

Symposium on Ex Corde Ecclesiae

***835 EX CORDE ECCLESIAE AND MISSION-CENTERED HIRING IN ROMAN CATHOLIC
COLLEGES AND UNIVERSITIES: TO BOLDLY GO WHERE WE HAVE GONE BEFORE**

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I. INTRODUCTION

Who should be hired in a Catholic college or university? [FN1] A sensible answer might be: whoever is the best qualified to accomplish the responsibilities associated with the position. Nonetheless, even the sensible must look beyond this simple rubric. Hiring is an employment practice which is regulated by laws and public policy. However, as stewards of God's work in the vineyard of education, must we consider other matters as new teachers and administrators are hired? As other symposiasts have suggested, the answer is an unambiguous "yes." [FN2] The Apostolic Constitution of the Holy Father, Ex Corde Ecclesiae, is one major source of these other considerations. This paper will attempt to demonstrate how the concerns of Ex Corde Ecclesiae are respected by and consistent with the legal framework of the Federal law that applies to employment practices in private, religiously affiliated educational institutions.

In the context of American law as it relates to the making of hiring decisions, employment practices are the concern of Title VII of the Civil Rights Act of 1964. [FN3] In choosing to hire or not hire, employers generally cannot discriminate against candidates for employment on the grounds of race, color, religion, sex, or national origin. [FN4] The anti-discrimination provisions of *836 Title VII ensure that those who are employed are chosen on the basis of merit and substance, not on the basis of racial, ethnic, gender, or religious grounds which generally have no bearing on the talents needed to perform the tasks for which that person is hired. [FN5]

Although elements of the contemporary world may skeptically question the existence of disciples who, out of their faith and reason, search for God's objective truth, the duty of the late twentieth century disciple is to meet, counter, and dispel this perspective. As the Holy Father recently stated in his encyclical Fides et Ratio, "human beings attain truth by way of reason because, enlightened by faith, they discover the deeper meaning of all things and most especially of their own existence. Rightly, therefore, the sacred author identifies the fear of God as the beginning of true knowledge: 'The fear of the Lord is the beginning of knowledge.'" [FN6] One forum for doing this is the very forum in which the voice of skepticism and disbelief has taken root: the American university.

The university apostolate is particularly well suited for the opening of the mind that leads to the conversion of heart. It is in the Catholic academy which has the "basic mission of ... a continuous quest for truth through its research, and the preservation and communication of knowledge for the good of society." [FN7] By engaging the skeptical intellect in dialogue about justice, the Catholic scholar, teacher, and intellectual is well suited to use the shared awareness of contemporary circumstances "to examine and evaluate the predominant values and norms of modern

society and culture in a Christian perspective." [FN8]

If the academy is the place where kindred intellectuals come together to debate the great issues that confront the human family, then it is the Christian educator who, through participation in the academic labor, can share in the molding of how individuals and societies can address the problems which divert the progress of mankind and the common good. Through western history, the evolution of universities has often been influenced by religious beliefs. [FN9]

***837** The task of a Catholic university is "to unite existentially by intellectual effort two orders of reality that too frequently tend to be placed in opposition as though they were antithetical: the search for truth and the certainty of already knowing the font of truth." [FN10] The first order, i.e., the search for truth, must be a "free search for the whole truth about nature, man and God." [FN11] Yet, this truth is Christ, for he is "the way, and the truth, and the life." [FN12] As Pope John Paul II recently stated, "[t]he wisdom of the Cross, therefore breaks free of all cultural limitations which seek to contain it and insists upon an openness to the universality of the truth which it bears. [FN13] While this search for truth has, in part, properly addressed academic excellence, the Catholic soul of some universities has also been greatly modified. This modification has had its good qualities such as the incorporation of lay men and women into positions of responsibility. Consistent with the spirit of *Gaudium et Spes*, the laity have responded to the call to the "secular duties and activities" that are properly theirs. [FN14] For the laity involved with the formation of those about to enter the powerful establishment of the legal profession, "it is generally the function of their well-formed Christian conscience to see that the divine law is inscribed in the life of the earthly city..." [FN15] This is so because the unity of the human person is such that the faith-related moral conscience cannot be divorced from their participation in the daily events of worldly human existence. [FN16]

Catholic universities require the participation of Catholic, Christian, and other religious believers, but we must not forget that the underlying spirit of these universities where many diverse lives intersect cannot be abandoned. Although the Catholic academy exists in part "to institute an incomparably fertile dialogue with people of every culture," [FN17] the adjective "Catholic" and the noun "university" must remain compatible and not at odds with each other. Even though the "university" is "animated by a spirit of freedom and charity" that is "characterized by mutual respect, sincere dialogue, and protection ***838** of the rights of individuals," [FN18] it must also be "Catholic" which entails that its Catholic members "are also called to a personal fidelity to the church with all that this implies" and non-Catholic members "are required to respect the Catholic character of the university, while the university in turn respects their religious liberty." [FN19] If the university is committed to the freedom of healthy inquiry, then the institution and its members must be equally committed to the proposition that the truth which is sought and the knowledge to be achieved is the transcendent and the objective--which is God. [FN20]

Many educators have taken the stance that they wish to preserve and enhance their Catholic nature and affiliation. Some have expressed varying measures of optimism and hope that religiously affiliated universities can, on the one hand, compete with secular institutions in the fields of excellent teaching, scholarship, and research but, on the other hand, will contribute something in addition which is distinctive from their secular counterparts and which emerges from their religious tradition. [FN21] Catholic universities should preserve their religious identity while at the same time offering a curriculum that meets the rigor of intellectual investigation across most, if not all, academic disciplines. The conviction of many individuals concerned with preserving the Catholic nature and affiliation of these schools is that faith and belief are not mutually exclusive. [FN22] The academy is the arena in which reason and belief can and do come together in the search for answers to questions which humans have been addressing in the western universities for over eight hundred years. The religiously affiliated academies have been the place where faith and reason have come together to pose these questions and to seek their answers. [FN23] As Robert Bolt has Thomas More suggesting in *A Man ***839** for All Seasons*, the human being was made by God "to serve him wittily, in the tangle of his mind!" [FN24]

The missions of Catholic universities include building communities of scholars in which the educational dialogue is directed at seeking truth--but a truth that is defined in terms of God's truth rather than man's. [FN25] Their particular mission is different from their secular counterparts. The Catholic school's search for truth transcends the material because it seeks the eternal--or as Bonaventure said, it is the human activity which constitutes "the mind's road to God." [FN26] In order to do this, the environment to support this quest differs again from that of the secular educational institution.

The purpose of this article is to investigate some principal legal issues relevant to employment practices--particularly hiring--in Catholic universities. One of these questions is how can a Catholic school raise with prospective candidates for appointment to faculty or administrative positions questions concerning their understanding of the school's mission and their ability to support and contribute to it. [FN27] A further area of investigation concentrates on how Catholic institutions may rely on statutory provisions to employ faculty and administrators who would actively support and contribute to the Catholic institution's mission.

Such employment practices can be developed to observe the requirement not to discriminate unlawfully against others while at the same time recognizing the need to ensure that these schools are Catholic institutions. These mission-centered hiring practices would promote and sustain the diversity that is important to American culture and education vis-a-vis race, ethnic heritage, color, sex, and even religion. Mission sensitive hiring practices can *840 acknowledge that while some private and public institutions will and ought to remain secular, others need and should not. Diversity is enhanced, and pluralism is protected. If affirmative steps are not taken to address the erosion in religiously affiliated higher education, it is quite possible, perhaps even inevitable, that the Catholic university will become extinct not because of voluntary decision but because critical employment appointments could not be made with mission-oriented goals in mind.

II. LEGAL BACKGROUND

Under federal statutory law, religious organizations generally have grounds for some exemptions from the requirement for non-discrimination employment practices of the Civil Rights Act of 1964. These provisions cover: (1) religious corporations, associations, educational institutions, or societies who employ individuals of a particular religion to perform work connected with their religious activities; [FN28] (2) employment practices which admit or employ an individual on the basis of religion, sex or national origin where any of these characteristics are bona fide occupational qualifications reasonably necessary to the "normal operations" of the employer's business or enterprise; [FN29] and (3) employment practices of a school, college, university, or other educational institution for hiring individuals of a particular religion where the educational institution is "in whole, or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such [institution] is directed toward the propagation of a particular religion." [FN30]

At this stage, it would be helpful to explore these three exemptions and the impact they have on how a Catholic university can recruit individuals who would reinforce the identity and mission of the institution and to reject those individuals who would not.

A. The Three Religious Exemptions of Title VII

By way of background, § 2000e-2 identifies general employment practices which violate the non-discrimination provisions. Most notably, § 2000e-2(a)(1) declares that it is unlawful for an employer to refuse to hire or to discharge an individual or to discriminate against that individual in the context*841 of wages, benefits, conditions or privileges of employment because of that individual's race, color,

religion, sex, or national origin. [FN31] In addition, subsection (a)(2) expands employee protection by forbidding use of these characteristics when they limit, segregate, or classify the employees or applicants in any way that deprives or tends to deprive such individuals from employment opportunities or otherwise adversely affects their employment status. [FN32]

As noted earlier, Congress provided three exemptions to religiously affiliated employers. We should not hastily conclude that only religious employers were granted exemptions from Title VII prohibitions. Other employers are insulated from allegations of discrimination for certain types of employment practices when they either favor certain individuals or would disfavor other individuals for reasons which follow.

For example, an employer who conducts business on or near an Indian reservation may extend preferential treatment to Indians so long as this practice is publicly announced. [FN33] An employer may also apply different standards of compensation or extend different terms of employment to specific individuals where these differences are based on recognized seniority and merit systems of employee classification or professionally developed tests designed to test abilities that are related to the tasks of the jobs to be performed by the employees. [FN34] Of course, the use of these criteria should not be used to mask the real intention of an employer who wishes to discriminate against individuals on the basis of race, color, religion, sex, or national origin. [FN35] Other exemptions permit discriminatory employment practices based on national security reasons [FN36] and certain political affiliations of the individual (i.e., membership in the Communist Party) [FN37] which could compromise that person's ability to perform delicate or sensitive jobs that are a part of or related to national security. Now, let us consider the three primary exemptions for the Catholic university as a religious employer.

1. The First Exemption: Religious Educational Institution Exemption--§ 2000e-1(a)

Section 2000e-1(a) of Title 42 provides that the non-discrimination and other remedial provisions of the equal employment opportunity legislation do not apply to a "religious corporation, association, educational institution, or society [hereinafter employer]" concerning the employment of "individuals of a particular religion to perform work connected with the carrying on by such [[employer] of its activities." At the outset, it is essential to define several important terms of this part of the statute in order to determine how *842 these exemptions are to be construed. The terms religious, religion, and activities are primary candidates for examination. The terms corporation, association, educational institution, and work are terms that are also important to ascertaining the meaning of this first provision and to applying it to specific cases.

The only specific term defined by the definition's section of this subchapter of the Civil Rights Act is religion. [FN38] The meaning of this relevant term covers "all aspects of religious observance and practice, as well as belief..." [FN39] The phrase "all aspects" of religious observance, practice, and belief is broad and encompassing. But virtually all of the cases interpreting subsection (j) concentrate on the issue of protecting the employee who might be discriminated against because of that individual's religious observance, practice, or belief rather than the employer's religious nature. Put within the context of a university which maintains Catholic identity and affiliation, a broader sense of the meaning of religion emerges when § 2000e-1(a) and § 2000e(j) are read together. Assuming that a Catholic university is an "educational institution" under § 2000e-1(a), then the activities it pursues under the religion it follows "would include all aspects of religious observance and practice, as well as belief." [FN40] Thus, the Catholic university should be able to develop policies, including employment practices, which reflect not only its religious practices and observances but also the views and their implementation which reflect Catholic beliefs. It follows that hiring practices which seek to employ individuals sympathetic with an supportive of Catholic beliefs would be both permissible and protected.

If we read these two sections, i.e., §§ 2000e-1(a) and 2000e(j), in pari

materia, we see that the religious dimension of the employer covered by § 2000e-1(a) would include this employer's institutional observances, practices, and beliefs. Because this subsection specifically mentions "educational institutions," § 2000e-1(a) would apply to a Catholic university. Assuming that the Catholic university's observances, beliefs, and practices that come from the Catholic religious tradition would exclude the school from the non-discriminatory equal employment opportunity provisions of the Civil Rights ***843** Act, [FN41] the next question which must be addressed is how extensive is this protection or insulation from the non-discrimination provisions of Title VII?

Not all of the employer's hiring decisions are immune from the equal employment opportunity provisions of the Civil Rights Act. Those employment practices which consider race, national origin, color, and sex and which have little bearing on religion (including its practices, beliefs, and identification with an academic community) might not be exempt. [FN42] In the context of the religiously affiliated university, the coverage of § 2000e-1(a) may be limited to those situations in which the current or prospective employee's personal adherence to the religion in question is needed in order to "perform the work connected with the carrying on" of the university's various activities. For example, a Catholic university would be protected from enforcement of the non-discrimination provisions if it only considered for hire an ordained minister to serve as university chaplain if the chaplain were to perform functions which only an ordained minister would be qualified and experienced to do. [FN43] While a Catholic school could discriminate on religious grounds where there ***844** is a link between personal religious beliefs and the work required by the institution, [FN44] it is less clear if a Catholic school could mandate that a candidate for a faculty or administrative position could only be selected if that individual subscribed to the religious tenets associated with the school.

One Federal District Court has held that § 2000e-1 does not mean that the religious employer must hire only co-religionists (although it may should it see the necessity) when it desires to maintain the religious atmosphere consistent with its denomination's religious beliefs. However, the religiously affiliated employer can require its employees, who do not share the institution's religious traditions and convictions, to comply with employment practices which reflect the host religion's observances, practices, and beliefs. In *E.E.O.C. v. Presbyterian Ministries*, [FN45] a Presbyterian retirement home knowingly hired a Muslim receptionist. The employer informed her that she was not to wear the head covering worn by some Moslem women because that was not consistent with the religious atmosphere of the home. Although the employer's position did not require that all employees had to be Presbyterian, the court agreed with the employer that Title VII did not prohibit its employees from being required to respect the religious traditions of the home. [FN46] Similarly, the Third Circuit, in *Little v. Wuerl*, indicated that even when an employee charged the religiously affiliated employer with religious discrimination under Title VII, the court concluded that the religiously affiliated employer (in this case a primary school administered by the Roman Catholic diocese of Pittsburgh) is generally free from government intervention, a freedom which is to be read expansively. [FN47]

However, in another example, *E.E.O.C. v. Kamehameha Schools/Bishop Estate*, the outcome was not beneficial to the religious schools. [FN48] Here, the schools were established under the will of a benefactor who specified that all teachers would have to be members of the "Protestant religion." [FN49] Although the district court agreed with the employer that it was entitled to rely on the Title VII religious exemptions, [FN50] the Ninth Circuit held that the responsibilities of the position sought by the non-Protestant candidate had a "primarily ***845** secular purpose and character" even though the schools conducted classes in comparative religious studies, scheduled prayer and other religious services, and had hired "nominally Protestant" faculty in the past. [FN51] The Ninth Circuit agreed with the *E.E.O.C.*'s finding that the school could not discriminate on the basis of religion against teachers who did not come from the Protestant tradition. [FN52] Later, I shall demonstrate that there are deficiencies with this court's legislative analysis of the meaning of the Title VII religious exemptions.

At this point, I suggest that a religiously affiliated school can refuse to hire a candidate or can discharge an employee whose personal conduct counters the religious tenets of the school. [FN53] While a religiously affiliated school does not waive its right to discriminate against other candidates when it hires someone not a member of its church, [FN54] it should be remembered that the relationship between a religiously affiliated school and its faculty is not entirely exempt from coverage of the equal employment opportunity protections of Title VII. [FN55]

2. The Second Exception: The Bona Fide Occupational Qualification--§ 2000e-2(e)(1)

Congress also authorized employers to use religion, sex, or national origin where any of these three considerations constitute bona fide qualifications for employment if any of them is reasonably necessary to the normal operation of the business or enterprise. [FN56] A religiously affiliated school would be immune from enforcement of Title VII if it could show that considerations regarding the religion or religious views of an employee or a candidate for employment were integral to the occupational qualifications that are reasonably necessary to the successful execution of the employer's enterprise. [FN57] While the Ninth Circuit found that education was largely a secular enterprise *846 at the Kamehameha Protestant schools, the courts also found that the consideration of the religion of the teachers who would offer religious instruction fell within the bona fide qualification protected by subsection (e)(1). [FN58] In accordance with the bona fide occupational qualification, the Seventh Circuit held that a religiously affiliated university is exempt from Title VII when the school designated that seven of its thirty-one faculty positions in the philosophy department were to be restricted for members of the school's founding religious order. [FN59]

The religious bona fide occupational qualification exemption has been applied to employment practices conducted by American firms conducting business overseas. For example, an American contractor did not discriminate when it required the pilots ferrying religious pilgrims to Mecca must be Moslem. [FN60]

3. The Third Exemption: Religiously Affiliated Schools, Colleges, or Universities Exemption--§ 2000e-2(e)(2)

Subsection (e)(2) extends additional protection to religiously affiliated schools. [FN61] This exemption states that any school, college, university, or other educational institution which is "in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society" is permitted to employ individuals who are members of a particular religion. An educational institution is further protected by this same subsection if its employment practices are geared toward a curriculum which is "directed toward the propagation of a particular religion." [FN62] It is also a valid employment practice where a religiously affiliated university provides free housing and other benefits to the faculty members of the religious order which operated the university but did not provide such benefits to a lay member of the faculty who, unlike the order's teaching members, did receive a salary. [FN63] Recently, the Sixth Circuit held that a university which receives seven percent of its budget from a church organization is substantially controlled by a religious entity and thereby qualifies for this third exemption. As the court stated in *Killenger v. Samford* *847 University, "This kind of support is neither illusory nor nominal" so, therefore, it is "substantial." [FN64]

B. Reflection and Remaining Questions

The cases under § 2000e-2(e)(1) are fairly straight forward in applying the bona fide occupational qualification. More problematic are those decisions covering § 2000e-2(e)(2) where the courts have concluded that either the record was insufficient to determine if the school was a religious institution covered by 2000e-2(e)(2) [FN65] or the case could be decided on more narrow grounds. [FN66] While there is need to look at evidence which distinguishes schools which claim

religious affiliation from secular schools, the fact that there is an active presence of the founding religious order serving as teachers, administrators, and chaplains, and that the mission of the school reflects a religious ethos, philosophy, and *raison d'être* seem far more significant and relevant than the number of the order's members who participate and the financial contribution the order makes to the institution. [FN67] The synthesis of such a mission statement plus members of the church, order, or other religious group who participate in the teaching and administration of the school would certainly distinguish it from secular institutions which are state supported (e.g., land grant institutions, public grammar and high schools) or private schools which do not have a mission statement that reflects the beliefs, practices, and observances of a particular religion. Certainly, many individuals who belong to the faith which is at the core of the institution's identity might seek employment in the institutions because of their own church affiliation which is the same as that of the sponsoring school, college, or university. The presence of these individuals would supply a further reason for considering the school as being either religious or having religious affiliation.

But a question remains: what happens where the employee or candidate for employment is not a member of the religious group which sponsors the university? In other words, what happens when the Catholic university seeks out candidates for employment who are not Catholic but who are nonetheless desirous of supporting and contributing to its mission? None of the language of the three exemptions of Title VII specifically addresses this situation. Does this mean that the institution violates Title VII when it prefers *848 a candidate for employment who indicates a personal desire to support and contribute to the mission of the Catholic institution over a candidate who chooses to remain silent regarding his or her position vis-a-vis the religious identity and mission of the school?

Recruitment of faculty interested in the mission of the Catholic university is vital to its continued existence and self-preservation as a Catholic school. [FN68] However, the exemptions of Title VII do not directly address this situation. Because they do not, it is less apparent if the educational institution would violate the non-discrimination provisions of Title VII by preferring a candidate who desires to support and contribute to the Catholic nature and mission of the school over one who does not or whose personal views are in conflict with its Catholic identity. Nonetheless, there is some guidance available in helping the Catholic university through this thicket.

The Seventh Circuit [FN69] and the United States Supreme Court [FN70] have offered the greatest clarity in addressing these intricate employment issues pertaining to religious organizations and candidates for employment or employees who are refused employment on religious grounds even though they are members of the church or religious organization which runs the school or institution. The Seventh Circuit responded to the allegations made by Dr. Marjorie Maguire who applied for the position of associate professor of theology at Marquette University, a school founded by and still affiliated with the Society of Jesus. [FN71] She alleged that she was denied on at least six occasions the appointment she sought because of her sex and because of her controversial views on abortion. [FN72] The District Court noted that the crucial issue was not the alleged sex discrimination but, rather, the plaintiff's unorthodox views on abortion which conflicted with the Roman Catholic Church's teachings and position. [FN73] Although she professed to be a member of the Catholic Church, [FN74] she asserted that the preferential hiring policy adopted by the defendant university to hire Jesuits sexually discriminated against her. [FN75] Ultimately, the Seventh Circuit found that the principal issue was not the allegation of sex discrimination [FN76] but, rather, was the plaintiff's personal views that were hostile to the goals and mission of Marquette as they reflect the teachings of the *849 Catholic Church and the Jesuit order. [FN77] The Circuit Court agreed with the District Court that the plaintiff did not have Title VII grounds for challenging the employment practices of Marquette because she was not discriminated against on the basis of either sex or religion. [FN78]

The Supreme Court in 1987 addressed similar issues in the Amos case. There the employer was the Church of Jesus Christ of Latter Day Saints which owned and

operated a recreational facility and gymnasium at which Amos was employed. [FN79] The facility was run as a non-profit recreational facility open to the public. [FN80] Amos and other employees of the Church were dismissed because they had failed to obtain "temple recommends," i.e., certifications that they were members in good standing regarding particular Church practices. [FN81] These employees alleged that if the Church, under Title VII, were able to discriminate on religious grounds by firing employees from non-religious jobs (such as the position of attendants in the gymnasium), the Establishment Clause of the First Amendment of the U.S. Constitution would be violated. [FN82] The fact that this case was largely decided on the Constitutional issues does not restrict the insight it provides concerning the multiplicity of questions regarding employment discrimination allegations and religiously affiliated employers. The Supreme Court recognized that the non-profit activities of religious employers are entitled to protection from Title VII discrimination allegations when the work involved has been defined by the religious organization as being relevant to carrying out its religious mission. [FN83] The Court ultimately found that the statutory protection from anti-discrimination enforcement given to religious organizations for employment practices involving non-religious positions did not violate the Establishment Clause. [FN84]

In his concurring opinion, Justice Brennan developed the important issues underlying the Court's decision. He was willing to investigate issues which the majority chose not to raise and which have come up in other cases involving employers with a religious nature, character, or tradition. Justice Brennan wrote separately to investigate Title VII's exemptions for non-profit organizations with religious affiliation. [FN85] He recognized that Title VII's exemptions address the non-profit activities of religious employers and are related to "the legitimate purpose of alleviating significant governmental interference with the ability of religious organizations to define and carry out their religious *850 missions." [FN86] But Justice Brennan was not content with assuming what religious missions and organizations mean.

He understood "religious activity" to have a broad meaning. His definition of religious activity is encompassing and emerges from the variety of human endeavors consisting of individual participation in a "larger religious community" which "represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals." [FN87] This definition avoids the legalistic and technical and embraces the realistic and practical. His insight acknowledged that those individuals who are committed to the mission of the religious organization are the persons best qualified to determine which activities in fact further the organization's mission. [FN88]

Justice Brennan investigated an important point that might otherwise get obscured in a case involving important Constitutional and statutory issues concerning the rights and obligations of employers and employees. He relied on the concept of self-definition to investigate and explain this important point. He constructed a sensible sequence which begins with an identification of the activities which further the religious mission of a group. But who is best able or most qualified to determine what tasks are essential to religious missions-- legislators? public administrators? judges? Justice Brennan's sensible response to these questions was that those individuals who are members of the community and are "committed to [its] mission" are best able to determine what constitutes a "religious activity." [FN89] It is not public officials equipped with statute books and judicial opinions, legislative histories, and law dictionaries who can address this important issue.

Justice Brennan refined his point by arguing that the self-definition of the religious mission by the members of the religious organization not only determines the mission but also solidifies "individual religious freedom as well." [FN90] If some individual or group not supportive of the beliefs and observances of the faith community were to dictate the mission, the practical understanding of religion would be doomed, and the self-determination of the religious group and the people who comprise it and who identify with it would eventually face a form of persecution and perhaps even extinction. [FN91] Justice Brennan *851 expended considerable effort to warn that if a government body were to intrude in the process which defines the mission and the appropriate activities of the religious organization, then the

individuals who comprise it as well as the group itself "may be chilled" in their Free Exercise activities which are protected by the First Amendment. [FN92] In his conclusion, Justice Brennan pointed out that:

Sensitivity to individual religious freedom dictates that religious discrimination be permitted only with respect to employment in religious activities. Concern for the autonomy of religious organizations demands that we avoid the entanglement and the chill on religious expression that a case-by-case determination would produce. We cannot escape the fact that these aims are in tension. Because of the nature of nonprofit activities, I believe that a categorical exemption for such enterprises appropriately balances these competing concerns. As a result, I concur in the Court's judgment that the nonprofit Deseret Gymnasium may avail itself of an automatic exemption from Title VII's proscription on religious discrimination. [FN93]

And, to ensure that no one may conclude that the Court was endorsing religion in conflict with the Establishment Clause, Justice O'Connor added a caveat in her own concurring opinion. She pointed out that the Court's decision insulating the non-profit activities of religious organizations is an accommodation rather than an establishment of religion. [FN94] She further elaborated her conclusion by indicating that the effect of the Court's decision would eliminate the need for religious organizations to have to justify their non-profit activities as both religious as well as non-discriminatory (i.e., in compliance with Title VII). [FN95]

It would then appear that with this corpus of Constitutional and statutory law as interpreted by the Supreme Court and other Federal courts, Catholic universities first of all can claim both the right to determine what constitutes their religious activity along with the sovereign exercise of employment practices that favor certain types of individuals over others. However, this right to self-determination for religious organizations in non-profit activities has been clouded, as I suggested earlier, by the Ninth Circuit's decision in *E.E.O.C. v. Kamehameha Schools/Bishop Estate*. [FN96] Although the Supreme Court denied certiorari, no federal court has followed the Ninth Circuit's rationale *852 regarding these religious exemptions. [FN97] Some of the ambiguity generated by the Ninth Circuit's opinion stems from what the court considered to be a religious organization (a school, in the context of this case) and from what it further concluded were bona fide occupational qualifications which would protect certain employment practices from the charge of religious or other discrimination.

In *Kamehameha*, the Ninth Circuit addressed several Title VII issues concerning the primary and secondary educational system known as the Kamehameha schools and which were established in 1884 under the will of Bernice Pauahi Bishop. [FN98] Princess Bernice, a wealthy member of the royal Hawaiian family and a deeply spiritual individual, directed the trustees of the trust established under her will to use its income to found and maintain schools which would provide "a good education" as well as "instruction in morals and in such useful knowledge as may tend to make good and industrious men and women." [FN99] The Princess further instructed that "the teachers of said schools shall forever be persons of the Protestant religion, but that I do not intend that the choice be restricted to persons of any particular sect of Protestants." [FN100] For about one hundred years, the Kamehameha schools established under Princess Bernice's trust were conducted according to her wishes. However, in 1985, Ms. Carole Edgerton, who was not a Protestant, applied for an advertised teaching position which became available in the Kamehameha schools. [FN101] Upon being notified that she could not be awarded the position because of the religious qualification, she filed a discrimination complaint with the Equal Employment Opportunity Commission in accordance with the provisions of Title VII. [FN102] After attempts at conciliation failed, the E.E.O.C. brought an action in district court alleging religious discrimination against Ms. Edgerton under 42 U.S.C.A. § 2000e-2(a)(1), and both the E.E.O.C. and the schools moved for summary judgment. [FN103] After accepting the defendant's arguments that the schools were exempt from Title VII under the provisions of 42 U.S.C.A. §§ 2000e-1, 2000e-2(e)(1), and 2000e-2(e)(2), the district court granted the school's motion for summary judgment and denied the E.E.O.C.'s counter-motion. [FN104]

The district court concluded that: (1) since the schools were entitled to the

religious organization exemption of § 2000e-1(a), the schools could hire only Protestant teachers because of its religious history and its educational mission of providing a religious atmosphere for learning; [FN105] (2) the schools were entitled to rely on the bona fide occupational qualification of § 2000e-2(e)(1) because the need for "Protestant presence" was significantly related to the *853 educational tradition and character of the school, and it would be reasonable to conclude that the educational experience would be different if this presence were not maintained; [FN106] and, (3) the Protestant-only hiring policy was directed at propagating a religion integral to the students' daily life and to the schools' curriculum, both of which would be protected by § 2000e-2(e)(2). [FN107] As a result of the district court's action, the E.E.O.C. appealed the denial of its motion to the Ninth Circuit Court of Appeals.

In considering the case, the Ninth Circuit stipulated that it would construe the three statutory exemptions narrowly and that the burden of proving the exemptions was on the schools, and it consequently concluded that the schools were not entitled to the benefit of any of these exemptions and reversed the District Court. [FN108] This narrow construction, I submit, was inconsistent with the underlying intent and purpose of the exemptions as I shall soon demonstrate.

The Ninth Circuit relied on several components of legislative history to reinforce its point that the § 2000e-2(e)(2) religious curriculum exemption is to be narrowly construed. [FN109] But the statute's language uses the generic terms "school," "college," or "university, and it does not use the term "seminary." [FN110] The court began with a reasonable construction of the text that propagation refers to the spreading or instilling of particular religious values. [FN111] It then goes on to indicate that curriculum is restricted to "course work" and "required school activities." [FN112] Clearly, "course work" at the Kamehameha schools mandated religious education, and the "required school activities" incorporated the religious views that emerge from the Protestant, Christian Tradition. [FN113] To suggest, as the Court of Appeals did, that the curriculum at Kamehameha was not directed to the propagation of a particular religion is both problematic and incorrect. [FN114] As the district court found, the "Protestant tradition and its value system" permeated the "orientation of the schools" through the presence of the on-campus church, mandatory devotion times, mandatory religious instruction, and daily prayer. [FN115]

*854 The Ninth Circuit went on to refer to three short passages taken from the legislative history to buttress its conclusion. [FN116] Asserting that these excerpts support its contentions, [FN117] the court went on to address the role of religion in the Kamehameha schools as presented by its publications which, in the court's view, made a distinction between "the general traditions of the schools" and "their mission." [FN118] The court further noted that according to these publications, religion served "as a means for advancing moral values in education." [FN119] Of course it is quite possible to argue that the mission of these schools is to preserve and continue to practice its "general traditions. After all, missions can be determined by traditions, and traditions can be determined by missions. The two are inextricably related, and the distinction made by the court between them is artificial and mechanistic. [FN120]

The legislative history which the Ninth Circuit claimed to be "limited" [FN121] is in fact extensive and probes not only the exemption of § 2000e-2(e)(2) but also illuminates the meaning of the other two exemptions, i.e., § § 2000e-1(a) and 2000e-2(e)(1), as well.

III. A FAITHFUL LEGISLATIVE ANALYSIS AND EXPLANATION

The court referred to and quoted from statements made by Representatives Purcell, Roush, and Edmondson to reinforce its narrow view of the meaning of the § 2000e-2(e)(2) exemption. [FN122] However, an analysis of the complete legislative history leads to a broader and more complete understanding of the intent and purpose of the legislation and these statutory exemptions to Title VII enforcement than that reached by the Ninth Circuit.

In the House of Representatives' deliberations, Congressman Purcell offered the amendment to the pending legislation which became § 2000e-2(e)(2). With the minor exception of one word ("other") used to modify "educational institution," Rep. Purcell's amendment became § 2000e-2(e)(2). [FN123] While I shall not belabor the point here, legislative history must *855 be used with care and caution. [FN124] Legislative history is not always the touchstone that will reveal the truest meaning of a statute whose definition is in dispute. If we rely on it as being the source of all answers in difficult cases of statutory construction, we can often be disappointed. But, if used with care, it can be beneficial to ascertain the meaning of the statute in specific cases. [FN125] When examined carefully and read fully in the context of the legislative process leading to the enactment of the law, legislative history can provide a most useful tool for resolving difficult interpretive issues. The Kamehameha case is such an instance.

The Ninth Circuit accurately quoted Rep. Purcell's initial, brief description of the meaning of his amendment which subsequently became, with one minor change, the statute we now know as § 2000e-2(e)(2). [FN126] Rep. Purcell's understanding of his own amendment need not be the guiding force in determining the meaning of the specific and related legislation. [FN127] However, when the author's opinion about the legislation's meaning becomes generally, if not universally, shared by the debaters, then his opinion does count for a great deal when the legislation is being interpreted in subsequent litigation. [FN128]

As we proceed through the eight pages of the CONGRESSIONAL RECORD's reported debate and deliberation, it becomes clear that this was not a staged colloquy designed to put into legislative history that which could not be put *856 into the statute. [FN129] Rather, the debate provides insight into the meaning of this part of Title VII and provides a convincing resolution to the dispute in Kamehameha. The conclusions reached by the Ninth Circuit do not reflect Congress's intent nor the meaning of the statutory exemptions.

When Mr. Purcell offered his amendment, Rep. Gathings quickly supported it on the grounds that "religious institutions" (a term having broad meaning) should not be subject to "domination and control" by any government agency. In light of the Establishment Clause of the First Amendment, [FN130] he also argued that schools should be able to hire faculty members and "any employees" without having to have its decision vetoed by the E.E.O.C. or some other government body. [FN131] The Purcell amendment, however, was challenged by Rep. Emmanuel Celler, the powerful chairman of the House Judiciary Committee. Chairman Celler, while generally sympathetic with the concept of offering exemptions for the hiring of faculty and administrators, did not want to see exemptions broadened beyond this. [FN132] In particular, he was opposed to extending the exemption to "non-administrative and non-teaching personnel" such as janitors and other support staff. [FN133] This was a view espoused by Rep. John Lindsay who later offered an amendment to counter and restrict the Purcell amendment. [FN134]

But the Celler-Lindsay understanding of what the religious exemptions were about precipitated an extended and vigorous discussion which the Ninth Circuit failed to mention. [FN135] In the extensive legislative debate, the Purcell amendment, as well as the Purcell understanding of the Purcell amendment, became the majority view whereas the Celler-Lindsay understanding was essentially held by only a few members and subsequently abandoned by the proponents, i.e., Chairman Celler and Rep. Lindsay. [FN136]

*857 The debate following the Purcell amendment was punctuated with references to numerous experiences of members of Congress who had religiously affiliated institutions of various types in their respective districts or who attended or were trustees of religiously affiliated schools. Rep. Harris questioned Chairman Celler with the example of a Baptist college having to hire an atheist who applied for a janitorial vacancy. [FN137] Chairman Celler began to withdraw from his earlier position by suggesting that facts and circumstances could be vital in making a decision in the case posed by Rep. Harris. [FN138] While Rep. Harris initially used the example of a janitor, he continued with other positions such as a football coach at another school affiliated with a different denomination. [FN139] While Chairman

Celler opined that this type of position could conceivably be administrative and therefore covered by his understanding of the religious exemptions, he was pressed by Rep. Harris who argued that the Chairman's views and the interpretive ambiguities to which they led reinforced the need for the Purcell amendment. [FN140] To justify his position, Chairman Celler argued that the courts would have to be relied upon to determine the meaning and application of Title VII and its religious exemptions. [FN141] But Chairman Celler's efforts to pass these questions on to the courts did not sit well with other members of the House.

Rep. Poff retorted by discussing the difficulties that religiously affiliated educational institutions would face and which could and must be addressed by clear legislation. He posed the circumstance in which heads of religiously affiliated schools would be concerned with the religious views of employees with whom students would have daily contact. If an avowed atheist were hired because of the ambiguity of the statute, students could well be exposed to views that would unduly and negatively influence them. [FN142] While the academic freedom argument can be made that young inquiring minds ought to be exposed to many views on the human condition and its experiences as relayed by individual views, it is also legitimate for an educational institution and the administration which runs it to exercise their managerial function to *858 provide the atmosphere in which the school's distinctive, religious character is not only tolerated but is encouraged to flourish. [FN143] Rep. Poff was committed to the proposition that government "should not tamper with the freedom of any religious body in the operation of any of its institutions ... by meddling with the employment policies it pursues." [FN144]

But why should the government not tamper with these employment policies? Some answers to this question begin to emerge from the commentary made by the individuals responsible for crafting the language which became Title VII. A supporter of the more expansive view of granting exemptions to institutions with religious affiliations, Rep. Roush who is quoted by the Ninth Circuit, [FN145] identified the broad range of activities of religiously affiliated institutions which would need protection from blind application of Title VII. He noted that while so many religiously affiliated schools are non-profit corporations, there is no strong indication that they would be granted the status of a "religious corporation." [FN146] For him, the combination of being both religiously connected as well as not-for-profit was important. In his mind, religiously affiliated educational institutions "should have the right" to employ individuals whom the institution considers will be a part of and support the religious tradition and mission of the school as defined by its administration and its history. [FN147] In his words, the school

should have the right to compel the individuals it employs to adhere to its beliefs, for that college exists to propagate and to extend to the people with whom it has influence its convictions and beliefs. To force such a college to hire an "outsider" would dilute if not destroy its effect and thus its very purpose for existence. [FN148]

Of course, the argument was made that granting religious institutions exemption from Title VII in a number of areas might suggest the conferral of a carte-blanche approval to disregard all of the civil rights legislation. In order to dispel such a thought, Rep. Chelf spoke up. He had supported another amendment which placed in the general provisions of Title VII the amendment including "sex" discrimination which was contained in the original legislation. [FN149] He was sympathetic to the need to protect workers or applicants for employment from sex discrimination. But knowing that there were many religious communities within his Congressional district (e.g, men's and women's Catholic religious orders, Catholic colleges, Presbyterian colleges, Baptist colleges, and Mormon wards), and being familiar with the problems *859 they would all face if a narrow or restrictive interpretation were given to the Title VII religious exemptions, Rep. Chelf supported the Purcell amendment. [FN150] As he said, "let us vote for the Purcell amendment. We absolutely cannot take any chances--there is far too much at stake." [FN151]

While this rhetoric may be inspiring and invigorating, it presents the essential question of, "What exactly is at stake?" Rep. Gill offered an answer: what is at stake is the relationship of the religious and the secular, i.e., how the

religiously affiliated institution encounters the secular state especially through the transfer of Federal funds designated for educational purposes. [FN152] This relationship inevitably leads to questions about the Free Exercise and Establishment clauses of the First Amendment. Rep. Gill raised the circumstance in which religiously connected higher educational institutions receive "substantial amounts of Federal funds" and select employees based upon their religious affiliations and attitudes. [FN153] Rep. Harris raised another relevant question about whether there is a distinction between a "religious corporation" [a statutory term] and an educational institution which is in some way supported or sponsored by a particular denomination. [FN154] Rep. Harris, a frequent participant in the debate on the religious exemptions to Title VII enforcement, began to supply some answers to these important issues.

He explained that the drawing of strict, legalistic boundaries between religious corporations and educational institutions operated by religiously connected organizations was not what the Title VII religious exemptions were all about. [FN155] Both he and Rep. Roosevelt pointed to institutions of higher education some of which are "wholly owned and operated for the purposes of a religious corporation" and "not open to outside students" and many other institutions like The Catholic University of America located in Washington, D.C., which is religiously affiliated but which is also operated "for general purposes" of educating in a wide variety of subjects--some religious, but many secular. [FN156] Rep. Poage then commented on the "two different viewpoints" that had been presented concerning the religious exemptions and the institutions to which they applied. He reminded the members of the House that "a great majority of the church-affiliated schools over the United States" provide multiple functions and serve multiple purposes. He cogently stated that such schools

are established not simply to provide instruction in mathematics, science, or language, or even simply to promulgate a specific religious faith but in a great many cases it is also to provide a religious atmosphere in which they may help develop a better citizenship, and that religious atmosphere certainly cannot be maintained if these schools are *860 required by some agency in Washington to employ any atheist that comes along and asks for employment when they have a vacancy. [FN157]

Rep. Poage, after noting the important contribution church affiliated schools have made to the progress of citizenship and society, [FN158] raised an important issue for the members of the House, especially those who might agree with Chairman Celler, to consider. This issue re-focused on the missions of religiously affiliated schools which provide education in secular as well as religious subjects. Rep. Poage disagreed with Chairman Celler's view that religious schools in the United States had the single mission of promoting "a particular theology." [FN159] Since Mr. Poage wanted this disagreement fully understood, he posed the Celler view as that in which any school concerned with teaching conventional subjects did not have to be concerned with the "moral or religious attitude of the students"; this is so because secular subjects can be taught just as effectively by non-religious teachers. [FN160] Rep. Poage, along with other members of the House, correctly acknowledged that the presumed dichotomy between religious schools as those focusing primarily on religious education and other schools (including many church affiliated schools) which offered instruction in a wide range of subjects (including religious education) was more fiction than fact.

While noting that the primary reason for enacting the civil rights legislation was to combat racial discrimination, Rep. Bromwell argued the importance of considering the more subtle issues associated with religious questions. [FN161] Racial balance in public and employment sectors did not necessitate religious balance in all areas, and he argued that cases involving religious institutions called for exceptions. [FN162] Since there was initial disagreement on which institutions could rely on the religious exemptions of Title VII and which could not, Rep. Bromwell stated that the best way to eliminate the confusion about the meaning of the exemptions and the breadth of their application was to adopt the Purcell amendment. [FN163]

This observation prompted Rep. Gill to echo some of the sentiments of Chairman Celler. Rep. Gill believed that many institutions of higher learning in the United

States, including Harvard, could make some claim to having a religious foundation. That being the case, he did not believe that it made sense to enable all of these schools, especially those receiving Federal funds, *861 to deny some candidate for a teaching position employment because that individual did not belong to some particular religious belief. [FN164] While noting that much of Rep. Gill's concerns made sense, Rep. Edmondson pointed out the need to consider, as he put it, the other side of the coin. [FN165] The observation Rep. Edmondson made targeted the crisis a religiously affiliated school faces when it is required to hire individuals who are opposed to the religious beliefs and convictions which the school wants to foster or promote. [FN166] Rep. Quie, another supporter of the Purcell amendment, made the House members realize the danger of assuming that religiously affiliated schools always hire their co-religionists, for that is not the case, [FN167] and he identified many instances where religiously affiliated schools do not always hire their co-religionists. [FN168] The particular insight he offered was two-pronged: the first was that it is customary for religiously affiliated educational institutions to hire those they believe to be the best candidates for important positions; in other words, it is the responsibility and right of the institution to establish all the criteria [including mission centered concerns] by which hiring takes place. [FN169] The second aspect of his insight is that it is not the Federal government's responsibility to make these decisions; as he stated, in the case of an institution which is in whole or in part connected with a religious denomination or is directed toward the propagation of a particular religion, that decision ought to be made by them and in order to make it absolutely clear this amendment should be adopted. [FN170]

At this stage in the debate, Rep. Lindsay offered an amendment to the Purcell amendment. The Lindsay amendment would narrow the application of the religious exemptions to administrative and instructional employees of religious schools. [FN171] In offering his amendment, Rep. Lindsay stated that he *862 did not think that religious exemptions should be extended to all positions including those of "the labor force, grounds-keepers, and the like." [FN172] While Rep. Lindsay believed that the modifier "administrative" was broad and gave the religious school a good deal of flexibility, Rep. Whitten countered by arguing that religious institutions "should have the full right to see that all employees fit into their own plan of operations and are cooperative with what their objective is." [FN173] Mr. Whitten implied that if this discretion were not retained by the institution, it might have to engage individuals it would prefer not to employ because the employee's religious views might substantively and publicly conflict with the employer's. [FN174] Rep. Bennett was of the same view. He agreed that a religiously affiliated school should be able to hire personnel ("regardless of the position" involved) to protect the right to have a community of their choosing. [FN175] Reps. Mahon, Waggonner, and Kornegay endorsed, in rapid succession, Mr. Bennett's views favoring the Purcell amendment and opposing the Lindsay amendment. [FN176]

Rep. Kornegay further observed that his Congressional district contained numerous church-related colleges, orphanages, and other charitable institutions [including those affiliated with Baptist, Methodist, Presbyterian, and Catholic Churches as well as the Quakers and the Masonic Order]; consequently, he did not know what their hiring practices were because such matters were "none of [his] business and none of the Federal Government [[sic]." [FN177] It is important to note how broad in application the Kornegay understanding of the problem and the remedy was. He saw not only schools but many other kinds of charitable institutions affiliated with religious groups and organizations asneeding the Title VII religious exemptions.

Rep. Kornegay continued by offering his keen insight that

the Government should never have the authority to dictate or meddle into the affairs of our religious and charitable institutions... I stand here on the floor and earnestly beg this House not to take away from our dedicated historical and vital church-related schools and other charitable institutions the right to employ the teachers or the janitors of their choice. Gentlemen, this is a fundamental and constitutional right *863 which must never be violated, and I urge with all my power that the chairman of the committee accept the [Purcell] amendment. [FN178]

At this point in the debate, a remarkable thing occurred. Chairman Celler asked if

Mr. Kornegay would yield, and the latter consented. [FN179] Mr. Celler then stood and declared that "[i]n the light of the debate which has ensued" on the Purcell amendment and the Lindsay amendment offered in opposition, he (Chairman Celler) was now personally willing to accept the Purcell amendment and that the Lindsay amendment "would not be acceptable." [FN180] Rep. Kornegay commended the Chairman for accepting the Purcell amendment which would "permit our religious and church-related colleges and charitable institutions the freedom to employ the teachers and personnel of their choice." [FN181] It is essential to recognize and appreciate the breadth of Rep. Kornegay's explanation of the exemptions which Chairman Celler ultimately accepted. They covered both religious and church-related schools and religious and church-related charitable institutions. In the light of this extensive discussion in the House, the exemptions were considered to be very broad, not narrow as the Ninth Circuit suggested. [FN182] In light of this Congressional intent, the Ninth Circuit's wish to construe the statutory exemptions narrowly conflicted with the intent and purpose of the Title VII religious exemptions. To be consistent with legislative intent and purpose, the construction of these exemptions must be broad, not narrow. [FN183]

At this stage in the debate, Rep. Lindsay was recognized, and he requested that with unanimous consent his amendment be withdrawn. [FN184] And, without objection, the Lindsay amendment was withdrawn, and the sentiment of more narrow Title VII exemptions for religious institutions died on the floor. His withdrawal of the narrowing amendment in light of this extensive legislative debate is further proof that Congress saw need for a set of broad, not narrow, religious exemptions to Title VII.

The debate on these exemptions concluded, and the Purcell amendment went on to become a part of Title VII of the Civil Rights Act of 1964. In addition to the Lindsay Amendment, what also died on the floor of the House that day was the view that these religious exemptions only applied to a narrow group of religious educational institutions. When the analyst carefully reviews the legislative debate on these provisions, it becomes clear that Congress acknowledged the need that religious liberty extend to a very wide group of institutions claiming some kind of religious affiliation determined *864 not by the Federal Government or the courts but by the institutions and the people who comprise them. It is this backdrop which underlies the Ninth Circuit opinion. To suggest, then, as the court did in Kamehameha Schools that the religious exemptions to Title VII are to be narrowly construed would contradict the clear and powerful Congressional intent and purposes which undergird the religious exemptions to Title VII.

IV. CONCLUSION

If Catholic universities are to succeed in their missions, the question of who gets chosen to be a laborer in this work--work that contributes to the rich heritage of higher education in the United States--is of great importance. Of equal importance is the determination of the criteria by which these important employees are hired. While employers cannot, at one level, discriminate against candidates and employees on the grounds of race, color, religion, sex, or national origin, Catholic universities are nonetheless given statutory flexibility to select and retain employees who share in and contribute to their missions to seek wisdom and understanding within a context of religious belief and Catholic teachings.

The conviction of many individuals concerned with preserving the Catholic nature and affiliation of these schools is that understanding and belief are not mutually exclusive. The Catholic academy has been the place where faith and reason have come together to pose these questions and to seek their answers for centuries. Their mission, then, is different from their secular counterparts. The Catholic university's search for truth transcends the material because it seeks the eternal. In order to do this, the environment to support this quest differs again from that of its secular counterpart.

I have addressed questions of whether Catholic universities can implement employment practices that reinforce and enhance their mission. Both the language and

the spirit of Title VII enable and authorize Catholic universities to do this in those ways which the Catholic community--not outsiders--deem proper.

Ex Corde Ecclesiae allows Catholic universities to take affirmative steps to safeguard and preserve their special missions, missions that are respected and protected by Title VII of the Civil Rights Act of 1964. By not acknowledging the healthy relationship between the Holy Father's Apostolic Constitution and the civil law as well as their compatibility, we may contribute to the extinction of the distinctive missions of our Catholic universities. This extinction will come about not because of voluntary decision but because critical and lawful employment appointments were not made with mission-oriented goals in mind.

In the search for God's truth and wisdom, both Ex Corde Ecclesiae and the Title VII exemptions enable us to continue the important work of the Catholic academy--to boldly go where we have gone before.

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[FN1]. From this point on, I shall use only the term university or universities to refer to any higher educational institution which is involved in the educational enterprise of offering instruction or supporting research which leads to the conferral of an associate, baccalaureate, graduate, or professional degree. I have previously explored the matter of mission centered hiring along with an approach to implementing such employment practices in religiously affiliated institutions in my essay, "The Harvest Is Plentiful, But the Laborers Few:" Hiring Practices and Religiously Affiliated Universities, 30 U. RICH. L. REV. 713 (1996).

[FN2]. The right for the institution, not a faculty hiring committee, to determine who is employed to teach was recognized as an academic freedom by Justice Frankfurter in his concurring opinion in Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957). His "four essential freedoms" associated with higher learning are: (1) determining who may teach; (2) deciding what is taught; (3) ascertaining how subject matters shall be taught; and, (4) selecting who will be taught. Id.

[FN3]. See generally, Title VII, Equal Employment Opportunities Act, 42 U.S.C. § 2000 (1994).

[FN4]. 42 U.S.C. § 2000e-2(a)(1) is the principal anti-discrimination provision of Title VII which makes the failure to hire or discharge any individual on the basis of race, color, religion, sex, or national origin an unlawful employment practice. § 2000e-2(a)(2) parallels this first provision by declaring the limitation, segregation, or classification of employees or applicants based on considerations of race, color, religion, sex, or national origin to be unlawful employment practices.

[FN5]. Title VII does provide in 42 U.S.C. § 2000e-2(e) for employers to take into consideration religion, sex, or national origin where such considerations constitute a "bona fide occupational qualification reasonably necessary to the normal operations" of the business or enterprise.

[FN6]. Fides et Ratio, ¶ 20 (Biblical citation omitted).

[FN7]. APOSTOLIC CONSTITUTION OF THE SUPREME PONTIFF, August 15, 1990, Ex Corde Ecclesiae, ¶ 30.

[FN8]. Id. at ¶ 33.

[FN9]. The mottoes of Columbia and Oxford Universities ("In Your Light We See Light Itself" taken from Psalm 36 and "The Lord Is My Light" taken from Psalm 27) serve as evidence of this influence. The images of light and truth contained within these mottoes identify divine inspiration as a catalyst for the academic inquiry conducted within the university. These images also reflect the long standing human recognition of and quest for human understanding and reason seeking faith and for faith seeking understanding and knowledge. This recognition continues with more recently founded religiously affiliated schools such as Brigham Young University whose motto proclaims, "The Glory of God Is Intelligence." Within the context of a religiously affiliated university which claims a Christian foundation, John the Evangelist captures the essence of this seeking of truth: "Then Jesus said to the Jews who had believed in him, 'If you continue in my word, you are truly my disciples; and you will know the truth, and the truth will make you free.'" John 8:31-32 (NRSV). For an examination into the tradition of fides querens intellectum (the tradition of faith seeking understanding, and understanding seeking faith having roots in the writings of Augustine and Anselm of Canterbury), see, 1 FREDERICK COPLESTON, S.J., A HISTORY OF PHILOSOPHY 556 (1993).

[FN10]. Ex Corde Ecclesiae, at ¶ 1 (quoting from Pope John Paul II's Discourse to the Catholic Institute of Paris, June 1, 1980).

[FN11]. Ex Corde Ecclesiae, at ¶ 4.

[FN12]. John 14:6 (NRSV).

[FN13]. Fides et Ratio, ¶ 23.

[FN14]. Gaudium et Spes, ¶ 43.

[FN15]. Id.

[FN16]. Id.

[FN17]. Ex Corde Ecclesiae, ¶ 6.

[FN18]. Id. at ¶ 21.

[FN19]. Id. at ¶ 27.

[FN20]. Id. at ¶ 4.

[FN21]. See generally GEORGE MARSDEN, THE SOUL OF THE AMERICAN UNIVERSITY: FROM PROTESTANT ESTABLISHMENT TO ESTABLISHED NONBELIEF (1994), and JAMES T. BURTCHAELL, C.S.C., THE DYING OF THE LIGHT: THE DISENGAGEMENT OF COLLEGES & UNIVERSITIES FROM THEIR CHRISTIAN CHURCHES (1998); see also MARK SCHWEHN, EXILES FROM EDEN: RELIGION AND THE ACADEMIC VOCATION IN AMERICA at viii (1993), which discusses the migration of one scholar from the University of Chicago (Eden) to Valparaiso (a Lutheran

University in Indiana); CATHOLIC UNIVERSITIES IN CHURCH AND SOCIETY: A DIALOGUE ON EX CORDE ECCLESIAE, (John Langan, S.J., ed., 1993) in which a series of essays addresses Pope John Paul II's apostolic constitution on Catholic higher education, Ex Corde Ecclesiae, and intellectual life in the contemporary Catholic university; THE CHALLENGE AND PROMISE OF A CATHOLIC UNIVERSITY (Theodore Hesburgh, C.S.C., ed., 1994) in which another series of essays examines the nature of the Catholic university in both historical and contemporary contexts.

[FN22]. See Frederick Mark Gedicks, Public Life and Hostility to Religion, 78 VA. L. REV. 671, 694-95 (1992), wherein the author persuasively develops both historical and philosophical responses to the secular claims which suggest the incompatibility of knowledge and belief.

[FN23]. See generally HASTINGS RASHDALL, THE UNIVERSITIES OF EUROPE IN THE MIDDLE AGES (F.M. Powicke & A.B. Emden eds., 1936).

[FN24]. ROBERT BOLT, A MAN FOR ALL SEASONS, 73 (1962). Bolt has Thomas More telling his daughter Meg and her fiance Will Roper that, "God made the angels to show him splendor--as he made the animals for innocence and plants for their simplicity. But Man he made him to serve wittily, in the tangle of his mind!" Id.

[FN25]. A principal source of truth as being at the heart of the university enterprise is the biblical passage, "You will know the truth, and the truth will make you free." John 8:32 (NRSV).

[FN26]. Fr. Frederick Copleston has said of St. Bonaventure's Itinerarium mentis in Deum (The Mind's Road to God), that Bonaventure "maintains that the mind can apprehend eternal truths and draw certain and necessary conclusions only in the divine light. The intellect can apprehend no truth with certainty save under the guidance of Truth itself..." 2 FREDERICK COPLESTON, S.J., A HISTORY OF PHILOSOPHY 257 (1993).

[FN27]. See generally Ralph D. Mawdsley, Limiting the Right of Religious Educational Institutions to Discriminate on the Basis of Religion, 93 ED. LAW REPT. 1123 (1994); Ralph D. Mawdsley, Religious Educational Institutions: Limitations and Liabilities Under ADEA and Title VII, 89 ED. LAW REPT. 19 (1994); Joanne C. Brant, "Our Shield Belongs to the Lord:" Religious Employers and a Constitutional Right to Discriminate, 21 HASTINGS CONST. L. Q. 275 (1994); Treavor Hodson, The Religious Employer Exemption Under Title VII: Should a Church Define Its Own Activities?, 1994 BYU L. REV. 571; John E. Sanchez, Religious Affirmative Action in Employment: Fearful Symmetry, 1991 DET. C.L. REV. 1019; Scott McClure, Religious Preferences in Employment Decisions: How Far May Religious Organizations Go?, 1990 DUKE L. J. 587; and Laura S. Underkuffler, "Discrimination" On The Basis Of Religion: An Examination Of Attempted Value Neutrality In Employment, 30 WM. & MARY L. REV. 581 (1989).

[FN28]. 42 U.S.C. § 2000e-1(a) (1994).

[FN29]. 42 U.S.C. § 2000e-2(e)(1) (1994).

[FN30]. 42 U.S.C. § 2000e-2(e)(2) (1994). Although this last section is the most relevant to this essay, I suggest at this point that the phrase "toward the propagation of a particular religion" should be read broadly rather than narrowly. I do so because determining what constitutes "the propagation of a particular religion" incorporates the holistic approach to life as well as the specific

religious practices that occur within the lives of the members of each religious community. For example, within the Christian tradition, the propagation of the faith would include the relevance and application of Christian social thought within the daily lives of the members who are associated with educational, health care, and other institutions established and maintained by the worshipping community or its members. The reasons for this extend from the definition of religion contained in Title VII. The definition of "religion" is an expansive rather than a narrow one.

[FN31]. 42 U.S.C. § 2000e-2(a)(1) (1994).

[FN32]. 42 U.S.C. § 2000e-2(a)(2) (1994).

[FN33]. 42 U.S.C. § 2000e-2(i) (1994).

[FN34]. 42 U.S.C. § 2000e-2(h) (1994).

[FN35]. *Id.*

[FN36]. 42 U.S.C. § 2000e-2(g) (1994).

[FN37]. 42 U.S.C. § 2000e-2(f) (1994).

[FN38]. 42 U.S.C. § 2000e(j) (1994) states in pertinent part that, "religion includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." *Id.* (emphasis added).

The term religion also has a special significance in the context of the religion clauses of the First Amendment. I have suggested elsewhere that the term generally refers to belief in the transcendental. See Robert Araujo, S.J. *Contemporary Interpretation of the Religion Clauses: The Church and Caesar Engaged in Conversation*, 10 J. LAW & REL. 501 (1993-94). For the purposes of this article, I suggest that religion deals with an individual's belief in God--the God of the Abrahamic religions of Judaism, Christianity, and Islam.

[FN39]. 42 U.S.C. § 2000e(j) (1994) (emphasis added).

[FN40]. *Id.* (emphasis added).

[FN41]. This assumption is reinforced by *Killinger v. Samford University*, 113 F.3d 196 (11th Cir. 1997), where the court found that Samford University was able to claim this exemption. The record demonstrated that the University (1) received 7% of its budget from Alabama State Baptist Convention; (2) described itself as an institution "to foster Christianity through the development of Christian character, scholastic attainment, and a sense of personal responsibility..."; and (3) hired non-Baptists as well as Baptists. As the court stated, "We think that the idea of institutional policy is not as narrow as Plaintiff seems to think it is; we think Samford's policy includes its general purpose, principles, and tendencies as a religious institution. We are also aware of no requirement that a religious educational institution engage in a strict policy of religious discrimination--such as always preferring Baptists in employment decisions--to be entitled to the exemption." *Id.* at 199-200. The court also noted that it is unaware of any "rigid

sectarian" requirement for a school to qualify for the "religious educational institution" exemption. Id. at 199. However, in order to teach religion at Samford, a faculty member must subscribe to the 1963 Baptist Statement of Faith and Message in which this individual pledges "affirmations" and "commitments" to advancing Christianity. Id. This last requirement parallels the requirement of Ex Corde Ecclesiae, Article 4.4 of the General Norms which states, "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." Cf., Canon 812.

[FN42]. See Vigars v. Valley Christian Center, 805 F. Supp. 802, 807 (N.D. Cal. 1992), where the court indicates that the legislative history of the religious statutory exemptions do not generally apply to sex-based employment practices exercised by religiously affiliated employers. See also, Maquire v. Marquette Univ., 814 F.2d 1213 (7th Cir. 1987) where the plaintiff unsuccessfully argued sex discrimination by a religiously affiliated school. The plaintiff's contentions were countered by two defenses: (1) it was not plaintiff's gender which was used against her, but rather that the position she sought had to be filled by a Jesuit (and since only males can be Jesuits, only a male could fill the position); and, (2) the plaintiff's personal views on abortion were hostile to the teachings of the sponsoring religious group and contravened the goals and missions of the defendant university.

[FN43]. See Little v. Wuerl, 929 F.2d 944, 949 (3d Cir. 1991). But see Rasul v. District of Columbia, 680 F. Supp. 436 (D.D.C. 1988), where the court held that prison authorities could not discriminate against a Muslim cleric since they had not demonstrated that the hiring of a Protestant cleric was a bona fide occupational qualification for the post of prison chaplain.

[FN44]. Equal Employment Opportunity Commission v. Mississippi College, 626 F.2d 477 (5th Cir., 1980), cert. denied, 453 U.S. 912. See also Little v. St. Mary Magdalene Parish, 739 F. Supp. 1003 (W.D. Pa. 1990), aff'd, 929 F.2d 944 (3d Cir. 1991). The Third Circuit in Little read the exemption of the employer broadly; a religious school need not hire only coreligionists if it chooses, but it can hold all employees regardless of their personal religious beliefs to conduct themselves in ways consistent with its religious principles. Little, 929 F.2d at 951.

[FN45]. 788 F. Supp. 1154 (W.D. Wash. 1992), where the court recognized an implied right based on the Free Exercise clause against the claim of religious discrimination covered by Title VII.

[FN46]. Id. at 1156.

[FN47]. Little, 929 F.2d at 951.

[FN48]. E.E.O.C. v. Kamehameha Schools/Bishop Estate, 990 F.2d 458 (9th Cir. 1993), cert. denied, 510 U.S. 963 (1993), on remand, 848 F. Supp. 899 (D. Haw. 1991).

[FN49]. Id.

[FN50]. Kamehameha, 780 F. Supp. at 1323, where the District Court agreed with the school and estate that the Protestant-only hiring requirement was a bona fide occupational qualification.

[FN51]. Kamehameha, 990 F.2d at 466.

[FN52]. Id. at 467.

[FN53]. See, e.g., Little v. Wuerl, 929 F.2d 944 (3d Cir. 1991) (refusal of Catholic school to rehire teacher who was divorced and remarried upheld); but see Vigars v. Valley Christian Center, 805 F. Supp. 802 (N.D. Cal. 1992), where court held that parochial school was not automatically exempt from non-discrimination provisions of Title VII where it fired a school librarian who had a child out of wedlock. The District Court denied the employer's motion for summary judgment because of the dispute of material issues. However, the Sixth Circuit upheld the discharge of a teacher who violated the religious school's policy against extramarital sex. See Boyd v. Harding Academy of Memphis, 88 F.3d 410 (6th Cir. 1996). As the Sixth Circuit has further noted in Killinger v. Samford University, this "exemption allows religious institutions to employ only persons whose beliefs are consistent with the employer's when the work is connected with carrying out the institution's activities." Killinger, 113 F.3d at 200.

[FN54]. Little, 929 F.2d at 951.

[FN55]. E.E.O.C. v. Mississippi College, 626 F.2d 477, 485 (5th Cir. 1980). The court noted, however, that if the suspect employment practice is pursued in accordance with religious considerations in mind, then the Title VII exemptions for religious employers can insulate the practice from Title VII enforcement action.

[FN56]. 42 U.S.C. § 2000e-2(e) (1994).

[FN57]. 42 U.S.C. § 2000e-2(e)(1) (1994).

[FN58]. Kamehameha, 990 F.2d at 465-66.

[FN59]. See Pime v. Loyola Univ. of Chicago, 803 F.2d 351 (7th Cir. 1986), where the court found that reserving a certain number of positions within the philosophy faculty for members of the university's founding religious order constituted a bona fide occupational qualification. Id. at 354.

[FN60]. See Kern v. Dynalectron Corp., 577 F. Supp. 1196 (N.D. Tex. 1983), aff'd., 746 F.2d 810 (5th Cir. 1984). It is interesting to note that in the context of this case, it was also mandated by local law that any non-Moslem caught flying into Mecca would be beheaded.

[FN61]. 42 U.S.C. § 2000e-2(e)(2) (1994).

[FN62]. Id.

[FN63]. See Tagatz v. Marquette Univ., 681 F. Supp. 1344, 1358-59 (E.D. Wis. 1988), aff'd., 861 F.2d 1040 (7th Cir. 1988). The Seventh Circuit noted that while Marquette is a Jesuit institution, the university "declined to plead the religious exemption as a defense" to the claim of religious discrimination. Id. at 1043.

[FN64]. 113 F.3d at 201.

[FN65]. In his concurrence in *Pime v. Loyola University*, Judge Posner questioned whether Loyola University is a religious employer for purposes of § 2000e-2(e)(2). 803 F.2d at 357. He further indicates that while "the degree of religious involvement in universities popularly considered to be religiously affiliated is highly variable [citation omitted], neither the statute nor the legislative history indicates where in the continuum Congress wanted to make the cut" for purposes of § 2000e-2(e)(2). Id. at 358. Because of the silence in the record concerning information detailing Loyola's governance and other material factors, Judge Posner was reluctant to address whether the religious employer exemption would apply. Id. It was sufficient to decide the case in favor of Loyola knowing that there was no "evidence of either discriminatory intention or discriminatory effect." Id.

[FN66]. *Pime*, 803 F.2d at 354, 357-58 (Posner, J., concurring); *Tagatz*, 861 F.2d at 1043, where Marquette University declined to rely on the religious exemption defense.

[FN67]. See *Pime*, 803 F.2d at 357-58 (Posner, J., concurring).

[FN68]. The faculty recruitment and appointment process is inextricably linked to how an institution identifies itself and projects this image to the public. For example, if a university wishes to project an image which attracts minority students, it is important to have members of the faculty who are themselves members of minority groups. See, e.g., Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 STAN. L. REV. 855, 864 (1995), where the authors comment on the "important social roles" which faculty serve because they largely "set an institution's tone and agenda."

[FN69]. *Maquire v. Marquette Univ.*, 814 F.2d 1213 (2d Cir. 1987).

[FN70]. *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. Amos*, 483 U.S. 327 (1987).

[FN71]. *Maquire v. Marquette Univ.*, 627 F. Supp. 1499 (E.D. Wis. 1986).

[FN72]. Id. at 1502.

[FN73]. Id.

[FN74]. Id. at 1503.

[FN75]. Id.

[FN76]. *Maquire*, 814 F.2d at 1218.

[FN77]. Id. at 1217.

[FN78]. Id.

[FN79]. Amos, 483 U.S. at 330.

[FN80]. Id.

[FN81]. Id. at n.4.

[FN82]. Id. at 331. The Establishment Clause reads: "Congress shall make no law respecting an establishment of religion...." U.S. Const. amend. I.

[FN83]. Amos, 483 U.S. at 339.

[FN84]. Id.

[FN85]. Id. at 340 (Brennan, J., concurring).

[FN86]. Id. at 339.

[FN87]. Id. at 342 (Brennan, J., concurring).

[FN88]. Id.

[FN89]. Id.

[FN90]. Id.

[FN91]. See Douglas Laycock, The Rights of Religious Academic Communities, 20 J.C. & U.L. 15, 33 (1993), where the author develops the theme of self-determination raised by Justice Brennan and applies it to the academic community; as Laycock effectively argues,

For the state or academic association 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 of 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 answers emerge. Id.

[FN92]. 483 U.S. at 343 (Brennan, J., concurring).

[FN93]. Id. at 345-46.

[FN94]. Id. at 349 (O'Connor, J., concurring).

[FN95]. Id. at 348-49.

[FN96]. 990 F.2d 458 (9th Cir. 1993), cert. denied, 510 U.S. 963 (1993). But see Bob Jones Univ. v. United States, 461 U.S. 574 (1983), where the Supreme Court upheld the denial of tax exempt status under § 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c)(3), to private schools which, although clearly providing education to students, practiced racial discrimination by prohibiting inter-racial dating amongst members of the university community.

[FN97]. 510 U.S. 963 (1993).

[FN98]. Kamehameha, 990 F.2d at 459.

[FN99]. Id. at 459 & n.1.

[FN100]. Id. at n.1.

[FN101]. 780 F. Supp. at 1318.

[FN102]. Id.

[FN103]. Id.

[FN104]. Id. at 1328.

[FN105]. Id. at 1324.

[FN106]. Id. at 1323.

[FN107]. Id. at 1328.

[FN108]. 990 F.2d at 460. Rex Lee (who successfully argued the Amos case before the Supreme Court, 483 U.S. at 328) correctly pointed out, that in asserting its "narrow construction" argument, the Ninth Circuit offered no support for this position which Prof. Lee suggests does not accurately reflect the law. See Rex Lee, Today's Religious Law School: Challenges and Opportunities, 78 MARQ. L. REV. 255, 263 (1995).

[FN109]. Id.

[FN110]. 42 U.S.C. § 2000e-2(e)(2) (1994).

[FN111]. 990 F.2d at 464.

[FN112]. Id.

[FN113]. See, e.g., 780 F. Supp. at 1321, where the district court recognized that the "Protestant presence" contributes to the educational character of the Kamehameha schools. In order for students to advance and graduate, they had to pass their religious education classes.

[FN114]. 990 F.2d at 463-64.

[FN115]. 780 F. Supp. at 1323.

[FN116]. 990 F.2d at 464.

[FN117]. Id.

[FN118]. Id. at 465.

[FN119]. Id.

[FN120]. As the District Court noted, "the essence or central mission of [[the schools] is to provide native Hawaiians with an education from the Protestant point of view." 780 F.Supp. at 1323.

[FN121]. 990 F.2d at 464.

[FN122]. Id.

[FN123]. His amendment inserted the following: "and (2) it shall not be an unlawful employment practice for a school, college, or 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 in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular 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." 42 U.S.C. § 2000e-2(e)(2). With the exception of the word "other" which is underlined, the Purcell amendment became the statute.

[FN124]. See, e.g., Patricia Wald, Some Observations on the Use of Legislative History in the 1981 Supreme Court Term, 68 IOWA L. REV. 195 (1983), and The Sizzling Sleeper: the Use of Legislative History in Construing Statutes in the 1988-1989 Term of the United States Supreme Court, 39 AM. U. L. REV. 277 (1990); Kenneth Starr, Observations About the Use of Legislative History, 1987 DUKE L. J. 371; Abner Mikva, A Reply to Judge Starr's Observations, 1987 DUKE L. J. 380. See also Robert Araujo, S.J., The Use of Legislative History in Statutory Interpretation: A Look at Regents

v. Bakke, 16 SETON HALL LEGIS. J. 57 (1992), and The Use of Legislative History in Statutory Interpretation: A Recurring Question--Clarification or Confusion?, 16 SETON HALL LEGIS. J. 551 (1992).

[FN125]. Id. Contrary to the position held by the Ninth Circuit that the legislative history is "limited," 990 F.2d at 464, it is clear that the meaning of the statutory language and its history were ambiguous concerning the Title VII exemptions granted to religiously affiliated institutions. See statement of Rep. Bromwell, 110 CONG. REC. 2589 (1964). Because of this ambiguity, Rep. Bromwell deemed it essential to clarify the meaning and eliminate the ambiguity by adopting the Purcell Amendment. Although the Ninth Circuit believed that the legislative history was limited, the almost eight pages (three columns each) of prolonged debate lead to determinate conclusion that religiously affiliated institutions, including schools, have the legally protected right "to carry out what they consider to be their moral responsibility to their faith." Comments of Rep. Schadberg, 110 CONG. REC. 2589 (1964) (emphasis added).

[FN126]. 990 F.2d at 464.

[FN127]. See, e.g., Monterey Coal Company v. Federal Mine Safety and Health Review Commission, 743 F.2d 589, 598 (7th Cir. 1984), where the court determined that the weight to be given remarks of the chairman of the principal House committee which oversaw the evolution of the legislation who was also a major sponsor of the bill which became the legislation had to be less weight because no other member of Congress voiced any opinion, favorable or unfavorable, concerning his remarks. Unlike that situation, the members of Congress who debated and agreed on the meaning of the religious exemptions to Title VII were considerable.

[FN128]. See Wald, *supra* note 124, at 201.

[FN129]. See William Moorhead, A Congressman Looks At The Planned Colloquy And Its Effect In The Interpretation Of Statutes, 45 A.B.A.J. 1324, 1316 (1959), where the author, a former member of Congress, argued that the planned colloquy can be employed to overcome political and parliamentary obstructions to inserting alternative language into the statute.

[FN130]. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...." U. S. Const., amend. I.

[FN131]. 110 CONG. REC. 2586 (1964).

[FN132]. Id.

[FN133]. Id.

[FN134]. Id. at 2589-90.

[FN135]. 990 F.2d at 464, where the Ninth Circuit concludes that the legislative history concerning the meaning of § 2000e-2(e)(2) was "limited." As argued and illustrated above, the legislative history was not, as the court suggests, limited; rather, it was extensive and insightful about the meaning of the religious exemptions. See *supra* note 125.

[FN136]. While judges may not defer to the views of single legislators, see, supra note 127, they should take account of and accord great weight to consensus regarding statutory meaning which is solidified by vigorous debate that is also accompanied by the clear withdrawal of opposing interpretations. In the debate on the meaning of the religious exemptions, both Chairman Celler and Rep. Lindsay withdrew their opposition to the broad interpretation of the religious exemptions as proposed by Rep. Purcell and others. See 110 CONG. REC. 2592 (1964) (Celler) and 110 CONG. REC. 2593 (1964) (Lindsay).

[FN137]. Rep. McCulloch held the view that the bill, without the Purcell amendment, exempted many occupations. However, he did not think that candidates for janitorial positions should be discriminated against because of a preferential hiring practice which favored candidates of one religion. 110 CONG. REC. at 2587 (1964).

[FN138]. See, 110 CONG. REC. at 2586 (1964):

Mr. CELLER. Religion is not, and should not be a qualification for the job of janitor...

Mr. HARRIS. Then an atheist could be forced upon this particular college?

Mr. CELLER. Not necessarily. It would depend on all the circumstances.

Mr. HARRIS. But the Commission would have authority to determine whether it would come within the statute?

Mr. CELLER. That would be for the courts and the Commission. That example goes a little too far.

[FN139]. Id. at 2586.

[FN140]. Id.

[FN141]. Id.

[FN142]. Id.

[FN143]. In Weber v. United Steelworkers, 443 U.S. 193, 203-04 (1979), the majority of the Court, in relying on legislative history, recognized that government authorities, including the courts, should defer to the exercise of managerial discretion of private employers to comply with the remedial aspects of Title VII.

[FN144]. 110 CONG. REC. at 2586 (1964).

[FN145]. 990 F.2d at 464.

[FN146]. 110 CONG. REC. at 2587 (1964).

[FN147]. Id.

[FN148]. Id.

[FN149]. Id.

[FN150]. Id.

[FN151]. Id.

[FN152]. Id. at 2588.

[FN153]. Id.

[FN154]. Id.

[FN155]. Id.

[FN156]. Id.

[FN157]. Id.

[FN158]. Rep. Poage pointed out that, "these schools are rendering a wonderful service to our civilization. I think if they should be wiped out, and even if we should replace them with State-supported institutions which might well be able to give our young people every bit of education and cultural training which these church-affiliated institutions are now giving, that the Nation would suffer an irreparable loss in the type of training for citizenship and Christian living which the church-affiliated institutions provide." 110 CONG. REC. at 2588 (1964).

[FN159]. Id.

[FN160]. Id.

[FN161]. Id. at 2589.

[FN162]. Id.

[FN163]. Id.

[FN164]. Id. at 2589-90.

[FN165]. Id. at 2590.

[FN166]. Id.

[FN167]. Id.

[FN168]. Id.

[FN169]. Id.

[FN170]. Id. Rep. Quie continued by saying that Congress "had better leave religious decisions to religious institutions themselves and not attempt to do it ourselves through Federal executive agencies." Id. This statement can be taken at its face level. But it can also be revealing on another one. This further level focuses on the need for the institution to make decisions about the religious aspects of the institution, regardless of whether the institution decides to place one of its co-religionists into a position or not. It is the institution's right and responsibility to make the determination on the religious issues, not the Federal government's. In following Rep. Quie, Rep. Clausen, also a supporter of the Purcell amendment, added a further need for keeping decisions about the religious nature of religious institutions with the institutions themselves; this need focused on the right of religious liberty protected by the Free Exercise clause of the First Amendment. 110 CONG. REC. at 2590 (1964).

[FN171]. The Lindsay amendment offered the following substitute, which is underlined: "and (2) 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 administrative or instructional 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 by a particular 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." 110 CONG. REC. at 2591 (1964).

[FN172]. Id.

[FN173]. Id. (emphasis added). Although Mr. Lindsay believed that the word "administrative" could be applied broadly, one wonders how broadly the Ninth Circuit would have interpreted it in view of the fact that it chose to apply a narrow construction to the religious exemptions of Title VII. See 990 F.2d at 460, where the court stated at the beginning of its opinion that, "We construe the statutory exemptions narrowly...."

[FN174]. Id.

[FN175]. Id. at 2592.

[FN176]. Id.

[FN177]. Id.

[FN178]. Id.

[FN179]. Id.

[FN180]. Id. Rep. Chelf was recognized shortly after Chairman Celler's statement, and he (Mr. Chelf) analogized the "conversion" of the Chairman to that of Saul of Tarsus who, while on the way to Damascus, suddenly saw the "light" to stop persecuting Christians and to join their community of believers. 110 CONG. REC. at 2593 (1964). See also Acts of the Apostles 9:1-19; Acts of the Apostles 22:3-16.

[FN181]. 110 CONG. REC. at 2593 (1964) (emphasis added).

[FN182]. See 990 F.2d at 460.

[FN183]. Id.

[FN184]. 110 CONG. REC. at 2593 (1964).

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