

Symposium on Ex Corde Ecclesiae

***697 TOWARD DIVERSE DIVERSITY: THE LEGAL LEGITIMACY OF EX CORDE ECCLESIAE**

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As faculty members of a non-Catholic university, but one that is deeply concerned with the right of religiously affiliated institutions of higher education to implement measures such as those contemplated by Ex Corde Ecclesiae, we are honored to participate in this symposium. We are very conscious that we are not experts on the range of issues posed for Catholic higher education by Ex Corde Ecclesiae, including those posed for both Catholic and non-Catholic colleagues. We welcome the opportunity to learn from others who bring much greater knowledge of these issues to the symposium, and we hope that our diverse perspective will be useful.

What we bring, in addition to many years of interest in the relevant issues, is experience at Brigham Young University (BYU), which is currently the largest religiously affiliated university in the United States. [\[FN1\]](#) The Church of Jesus Christ of Latter-day Saints (the "LDS" or "Mormon" Church) is the sponsoring religious organization, and its linkage to BYU is if anything substantially closer than the linkage typical at Catholic universities. Moreover, the policies designed to preserve the close ties between the Church and the University appear to be considerably stronger than those called for by Ex Corde Ecclesiae and the proposed Application to the United States. The Chairman of BYU's Board of Trustees is the President of the LDS Church, and the members of the Board are drawn from the highest governing bodies of the Church--other members of the First Presidency, members of the Quorum of the Twelve Apostles, and representatives of other important organizations within the Church. To the best of our knowledge, the Vatican has no similar direct presence on the boards of Catholic institutions of higher education in the United States, although ecclesiastical figures often hold leading roles. [\[FN2\]](#)

***698** More generally, it is safe to say that no one who attends or teaches at BYU will fail to notice that the mission of the university is designed to contribute to the larger mission of the LDS Church. Prominent church leaders address campus-wide devotionals that are held almost every week. Training in student church units helps prepare BYU students for life in a church that is theologically committed to a lay ministry. The linking of the missions of church and university certainly parallels and arguably exceeds that contemplated by Ex Corde Ecclesiae.

BYU has official policies expressing a strong preference for hiring scholars who are faithful members of the LDS Church, with the result that approximately 95% of the faculty are LDS. By contrast, the requirements of the Particular Norms of the Application to the effect that "the university should recruit and appoint faithful Catholics so that, as much as possible, those committed to the witness of the faith will constitute a majority of the faculty," [\[FN3\]](#) seem less demanding. Non-LDS faculty members at BYU are free to pursue their own religious beliefs, but are required to observe the university's HonorCode and are expected to carry out their teaching and research roles in ways that are compatible with the mission of the

university. Stricter requirements apply to LDS Church members. Before being hired, they are endorsed by ecclesiastical leaders, and interviewed by department, college and university-level officials, and by a member of one of the governing bodies of the Church. In addition, faculty appointments must be approved by the university's Board of Trustees. Thereafter, they are expected to meet the conduct standards necessary for entrance into LDS Temples, which entails attending church regularly, paying tithing, abstaining from extra-marital sex, avoiding alcohol, coffee, tea, tobacco, and illegal drugs, being honest, and in general, doing one's best to live a Christian life. Because of differences in doctrine, the meaning of what it is to be a "faithful Catholic" under *Ex Corde Ecclesiae* would no doubt differ, but the thrust is similar. Christian witness rings hollow if it is not witness both in word and in deed. Moreover, each religious tradition has its own experience and its own doctrines about the issues of how truth is to be communicated. One of the texts regarded as scripture in our tradition proclaims,

Verily I say unto you, he that is ordained of me and sent forth to preach the word of truth by the Comforter, in the Spirit of truth, doth he preach it by the Spirit of truth or some other way? And if it be by some other way, it is not of God. [FN4]

This is sobering and humbling language, both for a teacher and for a religious tradition. Within the LDS tradition, it is understood that while no one is perfect, an individual is much more likely to be able to teach "by the Spirit" if one is leading a generally worthy life. While doctrines about what best qualifies teachers may vary, most traditions assume that there is some connection *699 between an individual's beliefs and personal worthiness and effectiveness in helping to communicate both the highest truths and those that are more mundane. Accordingly, it is not at all surprising that religious traditions feel obligated to do what they can to assure that their teachers, both in their formal church settings and in their educational institutions, do all they can to maintain a clear channel for divine influence in their teaching.

Our experience, both as faculty members, and in Jim's case, as the member of BYU's administration currently responsible for dealing with hiring and other employment issues, is that the foregoing policies contribute in significant ways to a vibrant though obviously diverse academic environment. In our personal lives, we have felt a freedom at B.Y.U. to explore and discuss with students issues and values that would have been difficult to discuss with the same measure of openness at other institutions. There are, of course, trade-offs. Many will elect to teach or study in different settings. But given the dwindling number of institutions that are diverse in that they provide genuinely religious settings for study, it seems to us all the more important that such settings be protected. Churches and universities are the seedbeds of pluralism, and one of the major hazards of our time is that there are too many pressures toward forcing all institutions to be pluralistic in exactly the same way, thereby threatening in the long run a major source of pluralism in society. Whatever those within the Catholic Church and within Catholic higher education may think about the pros and cons of *Ex Corde Ecclesiae*, it is vital that the right to pursue such a policy should be protected. To the extent that BYU provides if anything a harder case, the news, at least thus far, is that *Ex Corde Ecclesiae* is unlikely to unleash new liability nightmares for Catholic higher education. American law continues to respect the right to such religious and educational autonomy.

The fundamental legal question posed by *Ex Corde Ecclesiae* and the proposed Application to the United States is whether U.S. law will continue to protect the right of religious institutions, including religiously affiliated educational institutions, to the autonomy necessary to maintain religiously diverse forms of diversity in American higher education. Our paper focuses on a limited set of issues that bear on this question, some of which are strictly legal, and some (such as accreditation) that are quasi-legal because of the practical impact they have on the functioning of contemporary educational institutions. Section I addresses the implications of Title VII and parallel state legislation proscribing discrimination in employment. Following sections address contract issues (Section II), academic freedom (Section III), and accreditation (Section IV). In our view, protection of academic autonomy for religious higher education is linked to maintaining academic

integrity. If we lose the right to be diversely diverse, we risk losing the right to be what we truly are, and what we truly should be.

I. EMPLOYMENT DISCRIMINATION LAW

In a litigious world, in which it is becoming increasingly easy to turn lost job opportunities, denied promotions, and terminations into lawsuits, liability *700 under anti-discrimination legislation is inevitably a major worry for educational institutions that are already short of funds and can ill afford employment litigation. From this perspective, the good news is that both Title VII and parallel state legislation contain strong exemptions for religious employers in general and for educational institutions in particular. The difficult questions, of course, turn on how broadly these exemptions are to be construed.

To provide context for the analysis of these questions, it may be helpful to relay an experience described to one of us at roughly the time of the Supreme Court's decision in the Amos case. [FN5] A lawyer from another tradition described why the outcome in Amos seemed so important to him. He had attended a small college sponsored by his own faith tradition. He had attended religion classes, and had benefitted from the atmosphere in other subjects that he studied. But as he looked back, the person who had the greatest impact on his own personal conversion was a cook in the college cafeteria. This account highlights the need for a broad understanding of the exemptions in our anti-discrimination laws, which are designed to protect the autonomy of religious institutions in determining how they can best carry out their religious mission. State officials need to be discriminating about discrimination, if the practical needs of religious institutions are to be adequately respected.

With this type of practical reality in mind, let us turn to the applicable anti-discrimination norms themselves. Title VII of the Civil Rights Act of 1964 was meant to shield the workplace from various types of discrimination by placing prohibitions on employers on the basis of race, sex, religion and national origin. [FN6] It provides:

It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employee or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin. [FN7]

There are three basic exemptions to Title VII's prohibition of discrimination in the workplace where religion is involved: 1) preferential treatment on religious grounds by religious corporations, organizations and educational institutions; [FN8] 2) preferential treatment in connection with a bona fide occupational qualification (BFOQ); [FN9] and 3) preferential treatment by religious *701 schools and learning institutions. [FN10] Catholic universities seeking to implement Ex Corde Ecclesiae when making hiring and firing decisions will no doubt take particular solace from the third exemption, which provides:

It shall not be an unlawful employment practice for a school, college, university, or other educational institution, or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or substantial part, owned, supported, controlled, or managed by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution of learning is directed toward the propagation of a particular religion. [FN11]

The issue for a religious university becomes whether it is considered owned, supported, controlled or managed in whole or substantial part by a religious entity, or whether it has the requisite religious mission. The closer the nexus between the school and the religious corporation or affiliation the easier the answer will be.

The religious exemption does not give religious institutions blanket approval to make hiring and firing decisions without regard to the other provisions of Title VII. In particular, institutions availing themselves of the religious exemption are not thereby justified in making such decisions based on race or national origin. [FN12] But where genuine concerns about maintaining the religious environment or otherwise contributing to the religious mission of an institution are at stake, the exemptions should be sufficiently broad.

State law is equally likely to exempt a religious educational institution from granting preferences to adherents of the same faith in its hiring and firing practices, and possibly even more so. A majority of the states provide an exemption for religious organizations or religious educational institutions. The most common form such state exemptions take is similar if not identical to the Title VII language. For example, Arizona's statute provides:

It is not an unlawful employment practice: For any school, college, university or other educational institution or institution of higher learning to hire and employ employees of a particular religion if such school, college, university or other educational institution or institution of learning is in whole or in substantial part owned, supported, controlled or managed by a particular religion or religious corporation, association or society, or if the curriculum of such school, college, university or other educational institution or institution of learning is directed toward the propagation of a particular religion. [FN13]

***702** Other state statutes effectively exempt religious higher education from their coverage by explicitly excluding educational and charitable religious institutions from the definition of "employer." [FN14] Still another state variation is to grant the religious educational institution the right to limit employment to or grant preference to members of the same religion. [FN15]

The exemption that offers the least amount of protection to religious universities comes from the states that allow for an exception when there is a bona fide occupational qualification. [FN16] This will not give the automatic exemption that other statutes provide for religious educational institutions. Those institutions will find themselves having to prove they deserve a particular exception on a case-by-case basis, and the exemption will not always protect hiring faithful members of a tradition for more secular positions.

There are a variety of issues that could be addressed with respect to the foregoing anti-discrimination norms, but the most critical question is the scope that should be given to the exemptions. If the provisions are broadly construed, as we believe they should be, the available exemptions should shield institutions that elect to implement Ex Corde Ecclesiae. Father Araujo provides a detailed analysis of the legislative history of the exemption for educational institutions that makes it clear that Congress intended the exemptions to be liberally construed to protect all employment decisions made ***703** by the institutions covered. [FN17] Our aim here is to suggest additional arguments for broad construction of the exemptions.

Fundamentally, the argument is that the First Amendment guarantees autonomy to religious institutions, that the constitutional guarantee of religious autonomy extends to religiously affiliated educational institutions, and that exemptions in anti-discrimination legislation should be read broadly to protect the constitutional values involved.

It has long been recognized that the religion clause of the First Amendment safeguards the religious autonomy not only of individuals, but of religious associations. [FN18] Professor Douglas Laycock wrote the pathbreaking article working out this idea in the employment area, [FN19] and the fundamental idea has been further elaborated by Professor Carl Esbeck, [FN20] among others. The basic notion of institutional autonomy runs as the guiding thread through the Supreme Court's decisions in church property dispute cases [FN21] and other cases involving the internal affairs of religious institutions. [FN22]

In his 1981 article, Professor Laycock argued that it made more sense to think of

the autonomy value as being grounded in the Free Exercise Clause, since the key functional import of the autonomy value is to relieve religious institutions of regulatory burdens that might otherwise apply. [FN23] This analysis was developed, however, in a pre-Smith [FN24] world, when the Free Exercise Clause was understood to have some bite against neutral regulatory burdens imposed on religious institutions. In the post-Smith, post-Boerne [FN25] context, however, it is important to remember that the autonomy doctrine has Establishment Clause roots as well. That is, the Establishment Clause was designed to make it clear that the federal government lacked power-in the strong sense of jurisdictional competence-to intervene in religious affairs. Since Everson, [FN26] the Establishment Clause has been held applicable to the states. The functional impact of the constitutional limitation on state power in the field of religion is to separate church from state, and by implication, to *704 protect the autonomy of religious institutions. In crucial respects, the Establishment Clause provides even greater protection for religious autonomy than the Free Exercise Clause. There is no need to meet a "burden" requirement in the Establishment Clause context. No showing of coercion is necessary. [FN27] More generally, to use the spatial imagery implicit in the "wall of separation" metaphor, the Establishment Clause creates a buffer zone between the domain of the state and the domain of church autonomy. Free exercise rights abut directly against state power; the assumption behind Establishment Clause analysis that the state lacks power to take actions "respecting an establishment of religion" leaves additional breathing space. The state may not be "excessively entangled" with religious institutions.

When one thinks about religious institutions, one obviously thinks first about core religious institutions: the church, the synagogue, the mosque and the associated religious structures. But it is clear that the teaching function is absolutely central to the life and transmission of religious values, and religious communities should have broad latitude to structure various aspects of their teaching function in any way that seems appropriate in their community (within the broad constraints that set limits to any religious rights). In short, anti-discrimination legislation gets it right when it proposes exemptions for religiously affiliated educational institutions, and this legislation should be broadly construed.

One of the core teachings of the case law dealing with internal religious disputes is that courts lack competence-both in the jurisdictional sense, and in the sense of expertise-to address religious disputes. As Laycock and Waelbroeck have pointed out, this basic principle applies in the context of academic freedom disputes within religiously affiliated universities. [FN28] It is for this reason that courts lack power to intervene in disputes involving "ministerial" positions. [FN29]

The difficult question, of course, is the extent to which this basic rationale extends to other positions as well. While Amos did not squarely address this issue because of the way the case was presented to the court as an Establishment Clause issue, it certainly legitimated an interpretation of Title VII which gave religious institutions broad autonomy in considering the way they hire and fire seemingly non-religious employees. The ultimate question is who should determine how a religious institution goes about structuring its religious mission. As between outside state officials and the religious institution itself, the constitutional values at stake clearly incline toward protecting the perspective of the religious institution. Persons in support positions that are not directly involved in "ministerial" functions may contribute to the religious mission (or free up religious resources) in ways that are highly significant to the religious community.

*705 In a forthcoming essay, [FN30] Professors Patrick Schiltz and Douglas Laycock suggest that the cases dealing with internal religious disputes are poorly suited for resolving religious employment disputes. In their view, this line of cases have all

involved disputes over interpretation of, or continued adherence to, standards that were internally derived, i.e., that were found in the doctrines or governing documents of the religious organization. By contrast, in most employment disputes, the government itself has made a policy choice and sought to impose that choice on a religious organization ___ by, for example, dictating that the organization may not

make employment decisions on the basis of race or that its employees must be permitted to join unions. Different problems arise when the government is invited to referee an internal dispute within a religious organization ___ and to do so with reference to the organization's own internally derived standards ___ than when the government takes it upon itself to regulate religious organizations in pursuit of secular ends. Case law that appropriately safeguards religious liberty in one setting will not necessarily do so in the other.

Whatever one thinks of the validity of this criticism with respect to the whole array of cases that arise in religious employment settings, it seems particularly inapt with respect to the issues likely to arise in connection with implementation of *Ex Corde Ecclesiae*. In that context, the underlying disputes concern differences of opinion within a religious community about how its educational institutions should best be structured to further the overall religious mission and to implement the canon law of the church with which the educational institutions are affiliated. This is clearly the type of dispute that the internal religious dispute cases require secular courts to avoid.

One hazard in applying the religious dispute cases to conflicts that may arise in the course of implementing *Ex Corde Ecclesiae* derives from a recurrent misunderstanding of one of the major branches of Supreme Court doctrine in this area. After *Jones v. Wolf*, [FN31] it became clear that states could avoid impermissible intervention in religious affairs either by adopting a deference to church polity approach, or by adopting the "neutral principles" approach. Some courts have confused the "neutral principles" theory of *Jones* with the "general and neutral laws" of *Employment Division v. Smith*, [FN32] to conclude that whenever a court can identify secular (i.e., religiously neutral) governing principles, it is free to apply them to a dispute, thereby overriding religious autonomy concerns. Thus, in *South Jersey Catholic School Teachers Association v. St. Teresa of the Infant Jesus Church Elementary School*, [FN33] an intermediate appellate court in New Jersey, after noting the "longstanding *706 principle of First Amendment jurisprudence [that] forbids civil courts from deciding issues of religious doctrine or ecclesiastical polity," [FN34] went on to state:

Courts can decide secular legal questions in cases involving some background issues of religious doctrine, so long as they do not intrude into the determination of the doctrinal issues.... In such cases, courts must confine their adjudications to their proper civil sphere by accepting the authority of a recognized religious body in resolving a particular doctrinal question, while, where appropriate, applying neutral principles of law to determine disputed questions which do not implicate religious doctrine.... "Neutral principles" are wholly secular legal rules whose application to religious parties does not entail theological or doctrinal evaluations. [FN35]

The Appellate Division's claim in the foregoing passage is that any hazard to religious autonomy resulting from state action (state-mandated collective bargaining in the *South Jersey* case) can be cured by "reliance on the doctrine of neutral principles." [FN36] Essentially, the Appellate Division assumes that so long as it relies on "wholly secular legal rules whose application to religious parties does not entail theological or doctrinal evaluations," it is free to impose regulatory burdens on a religious entity. [FN37] As developed in the church property jurisprudence of the U.S. Supreme Court, however, the doctrine of neutral principles has a very different meaning. It holds that where a religious body has exercised its autonomy by executing standard legal documents such as contracts, wills, trusts, and deeds, courts may apply "neutral principles" to interpret those instruments. [FN38] The aim of this doctrine is to assure that courts defer to expressions of religious autonomy embodied in secular instruments, [FN39] not that they are free to invoke substantive secular norms to dictate the manner in which religious autonomy may be exercised in the first place. Thus, the neutral principles doctrine may not be used to defend imposition of outside resolutions on disputes arising from the implementation of *Ex Corde Ecclesiae*. To the contrary, this doctrine is merely one of two constitutionally permissible approaches to protecting the autonomy of religious communities in resolving such disputes. The religion exemptions in Title VII and parallel state legislation are designed to respect this autonomy, and for this reason, they must be broadly construed to accommodate the demands of *Ex Corde*

Ecclesiae.

*707 II. CONTRACT ISSUES

Many faculty are attracted to religious colleges and universities because of the religious mission and values of those institutions. They desire to teach in a manner that is both intellectually enlarging and spiritually strengthening. 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. [FN40] They desire to provide a high quality education in an environment that is consistent with the ideals and principles of the church.

Freedom of contract permits people to assent voluntarily to employment terms that promote the mission of a religious college or university. [FN41] The terms are set forth in the offer letter, the annual contract, and the university policies. The religious expectations of the university should be explicitly described in those documents.

The Ex Corde Application states, "In order to maintain and safeguard its Catholic identity, every Catholic university should set out clearly in its statutes or mission statement or in some other internal document its Catholic character" [FN42] The General Norms of Ex Corde Ecclesiae provide, "All teachers and administrators, at the time of their appointment, are to be informed about the Catholic identity of the institution and its implications, and about their responsibility to promote, or at least to respect, that identity." [FN43] The Particular Norms of the Application provide, "The administration should inform faculty and staff at the time of their appointment regarding the Catholic identity, mission and religious practices of the university and encourage them to participate, to the degree possible, in the spiritual life of the university." [FN44]

In hiring, it is wise to give faculty applicants copies of the religious expectations, to discuss them in the interview process, and to answer questions. This helps to insure that the new faculty understand the expectations and voluntarily agree to them. It also helps the university to assess an applicant's commitment to the expectations. Then the parties can make an informed decision about whether to enter into an employment relationship that will hopefully fulfill the expectations of both the faculty member and the university.

The Particular Norms provide that "the university should recruit and appoint faithful Catholics as professors so that, as much as possible, those committed *708 to the witness of the faith will constitute a majority of the faculty." [FN45] This provision helps to preserve the religious mission and identity of the institution as a Catholic college or university. [FN46] A religious university may also desire that most faculty will be role models to the students of people who are proficient in their academic discipline and faithful and committed in the church. This communicates to the students that one does not have to make a choice between being a good academic or a religious person. [FN47] Instead, the university desires its students to develop a sound integration of intellect and faith. Ex Corde Ecclesiae states, "Christians among the teachers are called to be witnesses and educators of authentic Christian life, which evidences an attained integration between faith and life, and between professional competence and Christian wisdom." [FN48]

Faithful faculty provide examples to the students of the proposition that intellectual achievement and rigorous analysis are not incompatible with religious faith, and that they can even complement one another. The power of this example cannot be overstated. A faithful faculty member shows her students in a concrete way that the integration of intellect and faith is possible, and she proves it with evidence no less convincing than the power of her own life. [FN49] Former Notre Dame President Theodore M. Hesburgh said, "The greatest gift a [college or university] president can give his students is the example of his life." [FN50]

The norms provide that "all faculty ... are expected to exhibit not only academic competence but integrity of doctrine and good character. When these qualities are found to be lacking, the university statutes are to specify the competent authority and the process to be followed to remedy the situation." [FN51] To insure enforceability, the university documents should specify the standards that define "integrity of doctrine" and "good character."

The transition to new employment terms that reflect the Ex Corde norms could take time, depending on the institution. New faculty assent to the new terms when they are hired. Untenured faculty have annual contracts, so their employment terms can be modified yearly. However, for tenured faculty the issue is more complicated. A university can modify the employment terms of tenured faculty if the university's by-laws reserve the authority to amend university *709 policy. [FN52] A university can also modify employment terms of tenured faculty if the modifications are reasonable and uniformly applied. [FN53]

The norms provide, for example, that all professors are expected to exhibit "integrity of doctrine and good character," [FN54] and that professors who are not Catholic should be "respectful of the Catholic faith tradition." [FN55] The norms state that Catholic professors of the theological disciplines have a "duty to be faithful to the Church's magisterium as the authoritative interpreter of Sacred Scripture and Sacred Tradition." [FN56] Catholic theology professors must also have a mandate granted by the bishop of the diocese in which the university is located. [FN57] The norms explain:

The mandate is fundamentally an acknowledgment by Church authority that a Catholic professor of a theological discipline teaches within the full communion of the Catholic Church. The acknowledgment recognizes that he or she is a faithful Catholic, an active member of the Church's communion who teaches a theological discipline as a special ministry within the Church community.

The mandate 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. [FN58]

Whether these modifications are reasonable will depend on the reasonable expectations [FN59] of faculty at the particular college or university. If a new term is not binding on tenured faculty, they will be governed by the prior provision unless they can be persuaded to agree to the new term. Thus, it might take a generation before some of the new terms apply to all faculty. However, it should be remembered that the church will likely exist for more than a generation.

Courts refrain from adjudicating issues that involve the interpretation of church doctrine or issues of church governance because of establishment clause and free exercise concerns. [FN60] In addition, courts are often reluctant to *710 judge employment disputes involving theology faculty because those faculty perform ministerial functions. [FN61]

When courts do hear such cases, they tend to defer to the religious institution. [FN62] For example, in *Curran v. Catholic University of America*, [FN63] the university prohibited a tenured professor of Catholic theology from teaching theology courses because of his public opposition to certain church teachings. After the Vatican found the professor unsuitable to teach Catholic theology, the board of trustees withdrew his mandate, or canonical mission, to teach Catholic theology at the university. The court rejected the professor's contract and academic freedom claims. It held that because of the university's relationship with the Holy See, an obligation was implied in the professor's contract to observe the Holy See's requirements. The court held that the Apostolic Constitution of 1979, and therefore the professor's contract, required him to have a canonical mission, which meant that he had to teach in the name of the church and not to oppose its doctrine. [FN64]

III. ACADEMIC FREEDOM

Ex Corde Ecclesiae raises some academic freedom issues. The General Norms provide, "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." [FN65] They further state:

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. [FN66]

The Particular Norms provide, "Academic freedom is an essential component of a Catholic university. The university should take steps to insure that all professors are accorded 'a lawful freedom of inquiry and of thought, and *711 of freedom to express their minds humbly and courageously about those matters in which they enjoy competence.'" [FN67] At the same time, the Particular Norms state that all faculty are expected to exhibit "integrity of doctrine," [FN68] and that professors who are not Catholic should be "respectful of the Catholic faith tradition." [FN69] They provide that Catholic professors of the theological disciplines have a "duty to be faithful to the Church's magisterium as the authoritative interpreter of Sacred Scripture and Sacred Tradition." [FN70] They also state that those faculty need to observe "'a due respect [debito obsequio] for the magisterium of the Church.'" [FN71] They further provide that Catholic theology professors must have a mandate granted by the bishop of the diocese in which the university is located. [FN72] The mandate can be denied or removed. [FN73] These provisions can all affect academic freedom.

A. Limitations on Academic Freedom Exist at Every University

It is widely accepted that academic freedom is essential to the very definition of a university. It is also clear that academic freedom is not unlimited at any university. At most universities, there are at least four categories of official limitations on individual academic freedom. First, the curriculum is a limitation, and this limitation involves notions of relevance and coverage. [FN74] The second limitation is the scholarly discipline itself. This can be complex, because the disciplines are not value-free. [FN75] David Rabban has observed, "To a significant extent, the very definition of the discipline and its standards for determining professional competence are themselves based on conventional wisdom." [FN76] The American Association of University Professors has concluded that these issues inevitably "turn on value judgments." [FN77]

The third limitation involves certain kinds of offensive speech, including racial and sexual harassment. Many 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, religion, gender, or sexual orientation.

The fourth limitation relates to religion. State universities typically prohibit the advocacy of religious viewpoints by faculty in the classroom to maintain *712 a separation between church and state. For example, in *Bishop v. Aronov*, [FN78] the University of Alabama prohibited a professor from making religious statements in class. The professor taught exercise physiology, and some of his statements concerned his religious beliefs and his understanding of the creative force behind human biology. In addition, he gave brief explanations of his philosophical and religious approach to problems and his advice to students about coping with academic stress. He also organized an after-class meeting with students and others in which he discussed evidences of God in human physiology. The university prohibited him from doing these things. Since the university was a state institution, the professor alleged that the prohibitions infringed on his right of free speech.

The Eleventh Circuit agreed with the university. It 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. [FN79] Among other things, the court said, "Tangential to the authority over [the university's]

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." [\[FN80\]](#)

The court did not reach the issue whether the professor's speech constituted an establishment of religion. It reasoned that "[b]ecause of the potential establishment conflict, even the appearance of proselytizing by a professor should be a real concern to the University." [\[FN81\]](#) It held that "[t]he University can restrict speech that falls short of an establishment violation." [\[FN82\]](#) In other words, a public university can restrict speech in the classroom even if that speech does not violate the establishment clause.

Many religious colleges and universities also have religious limitations on academic freedom. Approximately a third of the church-related colleges responding to a 1978 survey included a clause in their faculty contracts requiring adherence to or respect for the church's beliefs or values. [\[FN83\]](#) Undoubtedly, other church-related institutions have similar unwritten limitations.

So both secular and religious universities have limitations related to religion. Secular universities prohibit the advocacy of religious viewpoints in the classroom, and some religious universities prohibit the advocacy of anti-religious viewpoints. At a secular university a professor could not teach that God exists, and at a religious university a professor could not teach that He does not. Deciding which is the greater freedom depends on the value that the individual faculty member places on the particular views that he or she wishes to express. These differences in freedoms are in part what attract *713 some faculty members to secular universities and others to religious universities. [\[FN84\]](#)

Those are four categories of substantive limitations on individual academic freedom. It is important to recognize that every university places some limitations on individual academic freedom in order to protect the institutional educational mission of the university. 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 always a situated freedom and a responsible freedom." [\[FN85\]](#)

B. Individual and Institutional Academic Freedom

There are two facets of academic freedom: individual academic freedom and institutional academic freedom. Individual academic freedom is "the freedom of the individual scholar to teach and research without interference." [\[FN86\]](#) Institutional academic freedom is "the privilege of universities to pursue their distinctive missions" [\[FN87\]](#) and "the freedom of the academic institution from outside control." [\[FN88\]](#)

Michael McConnell has identified three reasons why the institutional academic freedom of religious universities should be protected. The first reason is to promote pluralism in higher education. [\[FN89\]](#) Religious universities contribute to our diverse "ethical, cultural, and intellectual life." [\[FN90\]](#) Ex Corde Ecclesiae states:

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 institutions that are necessary for the free expression of cultural diversity.... Therefore they have the full right to expect that civil society and public authorities will recognize and defend their institutional autonomy and academic freedom [\[FN91\]](#)

The second reason for institutional academic freedom is to be consistent with the antidogmatic principles of academic freedom itself. [\[FN92\]](#) The third reason is religious freedom. [\[FN93\]](#) Religious universities "are an important means by which *714 religious faiths can preserve and transmit their teachings from one generation to the next." [\[FN94\]](#)

Both individual and institutional academic freedom are indispensable, and both can be abused. Since neither freedom is absolute, the two freedoms must be mediated, and the exercise of both individual and institutional academic freedom must be a matter of reasonable limitations on each.

A widely recognized statement on academic freedom is the 1940 statement of the American Association of University Professors (AAUP). [FN95] The 1940 statement recognizes the needs of religious universities. It provides that "limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of appointment." [FN96] The "limitations clause" recognizes the well established practice of religious colleges and universities of placing some limitations on individual academic freedom to preserve their religious mission and identity.

In 1970, the AAUP adopted an interpretive comment that said, "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." [FN97] While the interpretive comment did not "endorse" the limitations permitted by the 1940 Statement, neither did it prohibit them. Indeed, it would be an unusual feat of "interpretation" for an "interpretive comment" to prohibit what the 1940 statement expressly permits. For many years, the AAUP was unable to resolve what the 1970 interpretive comment meant. [FN98]

***715** In 1997, the AAUP issued draft guidelines to provide additional guidance. [FN99] The draft guidelines recognize the permissibility of religious limitations and give an example of a limitation that the AAUP considers to be adequately explicit. They provide, "A restriction on any teaching or utterance that 'contradicts explicit principles of [the church's] faith or morals,' for example, is adequately explicit." [FN100] The example was excerpted from Gonzaga University's limitation. 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. [FN101]

The AAUP made no objection to this limitation in its investigation of Gonzaga University.

When courts review academic freedom issues, they tend to show considerable deference to the university's judgment. [FN102] This deference was manifested in Bishop v. Aronov, [FN103] which involved the University of Alabama ***716** 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." [FN104]

IV. ACCREDITATION

Universities are accredited by six regional accrediting associations. [FN105] There are also specialized accrediting associations, such as the American Bar Association, the American Psychological Association, and the National Council for Accreditation of Teacher Education. In addition, there are state accrediting agencies.

Accrediting bodies have provisions that respect the needs of religious colleges and universities. For example, the American Bar Association permits employment policies related to a law school's religious affiliation, including a religious hiring preference, [FN106] if notice is given and the policies do not contravene other accreditation standards. [FN107]

***717** The Accreditation Handbook of the Northwest Association of Schools and Colleges "allows 'reasonable limitations on freedom of inquiry or expression which are dictated by institutional purpose' as long as they are 'published candidly.'" [FN108] Some accrediting bodies, such as the Association of American Law Schools,

[FN109] refer to AAUP principles, which include the limitations clause of the 1940 statement.

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, etc., often requires graduation from an accredited program.

Most courts have held that private accreditors' actions are not state action, [FN110] 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 exercise clause *718 of the first amendment applies to it. A state's refusal to grant a professional or occupational license also constitutes state action.

Therefore, constitutional issues could arise. For example, the Supreme Court has noted that "[t]he free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires." [FN111] Thus, the government may not regulate religious beliefs by imposing special disabilities on the basis of religious status or views. [FN112] State action based on accreditation standards that prohibit religious hiring preferences or affirmations of belief arguably regulates the religious beliefs of an academic community. Also, since religious universities "are an important means by which religious faiths can preserve and transmit their teachings from one generation to the next," [FN113] the free exercise clause should protect the right of religious universities to employ faculty who teach and exemplify religious beliefs and values. [FN114]

The Religious Freedom Restoration Act (RFRA) [FN115] provides a religious exemption from a federal 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. RFRA applies only to the federal government, because the Supreme Court held that Congress lacks constitutional authority to apply it to the states. [FN116] 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 some protection from state action.

If particular accreditation standards are unaccommodating, Catholic institutions could seek to influence accreditors to adopt religious exemptions that permit compliance with the Ex Corde norms. There are more than 230 Catholic colleges and universities in the United States. [FN117] As a group, or in cooperation with other religious colleges and universities, they could wield significant influence with accreditors.

V. HIGHER EDUCATION FOR ALL SEASONS

While the Ex Corde norms have legal legitimacy, some argue that adopting religious standards in religious universities will lessen the respect those institutions enjoy in higher education. Certainly academic reputation is important to colleges and universities. However, for religious believers, there are also higher values and higher principles.

*719 In 1535, Sir Thomas More was imprisoned and ultimately executed for refusing to swear to the preamble to the Act of Succession, which essentially made Henry VIII the head of the English church. Robert Bolt's play, *A Man for All Seasons*, depicts a scene in which the imprisoned Thomas More is visited by his friend Norfolk. Norfolk tries to persuade Thomas More to go along, and points to the many other influential people who had sworn to the act. Norfolk pleads, "But ... Thomas, look at those names ... You know those men! Can't you do what I did, and come with us, for fellowship?" Thomas More replies, "And when we stand before God, and you are sent to Paradise for doing according to your conscience, and I am damned for not doing according to mine, will you come with me, for fellowship?" [FN118]

Later Thomas More is visited by his daughter, Meg, who also tries to persuade him to swear to the act. He asks, "You want me to swear to the Act of Succession?" She replies, "'God more regards the thoughts of the heart than the words of the mouth.' Or so you've always told me." He says, "Yes." She continues, "Then say the words of the oath and in your heart think otherwise." Thomas responds, "What is an oath then but words we say to God?" She says, "That's very neat." He asks, "Do you mean it isn't true?" She answers, "No, it's true." Thomas More gives this answer: "Then it's a poor argument to call it 'neat,' Meg. When a man takes an oath, Meg, he's holding his own self in his own hands. Like water. (He cups his hands.) And if he opens his fingers then-- he needn't hope to find himself again." [FN119]

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[FN1]. Brigham Young University has approximately 29,000 students, enrolled primarily in undergraduate programs. There are approximately 1,500 members of the full time faculty, with an additional 400 part-time faculty members as well as more than 3,000 administrative and staff personnel. If one adds in thousands of student employees, the numbers are much larger.

[FN2]. For example, the Archbishop of Washington is the Chancellor of Catholic University of America.

[FN3]. *Ex Corde Ecclesiae: An Application to the United States; Part Two, Art. 4, Section 3(b)* (1998) [hereinafter *Application*].

[FN4]. Doctrine & Covenants 50:16-17.

[FN5]. Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327 (1987).

[FN6]. 42 U.S.C. § 2000 (1994).

[FN7]. 42 U.S.C. § 2000e-2(a) (1994).

[FN8]. 42 U.S.C. § 2000e-1 (1994).

[FN9]. 42 U.S.C. § 2000e-2(e)(1) (1994).

[FN10]. 42 U.S.C. § 2000e-2(e)(2) (1994).

[FN11]. *Id.*

[FN12]. See, e.g., Rayburn v. General Conference of Seventh-day Adventists, 772 F.2d 1164 (4th Cir.), cert. denied, 478 U.S. 1020 (1985).

[FN13]. Ariz. Rev. Stat. Ann. § 41-1463(F)(2) (West 1992 & Supp. 1998). Other statutes with similar or identical language include: D.C. Code Ann. § 1-2503(b) (1992 & Supp. 1998); Del. Code Ann. tit. 19 § 711(f)(2) (1995 & Supp. 1998); Ky. Rev. Stat. Ann. § 344.090(3) (Michie 1997); La. Rev. Stat. Ann. § 23:332(H)(2) (West 1998); Md. Ann. Code, art. 49B, § 16(g)(3) (1998); Mass. Gen. Laws. Ann. ch. 151B § 4(18) (West 1996 & Supp. 1998); Minn. Stat. Ann. § 363.02 sub.8 (West 1991 & Supp. 1999); Neb. Rev. Stat. § 48-1103(1) (1998); Nev. Rev. Stat. Ann. § 613.350(4) (Michie 1997); 43 Pa. Cons. Stat. Ann. § 955(h)(10) (West 1995 & Supp. 1998); R.I. Gen. Laws. Ann. § 28-5-6(6)(ii) (1998); Tex. Labor Code Ann. § 21.109(a) (West 1996); Utah Code Ann. § 34A-5-106(3)(a)(ii) (1997); and Vt. Stat. Ann. tit. 21, § 495(e) (1987 & Supp. 1998).

[FN14]. Indiana's statute reads: "The term 'employer' does not include: ... any school, education, or charitable religious institution owned or conducted by or affiliated with a church or religious institution." Ind. Code Ann. § 22-9-1-3(h)(2) (Michie 1997 & Supp. 1998). See also 775 Ill. Comp. Stat. Ann. 5/2-101(B)(2) (West 1993); Me. Rev. Stat. Ann. tit. 5 § 4573-A(2) (West 1989 & Supp. 1998); Mo. Ann. Stat. § 213.010(8) (West 1996 & Supp. 1999); N.H. Rev. Stat. Ann. § 354-A:2(VIII) (1995); Wash. Rev. Code Ann. § 49.60.040(3) (West 1990 & Supp. 1999); and Wyo. Stat. Ann. § 27-9-102 (Michie 1997).

[FN15]. Idaho Code § 67-5910(2)(c) (1995); and N.M. Stat. Ann. § 28-1-9(B) (Michie 1998).

[FN16]. See Cal. Gov't Code § 12940 (West 1992 & Supp. 1999); Fla. Stat. Ann. § 760.10(8)(a) (West 1997); Ga. Code Ann. § 45-19-34 (Michie 1990 & Supp. 1998); Kan. Stat. Ann. § 44-1009(a)(1) (1993); Mich. Comp. Laws Ann. § 37.2208 (West 1985 & Supp. 1998); Mont. Code Ann. § 49-2-303(1)(c) (1997); N.D. Cent. Code § 14-02.4-08 (1997); and Okla. Stat. Ann. tit. 25 § 1302 (West 1987). See also states that provide both the BFOQ exception and other exemptions that may provide more protection. Mass. Gen. Laws. Ann. ch. 151B § 4 (West 1996 & Supp. 1998); Me. Rev. Stat. Ann. tit. 5 § 4572 (West 1989 & Supp. 1998); and N.M. Stat. Ann. § 28-1-7(A)(1) (Michie 1998).

[FN17]. Robert John Araujo, S.J., Ex Corde Ecclesiae and Mission-Centered Hiring in Roman Catholic Colleges and Universities: To Boldly Go Where We Have Gone Before, 25 J.C. & U.L. 835 (1999).

[FN18]. See Douglas Laycock, Towards a General Theory of the Religion Clauses: The Case of Labor Relations and the Right to Church Autonomy, 81 COLUM. L. REV. 1373 (1981).

[FN19]. Id.

[FN20]. CARL H. ESBECK, THE REGULATION OF RELIGIOUS ORGANIZATIONS AS RECIPIENTS OF GOVERNMENTAL ASSISTANCE (1996); Carl H. Esbeck, Government Regulation of Religiously Based Social Services: The First Amendment Considerations, 19 HAST. CONST. L.Q. 342 (1992); Carl H. Esbeck, Establishment Clause Limits on Governmental Interference With Religious Organizations, 41 WASH. & LEE L. REV. 347, 369-70 (1984).

[FN21]. See, e.g., Jones v. Wolf, 443 U.S. 595 (1979); Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440 (1969).

[FN22]. See, e.g., Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976). See generally Arlin M. Adams & William R. Hanlon, Jones v. Wolf: Church Autonomy and the Religious Clauses of the First Amendment, 128 U. PA. L. REV. 1291 (1980).

[FN23]. See Laycock, *supra* note 18, at 1378-88.

[FN24]. Employment Div. v. Smith, 494 U.S. 872 (1990).

[FN25]. City of Boerne v. Flores, 521 U.S. 507 (1997).

[FN26]. 330 U.S. 1 (1947).

[FN27]. Abington Sch. Dist. v. Schempp, 374 U.S. 203, 221-24 (1963).

[FN28]. Douglas Laycock & Susan E. Waelbroek, Academic Freedom and the Free Exercise of Religion, 66 TEX. L. REV. 1455, 1460-63 (1988).

[FN29]. See Alicea v. New Brunswick Theological Seminary, 608 A.2d 218 (N.J. 1992); Welter v. Seton Hall Univ., 608 A.2d 206 (N.J. 1992).

[FN30]. PATRICK J. SCHILTZ & DOUGLAS LAYCOCK, Employment, in THE STRUCTURE OF AMERICAN CHURCHES (forthcoming treatise to be published under the auspices of the DePaul Center for Church/State Studies).

[FN31]. 443 U.S. 595 (1979).

[FN32]. 494 U.S. 872 (1990).

[FN33]. 675 A.2d 1155 (N.J. Super. App. Div. 1996).

[FN34]. Id. at 1171.

[FN35]. Id.

[FN36]. Id.

[FN37]. Id. (citing Elmora Hebrew Center, Inc. v. Fishman, 593 A.2d 725 (N.J. 1991)).

[FN38]. Jones v. Wolf, 443 U.S. 595 602-06 (1979).

[FN39]. See id. at 597-98.

[FN40]. See James D. Gordon III, The Importance of Religiously Affiliated Law Schools, 37 CATH. LAW. 183, 184 (1996).

[FN41]. "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)." WILLIAM A. KAPLIN & BARBARA A. LEE, THE LAW OF HIGHER EDUCATION 155 (3d ed. 1995).

[FN42]. Application, Part One, section VII.

[FN43]. John Paul II, Apostolic Constitution of the Supreme Pontiff, Ex Corde Ecclesiae, General Norms, Art. 4, section 2 (1990) [hereinafter Ex Corde Ecclesiae].

[FN44]. Application, Part Two, Art. 4, section 3(b).

[FN45]. Id. section 4(a).

[FN46]. Ex Corde Ecclesiae provides, "The responsibility for maintaining and strengthening the Catholic identity of the university ... calls for the recruitment of adequate university personnel, especially teachers and administrators, who are both willing and able to promote that identity. The identity of a Catholic university is essentially linked to the quality of its teachers and to respect for Catholic doctrine." General Norms, Art. 4, section 1.

[FN47]. We are indebted to Bruce C. Hafen for this point.

[FN48]. Ex Corde Ecclesiae, section 22.

[FN49]. Gordon, *supra* note 40, at 186.

[FN50]. Theodore M. Hesburgh, Speech at the 59th Annual Meeting of the American Council on Education, New Orleans, Louisiana (October 7, 1976).

[FN51]. Application, Part Two, Art. 4, section 4(c).

[FN52]. Rehor v. Case Western Reserve Univ., 331 N.E.2d 416, 422 (Ohio 1975) (retirement age).

[FN53]. Karlen v. New York Univ., 464 F. Supp. 704, 706-07 (S.D.N.Y. 1979) (retirement age); Drans v. Providence College, 383 A.2d 1033, 1039 (R.I. 1978) (mandatory retirement); Rehor v. Case Western Reserve Univ., 331 N.E.2d 416, 420-21 (Ohio 1975) (retirement age).

[FN54]. Application, Part Two, Art. 4, section 4(c).

[FN55]. Id. section 4(a).

[FN56]. Id. section 4(e).

[FN57]. Id. sections 4(f), 4(f)(4)(a).

[FN58]. Id. sections 4(f)(1)-(2).

[FN59]. Drans v. Providence College, 383 A.2d 1033, 1040 (R.I. 1978).

[FN60]. See, e.g., Jones v. Wolf, 443 U.S. 595 (1979); Serbian Eastern 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).

[FN61]. See, e.g., Alicea v. New Brunswick Theological Seminary, 608 A.2d 218 (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." Id. at 222.); Patterson v. Southwestern Baptist Theological Seminary, 858 S.W.2d 602 (Tex. Ct. App. 1993). Maquire v. Marquette Univ., 627 F. Supp. 1499, 1503-06 (E.D. Wis. 1986) (declining to adjudicate sex discrimination claim by applicant for theology position), aff'd in part on other grounds, 814 F.2d 1213 (7th Cir. 1987); cf. EEOC v. Catholic Univ., 83 F.3d 455 (D.C. Cir. 1996) (declining to adjudicate sex discrimination claim by canon law professor who was denied tenure).

[FN62]. KAPLIN & LEE, *supra* note 41, at 167.

[FN63]. Civ. No. 1562-87 (Sup. Ct. D.C., Feb 28, 1989).

[FN64]. See KAPLIN & LEE, *supra* note 41, at 164-65.

[FN65]. Ex Corde Ecclesiae, General Norms, Art. 2, section 5.

[FN66]. Id. Art. 4, section 3.

[FN67]. Application, Part Two, Art. 2, section 2 (quoting Vatican Council II, Church in the Modern World (Gaudium et Spes), at 62).

[FN68]. Application, Art. 4, section 4(c).

[FN69]. Id. section 4(a).

[FN70]. Id. section 4(e).

[FN71]. Id. Art. 2, section 2 (quoting Canon 218).

[FN72]. Id. Art. 4, sections 4(f), 4(f)(4)(a).

[FN73]. Id. Art. 4, section 4(f)(4)(e).

[FN74]. See ROBERT K. POCH, ACADEMIC FREEDOM IN AMERICAN HIGHER EDUCATION: RIGHTS, RESPONSIBILITIES AND LIMITATIONS 29-31 (1993).

[FN75]. See, e.g., HILLARY PUTNAM, REASON, TRUTH, AND HISTORY 139-41 (1981); LEO STRAUSS, NATURAL RIGHT AND HISTORY 52 (1953).

[FN76]. David M. Rabban, Does Academic Freedom Limit Faculty Autonomy?, 66 TEX. L. REV. 1405, 1426 (1988).

[FN77]. American Association of University Professors, Some Observations on Ideology, Competence, and Faculty Selection, ACADEME, Jan.-Feb. 1986, at 2a.

[FN78]. 926 F.2d 1066 (11th Cir. 1991), cert. denied, 505 U.S. 1218 (1992).

[FN79]. Id. at 1071.

[FN80]. Id. at 1074.

[FN81]. Id. at 1077.

[FN82]. Id.

[FN83]. PHILLIP R. MOOTS & EDWARD MCGLYNN GAFFNEY, JR., CHURCH AND CAMPUS: LEGAL ISSUES IN RELIGIOUSLY AFFILIATED HIGHER EDUCATION 73-74 (1979).

[FN84]. Gordon, *supra* note 40, at 185.

[FN85]. GEORGE S. WORGUL, JR., Editor's Preface, in ISSUES IN ACADEMIC FREEDOM viii-ix (George S. Worgul, Jr., ed., 1992).

[FN86]. Michael W. McConnell, Academic Freedom in Religious Colleges and Universities, 53 L. & CONTEMP. PROBS. 303, 305 (1990).

[FN87]. Statement on Academic Freedom at Brigham Young University, at 4 (1992).

[FN88]. McConnell, *supra* note 86, at 305. See generally David M. Rabban, A Functional Analysis of "Individual" and "Institutional" Academic Freedom under the First Amendment, 53 L. & CONTEMP. PROBS. 227 (1990).

[FN89]. McConnell, *supra* note 86, at 312-13.

[FN90]. *Id.* at 312.

[FN91]. *Ex Corde Ecclesiae*, section 37.

[FN92]. McConnell, *supra* note 86, at 313-15.

[FN93]. *Id.* at 315-18.

[FN94]. *Id.* at 316.

[FN95]. American Association of University Professors, Statement of Principles on Academic Freedom and Tenure, in AAUP Policy Documents and Reports 3 (1995).

[FN96]. *Id.*

[FN97]. American Association of University Professors, 1970 Interpretive Comments, paragraph 3, in AAUP Policy Documents & Reports 6 (1995). This language has been described as "highly presumptuous and overly simplistic." Poch, *supra* note 74, at 59. Dr. Poch explained:

It implies that the AAUP knows definitively whether church-related colleges and universities need a departure from academic freedom as defined by the association and refuses to consider the possibility that different constructions of "truth" and "ways of knowing" exist in academe. A church-related college or university may hold sacred certain values or beliefs and, through faith, consider such values and beliefs--such as the existence and teachings of Jesus Christ--truth itself. Also, faith or divine revelation and not necessarily research alone may be considered the "way of knowing" certain information....

The 1970 Interpretive Comments imply also that the AAUP definition of academic freedom should override institutional academic freedom in deciding which values and beliefs the college, university, or seminary elects to uphold through its affiliation with a church. The reason for different denominations and the multitude of church-related colleges and universities that are spread throughout the United States is the desire to be identified with certain values and beliefs. Presbyterians are Presbyterians and not Lutherans for a reason--they have some values and beliefs that are different from other groups or organizations.
Id. at 59-60.

[FN98]. In 1988 a subcommittee attempted to resolve the issue by recommending that institutions that invoke the limitations clause forfeit "the moral right to proclaim themselves as authentic seats of higher learning." Subcommittee of Committee A, The "Limitations Clause" in the 1940 Statement of Principles, ACADEME, Sep.-Oct. 1988, at 52, 55. 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.

Report of Committee A, 1988-89, ACADEME, Sept.-Oct. 1989, at 49, 54. Moreover,

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 simpleminded notion, for what I 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.

Report of Committee A 1988-89, ACADEME, Sept.-Oct 1989, at 49, 54.

[FN99]. The "Limitations" Clause in the 1940 Statement of Principles: Some Operating Guidelines, ACADEME, Jan.-Feb. 1997, at 49.

[FN100]. *Id.* at 51.

[FN101]. Academic Freedom and Tenure: Gonzaga University, 51 AAUP Bull. 8, 17 n.11 (Spring 1965).

[FN102]. April Kestell Cassou & Robert F. Curran, Secular Orthodoxy and Sacred Freedoms: Accreditation of Church-Related Law Schools, 11 J.C. & U.L. 293, 314 (1984); David M. Dumas, Caroline McIntyre, & Katheryne L. Zelenock, 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).

[FN103]. 926 F.2d 1066 (11th Cir. 1991), cert. denied, 505 U.S. 1218 (1992).

[FN104]. *Id.* at 1075.

[FN105]. They are the Middle States Association of Colleges and Schools, New England Association of Schools and Colleges, North Central Association of Colleges and Schools, Northwest Association of Schools and Colleges, Southern Association of Colleges and Schools, and Western Association of Schools and Colleges.

[FN106]. Carl S. Hawkins has observed that some people seem to have implicit faith in the untested premise that good legal education requires students and faculty with widely diverse religious backgrounds and beliefs. To the extent that they were inclined to impose this educational dogma on other law schools, their position would at some point deny accreditation to law schools whose religious atmosphere is pervasive enough to limit diversity in that direction. The difficulty with this kind of conscientious secularism is that it exalts an unproved premise as to the need for religious diversity to maintain good legal education, and it fails to consider the value of diversity among law schools as well as the value of diversity within a given law school. The issue ought to be the quality of legal education at a particular law school, and that issue ought to be resolved as a question of fact and not prejudged on the basis of secular dogma.

....

It is because we have untested beliefs as to the necessary conditions for good legal education that we need to allow room for diversity among law schools, so that diverse approaches can be tested through experience. Carl S. Hawkins, Accreditation of Church-Related Law Schools, 32 J. LEGAL EDUC. 172, 184-85 & n.38 (1982) (footnotes omitted).

[FN107]. American Bar Association, Standards for Approval of Law Schools and Interpretations, Standard 211(d) (1993). Standard 211 prohibits discrimination on the basis of religion. However, it adds:

This Standard does not prevent a law school from having a religious affiliation or purpose and adopting and applying policies of admission of students and employment of faculty and staff that directly relate to this affiliation and purpose so long as (1) notice of these policies has been given to applicants, students, faculty and staff before their affiliation with the law school, and (2) religious affiliation, purpose and policies do not contravene any other Standard, including Standard 405(d) concerning academic freedom. These policies may provide a preference for persons adhering to the religious affiliation and purpose of the law school, but shall not be applied to preclude a diverse student body in terms of race, color, religion, national origin, or sex. This Standard permits religious policies as to admission and employment only to the extent that they are protected by the United States Constitution. It shall be administered as if the First Amendment of the United States Constitution governed its application.

Id. The Association of American Law Schools has an analogous provision. ASSOCIATION OF AMERICAN LAW SCHOOLS, EXECUTIVE COMMITTEE REGULATIONS, HANDBOOK, § 6.17 (1993 ed.). See generally Robert A. Destro, ABA and AALS Accreditation: What's "Religious Diversity" Got to Do with It?, 78 MARQ. L. REV. 427 (1995).

[FN108]. NORTHWEST ASSOCIATION OF SCHOOLS AND COLLEGES, COMMISSION ON COLLEGES, ACCREDITATION HANDBOOK 8 (1994 ed.); see also id. at 133.

[FN109]. ASSOCIATION OF AMERICAN LAW SCHOOLS, HANDBOOK, Bylaws section 6- 8(d) (1993 ed.). American Bar Association Standard 405(d) provides: "The law school shall have an established and announced policy with respect to academic freedom and tenure of which Annex I herein is an example but is not obligatory." American Bar Association, Standards for Approval of Law Schools and Interpretations, section 405(d) (1993). Annex I follows the text of the 1940 statement.

[FN110]. McKeesport Hosp. v. Accreditation Council for Graduate Med. Educ., 24 F.3d 519, 523-26 (3d Cir. 1994); Medical Inst. of Minn. v. Nat'l Ass'n of Trade and Technical Sch., 817 F.2d 1310, 1312-14 (8th Cir. 1987); Peoria Sch. of Business, Inc. v. Accrediting Council for Continuing Educ. and Training, 805 F. Supp. 579, 581-83 (N.D. Ill. 1992); Transport Careers, Inc. v. National Home Study Council, 646 F. Supp. 1474, 1478-79 (N.D. Ind. 1986); Marlboro Corp. v. Association of Indep. Colleges and Schools, 416 F. Supp. 958, 959 (D. Mass. 1976), aff'd on other grounds, 556 F.2d 78 (1st Cir. 1977); Parsons College v. North Central Ass'n of Colleges and Secondary Schools, 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 College v. Middle States Ass'n of Colleges and Secondary Schools, 302 F. Supp. 459, 470 (D.D.C. 1969), rev'd on other grounds, 432 F.2d 650 (D.C. Cir. 1969), cert. denied, 400 U.S. 965 (1970).

In Oral Roberts Univ. v. American Bar Ass'n, No. 81-C-3171 (N.D. Ill. July 17, 1981), a law school used religious criteria, including an honor code and a statement of religious belief, in employment and admissions. The ABA found that the law school violated the ABA's prohibition against religious discrimination. The law school argued that states delegate authority to the ABA to accredit law schools, since states permit graduates of accredited law schools to take their bar exams. The court, on free exercise grounds, temporarily enjoined the ABA from denying provisional accreditation. The ABA then amended its standard and granted provisional accreditation. 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 (1985).

[FN111]. Employment Div. v. Smith, 494 U.S. 874, 877 (1991).

[FN112]. McDaniel v. Paty, 435 U.S. 618 (1978); Fowler v. Rhode Island, 345 U.S. 67,

69 (1953); see Employment Div. v. Smith, 494 U.S. 874, 877 (1991); cf. Larson v. Valente, 456 U.S. 228, 245 (1982).

[FN113]. McConnell, supra note 86, at 316.

[FN114]. Nelson, supra note 110, at 680; see Laycock & Waelbroek, supra note 28, at 1460-63 ("To build and run a religious university is an exercise of religion.") Id. at 1466.

[FN115]. 42 U.S.C. § 2000bb (1994).

[FN116]. City of Boerne v. Flores, 521 U.S. 507 (1997).

[FN117]. FELICAN A. FOY & ROSE M. AVATO, 1996 CATHOLIC ALMANAC 536 (1997).

[FN118]. Robert Bolt, A Man for All Seasons 76-77 (1962).

[FN119]. Id. at 81.

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