrine or church governance issues, they tend to defer to the religious institution.[237]

In *Curran v. Catholic University of America*,[238] the court demonstrated respect for the university's religious mission and institutional autonomy. In that case the university prohibited a tenured professor of Catholic theology from teaching Catholic theology.[239] The professor had publicly opposed certain church teachings

226. 926 F.2d 1066 (11th Cir. 1991).

227. *See supra* notes 93–103 and accompanying text.

228. *Bishop*, 926 F.2d at 1075.

229. 493 U.S. 182 (1996).

230. *Id*. at 199.

231. 474 U.S. 214 (1985) (upholding state university's decision to dismiss student on academic grounds).

232. *Id*. at 225.

233. 123 S.Ct. 2325 (2003).

234. *Id*. at 2339.

235. *See, e.g.*, Jones v. Wolf, 443 U.S. 595 (1979); Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976); Presbyterian Church v. Mary Elizabeth Blue Hull Church, 393 U.S. 440 (1969); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952).

236. Alicea v. N.B. Theological Seminary, 608 A.2d 218, 222 (N.J. 1992) ("[G]overnmental interference with the polity, *i.e.*, church governance, of a religious institution could . . . violate the First Amendment by impermissibly limiting the institution's options in choosing those employees whose role is instrumental in charting the course for the faithful."); Patterson v. Southwestern Baptist Theological Seminary, 858 S.W.2d 602 (Tex. Ct. App. 1993). *Cf*. EEOC v. Catholic Univ. of Am., 83 F.3d 455 (D.C. Cir. 1996) (declining to adjudicate sex discrimination claim by canon law professor who was denied tenure).

237. "The cases are consistent in deferring to religious institutions on matters that involve the interpretation of church doctrine (*Curran*) or matters of church governance." KAPLIN & LEE, *supra* note 43, at 167.

238. 117 Daily Wash. L. Rep. 656 (D.C. Super. Ct. 1989).

239. *Id*.

regarding sexual ethics.[240] After the Holy See declared that the professor was ineligible to teach Catholic theology, the board of trustees withdrew his canonical mission, an ecclesiastical license required of faculty who teach in departments conferring ecclesiastical degrees.[241] The court rejected the professor's contract and academic freedom claims.[242] It held that because of the university's special relationship with the Holy See, the university did not breach its contract by requiring the professor to teach courses other than Catholic theology, or by requiring the professor to agree to be bound by the Holy See's declaration.[243]

The court also held:

> On some issues—and this case certainly presents one of them—the conflict between the University's commitment to academic freedom and its unwavering fealty to the Holy See is direct and unavoidable. On such issues, the University may choose for itself on which side of that conflict it wants to come down and nothing in its contract with Professor Curran or any other faculty member promises that it will always come down on the side of academic freedom.[244]

The professor argued that permitting him to teach theology was good for the university, and that academic freedom is "'for the good of the Church.'"[245] However, the court responded that, in the adjudication of the contract claim, what was good for the university or the church was "not a question presented and not one the court has either the right or the competence to decide."[246] Instead, the court held that the professor's contract gave him no right to teach Catholic theology at the university in the face of the Holy See's declaration.[247] The court concluded: "Whether that is ultimately good for the University or for the Church is something they have a right to decide for themselves."[248]

X. ACCREDITATION ISSUES

Colleges and universities are accredited by six regional institutional accrediting associations: the Middle States Association of Colleges and Schools, the New England Association of Schools and Colleges, the North Central Association of Colleges and Schools, the Northwest Association of Schools and of Colleges and Universities, the Southern Association of Colleges and Schools, and the Western Association of Schools and Colleges. In addition, specialized accrediting bodies accredit specific academic programs; these include organizations such as the American Bar Association, the American Psychological Association, and the National Council for Accreditation of Teacher Education. State accrediting

240. *Id*.
241. *Id*.
242. *Id*. at 661.
243. *Id*.
244. *Id*. at 662.
245. *Id*. (quoting Transcript at 1451, 1524).
246. *Id*.
247. *Id*.
248. *Id*.

agencies also exist.

The standards of some accrediting bodies explicitly recognize the right of religious colleges and universities to place religious limitations on academic freedom. For example, the *Accreditation Handbook* of the Northwest Association of Schools and of Colleges and Universities recommends that the institution "[p]ublish candidly any reasonable limitations on freedom of inquiry or expression which are dictated by institutional mission and goals."[249] The *Handbook of Accreditation* of the Western Association of Schools and Colleges states: "For those institutions that strive to instill specific beliefs and world views, policies [must] clearly state conditions, and ensure these conditions are consistent with academic freedom."[250] The accreditation standards of the Middle States Commission on Higher Education provide: "Institutions whose charters and policies require adherence to specific beliefs or codes of conduct for faculty, staff, or students should provide prior notice of these requirements. The institution should state clearly the conditions of employment or study."[251]

The American Bar Association permits religious limitations and the Association of American Law Schools apparently does as well. The American Bar Association's accreditation standards provide: "A law school shall have an established and announced policy with respect to academic freedom and tenure of which Appendix I herein is an example but is not obligatory."[252] That appendix follows the text of the AAUP's 1940 Statement, including the limitations clause.[253] The accreditation standards of the Association of American Law Schools provide: "A faculty member shall have academic freedom and tenure in accordance with the principles of the American Association of University Professors."[254] The AAUP's principles include the limitations clause.[255] The Association of American Law Schools also adopts the position of the AAUP's 1970 Interpretive Comment 3, which states that the AAUP does not "endorse" religious limitations on academic freedom.[256] However, as discussed above,[257] the AAUP has determined that the 1970 Interpretive Comment 3 does not read the limitations clause out of the 1940

249. Northwest Association of Schools and of Colleges and Universities, Commission on Colleges and Universities, *Accreditation Handbook*, *Policies and Procedures § A-8(c)(2)*, *available at* http://www.nwccu.org/policyprocedure/policies/policies8.html (last visited Oct. 6, 2003).

250. Western Association of Schools and Colleges, *WASC 2001 Handbook of Accreditation*, *Standard 1, Criteria for Review § 1.4, Guidelines*, at 18, *available at* http://www.wascweb.org/senior/handbook.pdf (last visited Oct. 3, 2003).

251. Middle States Commission on Higher Education, *supra* note 46, Standard 6, at 19.

252. Section of Legal Education and Admissions to the Bar, American Bar Association, Standards for Approval of Law Schools, 2002–03, Standard 405(b) (2002), *available at* http://www.abanet.org/legaled/standards/chapter4.html (last visited Oct. 6, 2003)

253. *Id*. at Appendix 1. (Appendix I is titled "Appendix 1" in the 2002–03 edition.)

254. ASSOCIATION OF AMERICAN LAW SCHOOLS, 2002 HANDBOOK, BYLAWS § 6-8(d), at 36 (2002).

255. *1940 Statement*, *supra* note 4, at 3.

256. ASSOCIATION OF AMERICAN LAW SCHOOLS, *supra* note 254, Exec. Comm. Reg. § 6.16, at 53 (quoting *1940 Statement*, *supra* note 4, at 6).

257. *See supra* note 132 and accompanying text.

Statement,[258] and the AAUP has issued operating guidelines which reaffirm the validity of the limitations clause.[259]

Some other specialized accrediting bodies, such as the American Psychological Association, the American Speech-Language-Hearing Association, and the Council on Social Work Education, have endorsed the 1940 Statement.[260] It thus may be concluded that these organizations have officially accepted the 1940 Statement's limitations clause, which permits religious limitations on individual academic freedom.

Accreditors are the gatekeepers for federal and state funds and student financial aid. The Department of Education recognizes accreditors who meet specified standards for purposes of awarding federal funding and student financial aid. In addition, state professional and occupational licensing for teachers, physicians, lawyers, counselors, etc. often requires graduation from an accredited program.

Most courts have held that private accreditors' actions are not state action,[261] so the Constitution does not apply to them. However, the Department of Education's termination of a school's eligibility for funding or financial aid does involve state action, and therefore the Free Speech and Free Exercise Clauses of the First Amendment apply to it. A state's refusal to grant professional or occupational licenses to graduates also constitutes state action.

The First Amendment should prohibit the government from evaluating a university's religious mission, dictating what that mission should be, or prescribing how it should be implemented. By analogy, in *University of Great Falls v.*

258. AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, *The "Limitations" Clause in the 1940 Statement of Principles on Academic Freedom and Tenure: Some Operating Guidelines*, *in* POLICY DOCUMENTS & REPORTS 96 (9th ed. 2001).

259. *Id*.

260. *1940 Statement*, *supra* note 4, at 7–10.

261. McKeesport Hosp. v. Accreditation Council for Graduate Med. Educ., 24 F.3d 519, 523–26 (3d Cir. 1994); Med. Instit. of Minn. v. Nat'l Ass'n of Trade and Technical Sch., 817 F.2d 1310, 1312–14 (8th Cir. 1987); Peoria Sch. of Bus., Inc. v. Accrediting Council for Continuing Educ. and Training, 805 F. Supp. 579, 581–83 (N.D. Ill. 1992); Transport Careers, Inc. v. Nat'l Home Study Council, 646 F. Supp. 1474, 1478–79 (N.D. Ind. 1986); Marlboro Corp. v. Ass'n of Indep. Colls. and Sch., 416 F. Supp. 958, 959 (D. Mass. 1976), *aff'd on other grounds*, 556 F.2d 78 (1st Cir. 1977); Parsons Coll. v. N. Cent. Ass'n of Colls. and Secondary Sch., 271 F. Supp. 65, 70 (N.D. Ill. 1967); *contra*, St. Agnes Hosp. v. Riddick, 668 F. Supp. 478, 480 (D. Md. 1987); Marjorie Webster Junior Coll. v. Middle States Ass'n of Colls. and Secondary Sch., 302 F. Supp. 459, 470 (D.D.C. 1969), *rev'd on other grounds*, 432 F.2d 650 (D.C. Cir. 1970).

In *Oral Roberts University v. ABA*, No. 81-C-3171, 1981 U.S. Dist. LEXIS 18628 (N.D. Ill. July 17, 1981), a law school used religious criteria, including a statement of religious beliefs and commitment, in employment and admissions. The ABA found that the law school violated the ABA's standard prohibiting religious discrimination. The law school argued that states delegate authority to the ABA to accredit law schools, and that the ABA violated the law school's free exercise rights. The court temporarily enjoined the ABA from denying provisional accreditation. The ABA then revised its standard and granted provisional accreditation. For a description of the case, see Leonard J. Nelson, III, *Religious Discrimination, Christian Mission, and Legal Education: The Implications of the Oral Roberts University Accreditation Controversy*, 15 CUMB. L. REV. 663, 675–80 (1985).

NLRB,[262] the D.C. Circuit held that the National Labor Relations Board could not inquire whether a religiously-affiliated university had a "substantial religious character."[263] The court reasoned that the process was forbidden by the Supreme Court's decision in *NLRB v. Catholic Bishop of Chicago*[264] and constituted an intrusive inquiry into the university's religious mission.[265] The court observed that the NLRB's inquiry impermissibly involved "trolling through the beliefs of the University, making determinations about its religious mission, and that mission's centrality to the 'primary purpose' of the University."[266]

To the extent possible, the government and accreditors should respect an institution's decisions regarding its religious mission and the academic freedom limitations that the institution considers necessary to preserve that mission.[267] Douglas Laycock has argued:

> For the state or academic associations to protect academic freedom at religious universities would require a secular intrusion into the central deliberative processes of a religious institution. To decide what innovations a religious tradition can and cannot tolerate is to decide the future content of the faith. It is the essence of religious liberty that such decisions be made by the religious community, and never by secular authority. Religious limitations on academic freedom may be wise or foolish, and they may be administered well or badly. The questions raised by such limitations are the subject of serious debate within religious universities. That is where the debate should be conducted, and the Constitution should protect whatever answer emerges.[268]

Any college's or university's choices regarding educational philosophy should be given considerable deference. This is doubly true for religious institutions, because their choices also reflect their religious beliefs. Therefore, as much as possible, accreditors and the government should refrain from substituting their own views for those of the religious institutions. Otherwise, secular outsiders, including the government, would control the intellectual and spiritual activities of those institutions. Outsiders could coerce religious colleges and universities either to abandon their religious missions or to become unaccredited. Under either scenario, authentic religious colleges and universities could become extinct.

This deference should also include respect for the institution's decisions about

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262. 278 F.3d 1335 (D.C. Cir. 2002).

263. *Id*. at 1341.

264. 440 U.S. 490 (1979).

265. *Univ. of Great Falls*, 278 F.3d at 1341.

266. *Id.* at 1342.

267. James Nuechterlein has written:

> [W]herever [the line regarding academic freedom] is properly drawn, the decision as to the drawing of it should be made by the religious institutions involved, and not by external groups such as the government, academic accrediting agencies, or secular representatives of the professoriate like the AAUP. Religious universities, we should remember, have academic freedom rights of their own.

Nuechterlein, *supra* note 180, at 15.

268. Laycock, *supra* note 179, at 33.

how best to pursue its educational mission. For instance, a university must be able to select and retain faculty who actively support the university mission, because it is primarily through the faculty that the university pursues its mission.[269] The faculty teach the students, profess their views in the discipline and publicly, and select and mentor the next generation of faculty. A university that is forced to hire and retain a large number of faculty who are indifferent or antagonistic to the institution's religious mission will become less able to pursue that mission. Thus, hiring, retention, and academic freedom policies are essential to maintaining the university's religious mission.

Secular outsiders are not well qualified to second-guess the policies and particular decisions designed to implement the university's religious mission. Some issues involve interpreting religious doctrine and weighing the harm caused by expression or behavior that is inconsistent with that doctrine. Outsiders may be tempted to interpret religious doctrine for the institution, to find that certain expression or behavior does not contradict that doctrine, or to conclude that the harm to the institution's religious mission is minor. These decisions can legitimately be made only by the institutions themselves, through their established procedures.[270] If the procedures are followed, outsiders should respect the decisions made.

Many religious colleges and universities prefer to hire faculty who are members of their sponsoring religion.[271] As Justice Frankfurter stated in *Sweezy v. New Hampshire,* a university has an essential freedom to determine who may teach. [272] Government action based on an accreditation rule prohibiting a religious hiring preference, or requiring that the faculty be religiously diverse, would violate institutional academic freedom,[273] freedom of speech, and freedom of religion.[274]

269. "Deciding who will conduct the work of the church and how it will be conducted is an essential part of the exercise of religion." Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1398 (1981).

270. About religious universities, Douglas Laycock has written:

> They share many of the same goals and ideals of academic freedom as the secular schools, but they also maintain a competing commitment. The effort to synthesize these commitments requires discussion and sometimes bitter debate with the institution and its sponsoring church. But this is an internal discussion; it need not be an external discussion and it should not be a search for compromise with outsiders. How the religious university ultimately resolves the occasional conflict between its dual commitments is not the legitimate concern of outsiders.

Laycock, *supra* note 179, at 32.

271. For discussion of religious hiring preferences at religious colleges and universities, see Robert John Araujo, *"The Harvest Is Plentiful, but the Laborers Are Few": Hiring Practices and Religiously Affiliated Universities*, 30 U. RICH. L. REV. 713 (1996); Michael J. Mazza, *May a Catholic University Have a Catholic Faculty?*, 78 NOTRE DAME L. REV. 1329 (2003).

272. 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (quoting THE OPEN UNIVERSITIES IN SOUTH AFRICA 10–12 (Albert van de Sandt Centlivres et al., eds., Johannesburg: Witwatersrand Univ. Press 1957)).

273. "The effect of forcing religious schools to disregard religion in the hiring, tenuring, and disciplining of faculty members would be to destroy the distinctive character of these intellectual communities." McConnell, *supra* note 8, at 304.

The institution has a right to employ faculty who will communicate religious perspectives and teach in a manner consistent with the institution's religious mission.[275] In *Corporation of the Presiding Bishop v. Amos*,[276] the Court observed:

> Determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is . . . a means by which a religious community defines itself. Solicitude for a church's ability to do so reflects the idea that furtherance of autonomy of religious organizations often furthers individual religious freedom as well.[277]

Because the faculty teach by example as well as by precept, the institution also has a right to employ faculty who are active and faithful in the religion, rather than merely nominal members, and who observe the institution's behavioral standards and other religious requirements.[278]

A religious institution that aims to teach students to be both faithful and scholarly is more effective if most of its faculty are role models of faithful scholars. While the institution may decide that hiring some faculty members who are not members of the sponsoring church is beneficial, decisions regarding the number and compatibility of those faculty members are for the institution itself to make—not accreditors or the government. Congress has recognized the right of religious institutions to employ members of the religion by exempting such religious preferences from Title VII,[279] and the Supreme Court has unanimously upheld the constitutionality of that exemption.[280]

George M. Marsden has written that considering religious factors in hiring is essential in maintaining a school's religious character:

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274. "Churches have strong claims to autonomy with respect to employment of teachers." Laycock, *supra* note 269, at 1411.

275. John T. Noonan, Jr. has written:

> A Catholic law school does not exist unless a substantial number of the faculty are in fact committed Catholics. . . . If a religious law school may not consciously discriminate in preferring coreligionists over others, it not only risks losing the community it needs in order to embody its spirit, it also risks losing that range of representatives who individually embody the faith.

John T. Noonan, Jr., *Religious Law Schools and the First Amendment*, 20 J.C. & U.L. 43, 45 (1993).

276. 483 U.S. 327 (1987).

277. *Id*. at 342. *Cf.* Frederick Mark Gedicks, *Toward a Constitutional Jurisprudence of Religious Group Rights*, 1989 WIS. L. REV. 99, 110–12 (regulation of religious group membership will destroy the group's character).

278. "Behavioral regulation can be no less important than doctrinal standards to a religious institution, for actions often speak louder than words." McConnell, *supra* note 8, at 322. "Many [religious institutions] include in their institutional mission a unified and coherent religious vision, which faculty members are expected to uphold not only in teaching and scholarship, but also in the conduct of their lives." Hoekema, *supra* note 104, at 36.

279. 42 U.S.C. § 2000e-1(a) (1994). In addition, a specific exemption for religious educational institutions is set forth in 42 U.S.C. § 2000e-2(e)(2) (1994).

280. Corp. of the Presiding Bishop v. Amos, 483 U.S. 327 (1987) (holding that 42 U.S.C. § 2000e-1(a) does not violate the Establishment Clause).

> So far as the future is concerned, the most crucial area where these issues play themselves out is in faculty hiring. Once a church-related institution adopts the policy that it will hire simply "the best qualified candidates," it is simply a matter of time until its faculty will have an ideological profile essentially like that of the faculty at every other mainstream university. The first loyalties of faculty members will be to the national cultures of their professions rather than to any local or ecclesiastical traditions. Faculty members become essentially interchangeable parts in a standardized national system. At first, when schools move in the direction of open hiring, they can count on some continuity with their traditions based on informal ties and self-selection of those congenial to their heritage. Within a generation, however, there is bound to be a shift to a majority for whom national professional loyalties are primary. Since departmental faculties typically have virtual autonomy in hiring, it becomes impossible to reverse the trend and the church tradition becomes vestigial. The Protestant experience thus suggests that once a school begins to move away from the religious heritage as a factor in hiring, the pressures become increasingly greater to continue to move in that direction.[281]

After examining the secularization of religious colleges and universities, James Tunstead Burtchaell observed that one of the morals to the story is that "[i]n every one of its component elements—government, administrators, faculty, and students—the academy must have a predominance of committed and articulate communicants of its mother church."[282] He concluded that once the academic community's religious commitment is lost, it is unrecoverable.[283] Thus, the right to employ faculty who support the school's religious mission is central to institutional academic freedom.

XI. CONCLUSION

Both individual and institutional academic freedom are essential for colleges and universities. Individual academic freedom involves the freedom of an individual faculty member to teach, to research and to speak as a citizen. Institutional academic freedom is the freedom of the institution to pursue its mission and to be free from outside control. At all colleges and universities, a tension exists between individual and institutional academic freedom. Individual academic freedom exists within the context of the university mission.

To pursue their educational missions, all institutions of higher education place some limits on individual academic freedom. The limitations clause of the AAUP's 1940 Statement on academic freedom recognizes the right of religious

281. George M. Marsden, *What Can Catholic Universities Learn from Protestant Examples?, in* THE CHALLENGE AND PROMISE OF A CATHOLIC UNIVERSITY 187, 193 (Theodore M. Hesburgh ed., 1994).

282. James Tunstead Burtchaell, *The Decline and Fall of the Christian College (II)*, FIRST THINGS, May 1991, at 30, 38 (italics omitted).

283. *Id.*

colleges and universities to place limitations on individual academic freedom to preserve their religious mission and identity. The institutional academic freedom of religious colleges and universities is protected by the Free Speech and Free Exercise Clauses of the First Amendment. A religious college or university has the institutional academic freedom "'to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may admitted to study.'"[284]

284. Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (quoting THE OPEN UNIVERSITIES IN SOUTH AFRICA 10–12 (Albert van de Sandt Centlivres et al., eds., Johannesburg: Witwatersrand Univ. Press 1957)).