Notre Dame Law Review

Volume 78 | Issue 4 Article 7

5-1-2003

May a Catholic University Have a Catholic Faculty

Michael J. Mazza

MAY A CATHOLIC UNIVERSITY HAVE A CATHOLIC FACULTY?

*Michael J. Mazza**

INTRODUCTION

One might assume that the answer to the rhetorical question posed in the title of this Article would be both obvious and in the affirmative. But it depends on whom one asks. Surprisingly, many Catholic leaders have expressed strong reservations about universities[1] making employment-related decisions on the basis of religion. Frequently mentioned is the concern that lawsuits will arise if a school engages in employment discrimination on religious grounds.[2]

The question of whether a religious employer may discriminate on religious grounds in its employment practices has become even more important since June 1, 2002. That date, selected by the U.S. Catholic bishops in November 1999, was the deadline by which all theologians at Catholic universities in the United States were to have obtained a *mandatum* ("mandate," in English) from the bishop of the diocese where the school's president and central administration offices are located.[3] The *mandatum* requirement, which is essentially an acknowledgment by ecclesial authority that a Catholic professor of a theological discipline is teaching "in communion with the Catholic

* Law Clerk for the Hon. John L. Coffey, U.S. Court of Appeals for the Seventh Circuit; Adjunct Professor of Law, Marquette University Law School; B.A., 1987, University of St. Thomas; M.A., 1994, Notre Dame Institute; J.D., 1999, Marquette University Law School.

1 Throughout this Article, I will use the term "universities" to refer to any college, university, or other institution of higher learning that offers instruction and supports research leading to the conferral of an academic degree.

2 *See, e.g., Responses to Proposed Ordinances by the Association of Catholic Colleges and Universities*, 23 ORIGINS 614 (1994) (noting "fears" by Catholic academicians concerning the legality of hiring preferences).

3 United States Conference of Catholic Bishops, *Guidelines Concerning the Academic Mandatum in Catholic Universities (Canon 812)*, 31 ORIGINS 128, 129 (2001) [hereinafter *USCCB Guidelines*]; *see also* Michael Rust, *Holy Reform in Higher Ed*, INSIGHT ON THE NEWS (Feb. 21, 2000), *at* http://www.insightmag.com/main.cfm?include=detail&storyid=208374.

Church," applies to some 3000 Catholic theologians at the 235 Catholic universities in this country, and has generated a furious debate within and outside the Church.[4] The eventual impact of the requirement on the hiring and retention of theology instructors is an open question.[5]

Teachers, administrators, and even bishops have voiced concerns about this most recent attempt by church leaders to link employment decisions with religious or doctrinal considerations. Prominent theologians Monika Hellwig and Fr. Peter Phan are among the many professors worried that some theologians may lose their jobs over this issue.[6] Officials at Jesuit-sponsored Boston College and Marquette University have evinced similar angst,[7] and at least some of those charged with implementing the requirement—i.e., the bishops—are reported to have only "reluctantly" supported the rules and are concerned that making a *mandatum* a condition of employment would expose the colleges and the bishops themselves to civil lawsuits.[8] Cincinnati Archbishop Daniel E. Pilarczyk, chairman of the committee charged with developing procedures for granting the mandate, was quoted as saying the *mandatum* requirement was "an ecclesiological

4 *See* J. Michael Parker, *School Officials Discuss Response to Vatican*, SAN ANTONIO EXPRESS-NEWS, Aug. 26, 1999, at 1B; Nolan Zavoral, *Catholic Bishops Stir a Vigorous Campus Debate*, MINNEAPOLIS STAR-TRIB., June 25, 2001, at A1. The *mandatum* requirement applies only to Catholics teaching Catholic theological disciplines at Catholic universities. *See USCCB Guidelines*, *supra* note 3, at 129.

5 *See, e.g.*, D.R. Whitt, *"What We Have Here Is a Failure to Communicate": The Mind of the Legislator in* Ex Corde Ecclesiae, 25 J.C. & U.L. 769, 797–98 (1999) (noting that "unless the higher education institution itself requires that one obtain a mandate or retain it as a condition of employment, the acquisition or retention of the mandate is irrelevant to gaining or keeping a faculty position").

6 Arlene Levinson, *Catholic Theologians Come to Terms with Mandates*, ST. PAUL PIONEER PRESS, June 1, 2002, at 10E.

7 *See* Maria Figueras, *Wild Challenges Vatican Vision for University Identity*, MARQ. TRIB., Feb. 16, 1999, at 1 (quoting Marquette University president Fr. Robert Wild's concern that "[t]he requirement that Catholics who are hired by Catholic universities be faithful could present a 'legal basis for a lawsuit against the university and the church'"); Dina Gerdeman, *Bishops Want Voice in Colleges' Hiring*, PATRIOT LEDGER (Quincy, Mass.), Mar. 24, 1999, at 1A (describing anxieties of Boston College officials over the prospect of employment discrimination lawsuits if preferential hiring was implemented); *see also* Hanna Rosin & Caryle Murphy, *Bishops Tighten Academic Control*, WASH. POST, Nov. 18, 1999, at A1 (describing concerns among Catholic academicians that the new guidelines would lead to employment-related lawsuits as well as a loss of government funding for Catholic universities).

8 *See* Jeffery L. Sheler, *Guarding the Doctrine: Catholic Bishops Move To Rein in Academics*, U.S. NEWS & WORLD REP., June 25, 2001, at 52.

matter . . . . [It has] nothing to do with hiring or firing of tenured professors."[9]

Such expressions of concern are not universally well-received. On the contrary, some commentators have criticized administrators of Catholic universities for advertising the "Catholic nature" of their institutions to new students and donors on one hand, while, on the other, claiming that the civil law prevents them from hiring faculty who are committed to the institution's Catholic heritage and mission.[10] Even non-Catholics have expressed support for the *mandatum* initiative, opining that many erstwhile Protestant institutions of higher learning lost their religious identities once employment decisions were made without regard to religion. Kent Hill, president of the Protestant Eastern Nazarene College in Quincy, Massachusetts, stated it this way: "The pope is on the money. You can't have a Catholic school if the majority of the faculty isn't Catholic—and seriously Catholic . . . . If you lose control over the faculty, there is no question that the school will not remain faithful to its religious connections."[11]

Other writers have suggested that narrowly defining the term "catholic" and making parochial employment decisions would discredit Catholic theologians in the eyes of their peers, inhibit innovative scholarship, and discourage bright students from entering the field. Jon Nilson, Loyola theology professor and incoming president of the Catholic Theological Society of America, said he was "troubled about moving forward with this new juridical instrument that has this potential for damage."[12] DePaul religious studies professor Jeffrey Carlson added: "In the university we proceed from the idea that no idea stands alone . . . . Certainly one of the voices should be the offi-

---

9 Stephen Huba, *Accepted Theology at Heart of Debate*, CINCINNATI POST, Nov. 21, 2000, at 16A.

10 *See, e.g.*, GEORGE WEIGEL, THE COURAGE TO BE CATHOLIC 211 (2002) (chastising the American bishops for their lengthy delay in "getting national norms with real traction for implementing *Ex Corde Ecclesiae*"); E. MICHAEL JONES, JOHN CARDINAL KROL AND THE CULTURAL REVOLUTION 377–410 (1994) (chronicling efforts by individuals inside and outside the Catholic Church to decrease Vatican influence over American Catholic universities); GEORGE A. KELLY, THE BATTLE FOR THE AMERICAN CHURCH 59–97 (1979) (arguing that administrators of several prominent Catholic universities in the United States have consciously attempted to remove their institutions from Church control).

11 Gerdeman, *supra* note 7; *see also* GEORGE MARSDEN, THE SOUL OF THE AMERICAN UNIVERSITY: FROM PROTESTANT ESTABLISHMENT TO ESTABLISHED NONBELIEF 5 (1994) (maintaining that religiously affiliated universities in this country drifted to secularism rather than being moved in that direction by conscious design).

12 Julia Lieblich, *Catholic Colleges Mum on Teacher "Loyalty Oath"*, CHI. TRIB., June 7, 2002, at 6.

cial teachings developed by the magisterium of the Catholic Church. . . . But we invite students to consider multiple candidates for truth."[13]

This Article debunks the myth that civil law hamstrings administrators at Catholic universities when they make personnel decisions with respect to professors of theology or professors in general. Part I discusses the obligations that administrators of Catholic universities have under the laws of the Catholic Church, which authoritatively require administrators to discriminate on religious grounds in the area of employment.[14] Part II presents the basis for a sound defense against religious discrimination claims, as existing law provides substantial protection against such suits. Part III examines the holdings of several cases to show that Catholic universities need not fear adverse legal consequences if they abide by Canon Law. On the contrary, it is the retreat from ecclesial authority that poses the greatest threat of employment-related liability to the Catholic universities of this country.

I. CATHOLIC HIGHER EDUCATION AND CHURCH LAW

Having launched the major universities in Europe seven centuries ago,[15] the Catholic Church has considerable experience in the field of higher education. The tool by which the Church sees to the administration of these institutions is known as the Code of Canon Law (hereinafter "the Code"). The most recent version of the Code, revised in 1983, states that "[t]he Church has the right to erect and to supervise universities which contribute to a higher level of human culture, to a fuller advancement of the human person and also to the fulfillment of the Church's teaching office."[16] The Code goes on to require universities to secure the permission of the "competent ecclesiastical authority" before it can bear the title or name "Catholic university."[17]

Beyond these general principles, the Code also bears on employment decisions. Canon 810 of the Code provides as follows:

> It is the responsibility of the authority who is competent in accord with the statutes to provide for the appointment of teachers to Cath-

13 *Id.*

14 *See* 1983 CODE cc.807–14 (covering "Catholic Universities and Other Institutes of Higher Studies").

15 *See* 1 EDWARD MCNALL BURNS, WESTERN CIVILIZATIONS: THEIR HISTORY AND THEIR CULTURE 330 (8th ed. 1973).

16 1983 CODE c.807.

17 *Id.* c.808 (emphasis omitted).

> olic universities who besides their scientific and pedagogical suitability are also outstanding in their integrity of doctrine and probity of life; when those requisite qualities are lacking they are to be removed from their positions in accord with the procedure set forth in the statutes.[18]

Seven years after the promulgation of the revised Code, on August 15, 1990, Pope John Paul II released a document on Catholic higher education entitled *Ex Corde Ecclesiae*.[19] In it, he asserts that Catholic institutions of higher learning are born "from the heart of the Church,"[20] and that their privileged task 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 fount of truth."[21] The Pope continues: "It is the honor and responsibility of a Catholic university to consecrate itself without reserve to the cause of truth."[22]

Ex Corde Ecclesiae contains a number of specific provisions referred to as "general norms."[23] The document describes these norms as being "a further development of the Code of Canon Law" and "valid for all Catholic Universities and other Catholic Institutes of Higher Studies throughout the world."[24] The norms are "to be applied concretely at the local and regional levels by Episcopal Conferences . . . in conformity with the Code of Canon Law."[25]

Article four of the general norms bears directly on the employment practices of a Catholic university. Beginning with the principle that "[t]he identity of a Catholic University is essentially linked to the quality of its teachers and to respect for Catholic doctrine,"[26] the Pope goes on to list several specific requirements. First, "[a]ll teachers and all administrators, at the time of their appointment, are to be informed about the Catholic identity of the Institution and its implications, and about their responsibility to promote, or at least to respect,

---

18 *Id.* c.810, § 1. Canon 812 goes even farther, requiring those teaching "theological disciplines" to have "a mandate from the competent ecclesiastical authority." *Id.* c.812.

19 *See* JOHN PAUL II, EX CORDE ECCLESIAE [THE APOSTOLIC CONSTITUTION ON CATHOLIC UNIVERSITIES] (1990), *available at* http://www.vatican.va/holy_father/john_paul_ii/apost_constitutions/documents/hf_jp-ii_apc_15081990_ex-corde-ecclesiae_en.html.

20 *Id.* Intro., ¶ 1.

21 *Id.*

22 *Id.* Intro., ¶ 4.

23 *Id.* pt. II.

24 *Id.* pt. II, art. 1, § 1.

25 *Id.* pt. II, art. 1, § 2.

26 *Id.* pt. II, art. 4, § 1.

that identity."[27] Second, all teachers at the institution who are Catholic "are to be faithful to . . . Catholic doctrine and morals in their research and teaching."[28] This same provision requires even more of Catholic theologians, who, "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."[29] Third, all other teachers—defined as those "who belong to other Churches, ecclesial communities, or religions, as well as those who profess no religious belief"[30]—are to "respect Catholic doctrine and morals in their research and teaching,"[31] as well as "recognize and respect the distinctive Catholic identity of the University."[32] Fourth, "[i]n order not to endanger the Catholic identity of the University or Institute of Higher Studies, the number of non-Catholic teachers should not be allowed to constitute a majority within the Institution, which is and must remain Catholic."[33]

Neither these provisions in Canon Law nor the general norms of *Ex Corde Ecclesiae* have been received well on this side of the Atlantic. Many critics of *Ex Corde Ecclesiae* note that these provisions are broad in scope, applying to *all* professors, not just those in theology departments. Indeed, the authors of a commentary accompanying a popular translation of the Code wondered whether Canon Law was even applicable to Catholic universities in the United States because the institutions "are both distinctive and diverse in character."[34] The same authors claimed "it is difficult if not impossible to apply the canons as such to such divergent situations of the Catholic universities in the Fifty States of the United States,"[35] and that "it is evident that the canons are designed for systems of higher education in situations considerably different from those in North America."[36]

Administrators for American Catholic universities have worried that implementing the requirements articulated in *Ex Corde Ecclesiae* and Canon Law regarding employment would subject their institutions to civil liability. Boston College president Fr. William Leahy, S.J.,

---

27 *Id.* pt. II, art. 4, § 2.

28 *Id.* pt. II, art. 4, § 3.

29 *Id.*

30 *Id.* pt. II, art. 4, § 4.

31 *Id.* pt. II, art. 4, § 3.

32 *Id.* pt. II, art. 4, § 4.

33 *Id.*

34 THE CODE OF CANON LAW: A TEXT AND COMMENTARY 571 (James A. Coriden et al. eds., 1985).

35 *Id.*

36 *Id.*

objected to the idea that a majority of his faculty should be "faithful Catholics," and was quoted as saying "he does not know how many members of his faculty are Catholic because he doesn't ask them their religion."[37] Father John Moder, president of St. Mary's University in San Antonio, cautioned that "[i]f we recast our governing documents according to 'Ex Corde Ecclesiae,' we could find ourselves held to impossibly high standards by American courts," and warned that the bishops might be forced to share responsibility for any legal judgment against a Catholic university.[38] Fr. Robert Wild, S.J., president of the Jesuit-sponsored Marquette University in Milwaukee, expressed his fear that implementing *Ex Corde Ecclesiae* might present a "legal basis for a lawsuit against the university and the church."[39] Wild also asserted that he was not alone in his concerns: "lots of university presidents are uncomfortable" about the national implementation of *Ex Corde Ecclesiae.*[40]

Numerous professors appear to be upset, as well, and, like their administrative brethren, offer their legal opinion on the issue. University of Dayton theology professor Terrence Tilley, one of four consultants to the U.S. Catholic Bishops' Committee on the implementation of the *mandatum* requirement, warned that universities that make the *mandatum* a condition for tenure or employment for theology professors could be in violation of the Civil Rights Act of 1964.[41] Fr. Peter Phan, a professor at the Catholic University of America and president of the Catholic Theological Society of America, worries that "expensive lawsuits against the bishops and the colleges and universities" may arise if the *mandatum* requirement is not reversed.[42]

Why administrators and faculty members should be so wary of certain threshold requirements for professors is unclear. Some prerequisites to employment are already in place: professors must have the appropriate academic credentials, be engaged in published scholarship, etc. In an institution that purports to be infused with a religious vision, can it be illegal to require more of an employee, in order

37 Gerdeman, *supra* note 7.

38 Parker, *supra* note 4.

39 Figueras, *supra* note 7.

40 *Id.*

41 *See* Huba, *supra* note 9; *see also* Jeff Gelman, *Area Catholic Colleges Optimistic over Norms*, ALLENTOWN MORNING CALL, Nov. 17, 1999, at A1 (citing concern of University of Scranton theology professor Richard Rousseau that a lawsuit may arise if a bishop refuses to grant a *mandatum* to a professor and "it affects his status at [the] school").

42 Peter C. Pham, *This Too Shall Pass: Why* Ex Corde *'s Mandate Won't Last*, COMMONWEAL, Dec. 21, 2001, at 13.

that the unique mission of the institution survive? What if the employee happens to teach theology, a discipline in which the governing body has a particularly strong interest?

The next part of this Article addresses these questions.

II. CATHOLIC HIGHER EDUCATION AND RELIGIOUS DISCRIMINATION

There are at least two defenses to federal causes of action[43] brought by disaffected employees of Catholic universities who allege religious discrimination. One is based on the statutory protection afforded by Title VII of the Civil Rights Act; the other is rooted in the constitutional protection of the free exercise of one's religion under the First Amendment. Following the basic judicial principle that a court will not address constitutional issues if a case can be resolved on statutory grounds,[44] this Article will address the two defenses in the order in which a court would most likely address them: first the statutory exemption, then the constitutional exemption.

A. Title VII Exemption

Title VII allows educational institutions to discriminate in employment if certain conditions are met. The general exemption reads as follows:

> This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.[45]

---

43 Defenses to actions brought under state anti-discrimination statutes are covered below. *See infra* Parts II.B & II.C.

44 *See, e.g.*, NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 500 (1979) ("[A]n Act of Congress ought not to be construed to violate the Constitution if any other possible construction remains . . . ." (citations omitted) (discussing Chief Justice Marshall's holding in *Murray v. Charming Betsy*, 6 U.S. (2 Cranch) 64, 117–18 (1804))).

45 42 U.S.C. § 2000e-1(a) (2000). The constitutionality of this exemption was scrutinized in the U.S. Supreme Court's decision, *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987). In *Amos*, the Court held that the exemption in Section 702 of the Civil Rights Act of 1964, 78 Stat. 255 (codified as amended at 42 U.S.C. § 2000e-1 (2000)), did not run afoul of the Establishment Clause. Applying the *Lemon* test, *see* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971), the majority found that the law had a secular purpose, *Amos*, 483 U.S. at 336, did not have the primary effect of advancing religion (though it did "afford a uniform benefit to all religions"), *id.* at 339, and that it did not impermissibly entangle church and state, as it "effectuates a more complete separation of the two and avoids . . . intrusive inquiry into religious belief." *Id.* The Court chose not to opine

The exemption aimed specifically at educational institutions provides,

> [I]t shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society . . . .[46]

A third exemption, which functions as an affirmative defense,[47] applies when an employee's religion is a bona fide occupational qualification:

> It shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.[48]

These three exemptions may overlap; thus, employers can use them as alternative defenses.[49] When interpreting these exemptions, it is necessary to determine (1) whether a particular institution is a "religious" one or is "owned, supported, controlled, or managed" by a religion or religious body,[50] and (2) whether the alleged victim has suffered *religious* discrimination.[51]

---

on the impact of the other religion clause, declaring that it had "no occasion to pass on the argument . . . that the exemption . . . [was] required by the Free Exercise Clause." *Id.* at 339 n.17.

46 42 U.S.C. § 2000e-2(e)(2). For an entertaining and exhaustive summary of the legislative history of the Title VII exemption (e)(2), see Robert John Araujo, *"The Harvest Is Plentiful, but the Laborers Are Few": Hiring Practices and Religiously Affiliated Universities*, 30 U. RICH. L. REV. 713, 742–54 (1996).

47 *See* Joanne C. Brant, *"Our Shield Belongs to the Lord": Religious Employers and a Constitutional Right To Discriminate*, 21 HASTINGS CONST. L.Q. 275, 285 (1994) (offering a brief overview of Title VII).

48 42 U.S.C. § 2000e-2(e)(1).

49 *See* Brant, *supra* note 47, at 284; *see also* Pime v. Loyola Univ. of Chi., 803 F.2d 351 (7th Cir. 1986) (holding that the university's resolution to reserve vacancies in tenure-track teaching positions for Jesuits did not violate Title VII because having a Jesuit presence in the philosophy department justified a bona fide occupational qualification).

50 42 U.S.C. § 2000e.

51 *See Pime*, 803 F.2d at 354 (Posner, J., concurring) (arguing that plaintiff was not discriminated against because he was Jewish, but because he was not a member of the Jesuit order).

In at least three situations, the argument that a religious school is *exempt* under Title VII may not afford the school the protection it may otherwise expect. The first situation is when a court applies a Title VII statutory exemption to only some of a school's hiring practices. For example, in *EEOC v. Southwestern Baptist Theological Seminary*,[52] a federal appellate court refused to exempt from Title VII a church-controlled institution of higher learning in its hiring practices of support staff.[53] The court did allow, however, for such discrimination in the institution's hiring of certain other employees because of the Free Exercise Clause.[54]

The second situation when a school will not enjoy protection under Title VII's exemption for religious institutions is when the school is not sufficiently religious. In a concurring opinion in *Pime v. Loyola University of Chicago*,[55] Judge Richard A. Posner questioned whether Loyola fit the qualifications of a "religious employer" under § 2000e-2(e)(2).[56] He noted that while "the degree of religious involvement in universities popularly considered to be religiously affiliated is highly variable, neither the statute nor the legislative history indicates where in the continuum Congress wanted to make the cut."[57] He went on to warn,

> If Loyola, perhaps in order to attract financial or other support from non-Catholic sources has attenuated its relationship to the Jesuit order far beyond that of other Catholic universities, there would be a serious problem in holding that it could nevertheless discriminate freely in favor of Catholics; for remember that the exemption allows the *religious* employer to confine all hiring to members of one religious faith.[58]

The third situation in which a religious school may not benefit from Title VII's religious exemption is when a plaintiff sues under not a federal, but a *state* civil rights law that has no exemption for religious institutions.[59] For instance, in *Porth v. Roman Catholic Diocese of*

52 651 F.2d 277 (5th Cir. 1981).

53 *See id.* at 287.

54 *See id.* at 281; *see also* Starkman v. Evans, 198 F.3d 173, 175–77 (5th Cir. 1999).

55 *Pime*, 803 F.2d at 354 (Posner, J., concurring).

56 *Id.* at 357–58 (Posner, J., concurring).

57 *Id.* at 358 (Posner, J., concurring) (citation omitted).

58 *Id.* (Posner, J., concurring) (citations omitted) (emphasis added).

59 *Compare* Speer v. Presbyterian Children's Home & Serv. Agency, 824 S.W.2d 589, 598 (Tex. App. 1991) (holding that a church-related child care agency was entitled to an exemption in a state civil rights law), *vacated on other grounds by* 847 S.W.2d 227 (Tex. 1993), *with* Porth v. Roman Catholic Diocese of Kalamazoo, 532 N.W.2d 195, 197–98 (Mich. 1995) (holding that Michigan's anti-discrimination law had no religious exemption).

Kalamazoo,[60] a Protestant teacher sued the Catholic diocese that operated the Catholic elementary school where she was employed under a Michigan anti-discrimination statute.[61] The fourth and fifth grade teacher alleged that she had been terminated for religious reasons, even though her primary responsibility was to teach secular subjects such as math, reading, science, and social studies.[62] Pursuant to a new school policy of hiring only Catholic teachers, the school informed the teacher that her contract for the 1991–1992 school year would not be renewed because she was not Catholic.[63]

The Michigan Supreme Court acknowledged both that this was a case of obvious religious discrimination,[64] and that while the Civil Rights Act of 1964 clearly contained an express exemption for religious schools, the state civil rights act did not contain a similar exemption.[65] Nevertheless, the court held that the federal Religious Freedom Restoration Act[66] (hereinafter "RFRA") barred enforcement of the state anti-discrimination law.[67]

Congress enacted RFRA with the express purpose of "restor[ing] the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion has been substantially burdened."[68] Congress was reacting to the U.S. Supreme Court's 1990 decision in *Employment Division v. Smith*,[69] which many observers claimed had scaled back the protection that had traditionally been available under the First Amendment's Free Exercise Clause.[70] Under RFRA, a "person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government."[71] RFRA provides that the government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless the government demonstrates that application of the burden to the person "(1) is in furtherance of a compelling governmental interest; and (2)

60 *Porth*, 532 N.W.2d at 195.
61 *See id.* at 197.
62 *See id.*
63 *See id.*
64 *See id.* at 198.
65 *See id.* (interpreting MICH. COMP. LAWS § 37.2202 (1985)).
66 42 U.S.C. § 2000bb (2000).
67 *See Porth*, 532 N.W.2d at 198.
68 42 U.S.C. § 2000bb(b)(1).
69 494 U.S. 872 (1990).
70 *See infra* notes 87–92 and accompanying text.
71 42 U.S.C. § 2000bb-1(c).

is the least restrictive means of furthering that compelling governmental interest."[72]

The Michigan state court in the *Porth* case reasoned that because RFRA restored strict scrutiny to free exercise claims, affording the school more protection than that available under the First Amendment,[73] the state had to show a "compelling interest" before it could enforce its anti-discrimination law against the school.[74] The court found no such interest, explaining that religion "pervades all aspects of a church-operated school," even the teaching of secular subjects.[75] The court stated that the teacher's responsibilities were "inexorably intertwined with the primary function of defendant's school, which is the education of its students consistent with the Catholic faith."[76] Enforcing the state's anti-discrimination law to teaching positions in religious schools would, the court concluded, "detrimentally affect the operation of such schools."[77] Thus, the court affirmed the trial court's summary judgment in favor of the Catholic school.[78]

Would *Porth* be decided the same way today? In light of the Supreme Court's 1997 decision in *City of Boerne v. Flores*,[79] striking down RFRA as it applied to state governments, RFRA is no longer available as a defense in the way it was available to the diocese in *Porth*.[80] Fur-

72 *Id.* § 2000bb-1.

73 *See* Porth v. Roman Catholic Diocese of Kalamazoo, 532 N.W.2d 195, 199 (Mich. 1995).

74 *Id.* at 200.

75 *Id.*

76 *Id.*

77 *Id.*

78 *See id.*

79 521 U.S. 507 (1997).

80 Whether RFRA still applies to the federal government, however, is an open question. In *City of Boerne*, the Supreme Court left open the possibility that RFRA still applied to the federal government. *See id.* at 516. At least two federal appellate courts have held that RFRA still applies to the federal government. *See* Kikumura v. Hurley, 242 F.3d 950, 953 (10th Cir. 2001) (holding that a plaintiff had a "substantial likelihood" of success in proving that a prison warden's denial of a pastoral visit violated RFRA); Christians v. Crystal Evangelical Free Church (*In re* Young), 141 F.3d 854, 856 (8th Cir. 1998) (ruling that RFRA prevents the recovery of a debtor's religious tithes as "avoidable transactions" in bankruptcy proceedings). This conclusion is not universal, however. *See, e.g.*, La Voz Radio de la Communidad v. FCC, 223 F.3d 313, 319 (6th Cir. 2000) (expressing "doubt" that RFRA is still constitutional as applied to federal law); United States v. Indianapolis Baptist Temple, 224 F.3d 627, 629 n.1 (7th Cir. 2000), *cert. denied*, 531 U.S. 1112 (2001) (noting that while RFRA's constitutionality as applied to the federal government was "not without doubt," it would "assume [RFRA] is constitutional" when the parties did not dispute its constitutionality); *see also* Gregory P. Magarian, *How To Apply the Religious Freedom Restoration Act to Federal Law Without Violating the Constitution*, 99 MICH. L. REV. 1903 (2001) (exploring how the RFRA fits

thermore, commentators disagree on whether the strict scrutiny standard should be applied to free exercise claims arising under a Title VII exemption.[81] A free exercise defense would also offer a defendant a significant amount of protection from the application of a state anti-discrimination law.[82] Thus, we turn now to an examination of religious exemptions under the Free Exercise Clause.

B. The Free Exercise Clause

Before 1990, the U.S. Supreme Court generally used a four-step analysis when evaluating free exercise claims under the First Amendment to the Constitution.[83] Courts relied on this strict standard when adjudicating Title VII disputes.[84] Claimants had to (1) prove that the regulated or prohibited practice or conduct was motivated by or stemmed from sincerely held religious beliefs, and (2) demonstrate that the state regulation actually burdened those practices.[85] It was then up to the state to show that (3) a "compelling state interest" justified the burden on the belief in question, and (4) the burden was the "least restrictive means" of achieving that interest.[86]

In *Employment Division v. Smith*,[87] the Supreme Court held that the Free Exercise Clause was not violated when a state denied unemployment benefits to a person who, for religious reasons, violated a state ban on use of the drug peyote.[88] The Court held that the Clause was not violated when the burden placed on a religious practice was

---

into the constitutional scheme of governmental power and how courts should proceed in construing it).

81 *Compare* Ralph D. Mawdsley, *Issues Facing Religious Educational Institutions That Discriminate on the Basis of Religion*, 97 EDUC. L. REP. 15, 27 (1995) (proposing an "ownership/control-plus" test by which "only educational institutions owned or controlled by a religious organization" would be protected under Title VII, and then only for those positions which are "actively involved in the . . . organization's religious mission"), *with* Brant, *supra* note 47, at 308–10 (arguing that Title VII and its religious exemptions are "neutral laws of general applicability within the meaning of *Smith*").

82 *See, e.g.*, Montrose Christian Sch. Corp. v. Walsh, 770 A.2d 111, 129 (Md. 2001) (striking down a county anti-discrimination ordinance under a strict scrutiny analysis on the grounds that it violated the Free Exercise Clause).

83 *See* Thomas v. Review Bd., 450 U.S. 707 (1981); Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963).

84 *See, e.g.*, Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164 (4th Cir. 1985) (refusing to subject to judicial review a church's selection of pastors); Feldstein v. Christian Sci. Monitor, 555 F. Supp. 974 (D. Mass. 1983) (allowing religious publisher to require adherence to church's beliefs).

85 *See Thomas*, 450 U.S. at 716–18.

86 *Id.* at 718.

87 494 U.S. 872 (1990).

88 *See id.* at 890.

not the object of the government, but simply an "incidental effect" of a "neutral and generally applicable" law.[89] The Court stated that "the mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities."[90] Thus, the Court concluded, such general laws will not be subject to strict scrutiny under the Free Exercise Clause.[91]

In the wake of the *Smith* decision, persons claiming that their free exercise rights have been violated carry a heavier burden than they did under the previous line of cases. As state non-discrimination laws seem to be religiously neutral and generally applicable, it might appear that religious institutions have no right to discriminate in their employment decisions.[92]

There are at least two responses to this theory. First, it is not clear that *Smith* would necessarily apply to a church qua a religious entity. In other words, just because a *person* (e.g., a peyote-smoker) who seeks to avoid application of a "neutral and generally applicable law" may no longer demand strict scrutiny of that law post-*Smith*, it does not follow that a *religious employer* (e.g., a Catholic university) is in a similar position. After all, an exception to an employment-related law is not invoked by an *individual* seeking to protect an alleged right to observe a religious command or practice, but, at least arguably, by an *organization* seeking to protect its identity. Thus, the fear noted in *Smith*—i.e., that individuals professing religious belief may "become a law unto themselves"[93]—does not appear to be germane to the issue of religious employers making hiring decisions. Nor would judges, in analyzing the hiring practices of religious institutions, be required to determine "the 'centrality' of an individual's religious beliefs before applying a 'compelling interest' test in the free exercise field."[94] On these grounds, then, a strong argument may be made that *Smith* should not affect the manner in which religious employers defend themselves against employment discrimination suits.[95]

---

89 *Id.* at 878.

90 *Id.* (quoting Minersville Sch. Dist. Bd. of Educ. v. Gobitis, 310 U.S. 586, 594–95 (1940)).

91 *See id.* at 882.

92 *See generally* Laura B. Mutterperl, Note, *Employment at (God's) Will: The Constitutionality of Anti-Discrimination Exemptions in Charitable Choice Legislation*, 37 HARV. C.R.-C.L. L. REV. 389 (2002) (arguing that when religious organizations choose to accept government funds, they alter their status under constitutional and statutory anti-discrimination provisions and forfeit their Title VII exemption).

93 *Smith*, 494 U.S. at 885.

94 *Id.* at 887.

95 *See* EEOC v. Catholic Univ. of Am., 83 F.3d 455, 462 (D.C. Cir. 1996).

Assuming arguendo that the converse is true, and that *Smith* raises the bar for employers wishing to claim a right to discriminate on religious grounds, an exception appearing in the *Smith* decision itself provides the means by which strict scrutiny may still apply. The *Smith* Court rejected the Native Americans' claims in part because their free exercise claims were "unconnected with any communicative activity or parental right."[96] Thus, *Smith* allows for strict scrutiny when a claimant couples a free exercise right with some "other constitutional protections."[97] Such a "hybrid" claim would seem to allay the concern of the *Smith* Court that anarchy would result if citizens could disobey laws with impunity if they but claimed that the laws violated their religious beliefs.[98]

Though *Smith*'s "hybrid" analysis has come under fire, it is still in wide use today.[99] In his concurrence in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[100] Justice Souter stated his view that the hybrid approach in *Smith* was "ultimately untenable":[101]

> If a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the *Smith* rule, and, indeed, the hybrid exception would cover the situation exemplified by *Smith*, since free speech and associational rights are certainly implicated in the peyote-smoking ritual. But if a hybrid claim is one in which a litigant would actually obtain an exemption from a formally neutral, generally applicable law under another constitutional provision, then there would have been no reason for the Court in what *Smith* calls the hybrid cases to have mentioned the Free Exercise Clause at all.[102]

Justice Souter's obvious frustration with *Smith* has sounded an echo in several federal courts of appeal, including the Second,[103]

---

96 *Smith*, 494 U.S. at 882.

97 *Id.* at 881.

98 *See id.*

99 *See, e.g.*, Swanson *ex rel.* Swanson v. Guthrie Indep. Sch. Dist. No. I-L, 135 F.3d 694, 700 (10th Cir. 1998) (requiring a claimant alleging a free exercise violation to link that claim to a colorable claim of infringement of a companion constitutional right); *Catholic Univ. of Am.*, 83 F.3d at 467 (same); Brown v. Hot, Sexy & Safer Prods., 68 F.3d 525, 539 (1st Cir. 1995) (same).

100 508 U.S. 520 (1992).

101 *Id.* at 567 (Souter, J., concurring).

102 *Id.* (Souter, J., concurring).

103 *See* Knight v. Conn. Dep't of Pub. Health, 275 F.3d 156, 167 (2d Cir. 2001) (holding that the language in *Smith* relating to hybrid claims was "dicta and not binding on this court").

Sixth,[104] and Ninth[105] Circuits. Notwithstanding the above, as courts today frequently employ *Smith*'s hybrid framework,[106] it is important to undertake a hybrid inquiry.

There are at least four ways religious institutions could establish a hybrid claim in the employment discrimination context. First, they could argue that they stand *in loco parentis*,[107] and that the government cannot interfere with the "liberty of parents and guardians to direct the upbringing and education of children under their control."[108] If, as the Michigan Supreme Court noted in *Porth*, religious schools were forbidden from hiring and firing their teachers on religious grounds, the fundamental purpose of the school—i.e., to educate and form children within a particular tradition—would be frustrated. By linking this parental right claim, which the *Smith* court specifically recognized,[109] to their free exercise claim, schools might secure strict scrutiny of any law requiring them not to discriminate in employment matters. Given the widespread understanding that the doctrine of *in loco parentis* no longer applies at the college level,[110] however, this argument might be more persuasive at the grade or high school level rather than the post-secondary level.

A free exercise claim might also be conjoined to a free speech right. A university may argue, for example, that having to make employment decisions without regard to Catholic principles may send a message to the public that the institution does not wish to convey. In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*,[111] the U.S. Supreme Court held that organizers of a St. Patrick's Day parade could not be forced by a Massachusetts law to allow a group with a

104 *See* Kissinger v. Bd. of Trs., 5 F.3d 177, 180 (6th Cir. 1993) (terming as "illogical" the position that "the legal standard under the Free Exercise Clause depends on whether a free-exercise claim is coupled with other constitutional rights").

105 *See* Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134, 1147–48 (9th Cir. 2000) (O'Scannlain, J., concurring) (opining that *Smith* "is fraught with complexity both in doctrine and in practice," and expressing the hope that the Supreme Court would "refine its approach in this area").

106 *See supra* note 99.

107 *See* Pierce v. Soc'y of Sisters, 268 U.S. 510, 535–36 (1925) (granting a Catholic school standing to complain of unwarranted interference with the constitutional rights of parents).

108 *Id.* at 534–35; *see also* Troxel v. Granville, 530 U.S. 57, 75 (2000) (striking down a state law giving judges the authority to determine child visitation rights over parental objections on the grounds that the law violated the parents' rights under the Fourteenth Amendment to control the upbringing of their children).

109 Employment Div. v. Smith, 494 U.S. 872, 882 (1990).

110 *See, e.g.*, Bradshaw v. Rawlings, 612 F.2d 135, 138–39 (3d Cir. 1979); McNeil v. Wagner Coll., 667 N.Y.S.2d 397, 398 (App. Div. 1998).

111 515 U.S. 557 (1995).

message not endorsed by the organizers to march in the parade.[112] The Court held that such compulsion violated the parade organizers' right to free speech under the First Amendment.[113]

A third method of establishing a hybrid claim is to link the right to expressive association guaranteed by the First Amendment to a free exercise claim. Two recent cases illustrate a growing understanding of the right to expressive association guaranteed by the First Amendment and the way in which an organization may discriminate incident to the exercise of such a right. In *Roberts v. U.S. Jaycees*,[114] the U.S. Supreme Court found that the state of Minnesota had a compelling interest in eradicating sex discrimination, and that such an interest trumped the Jaycees' desire to exclude women from certain membership classes.[115] The Court justified its holding on the basis that the Jaycees, as a social service organization with otherwise broad and unselective membership criteria, lacked "the distinctive characteristics that might afford constitutional protection to the decision of its members to exclude women."[116] The rule in *Roberts* was amplified a decade and a half later in *Boy Scouts of America v. Dale*.[117] In *Dale*, the Court struck down the application of a New Jersey anti-discrimination statute that would have required the Scouts to retain "an avowed homosexual and gay rights activist"[118] as a scout leader because it violated the members' freedom of expressive association.[119] The Court stated, "It seems indisputable that an association that seeks to transmit such a system of values [e.g., trustworthiness, loyalty, helpfulness, friendliness, courtesy, kindness, cheerfulness, thriftiness, bravery, cleanliness, and reverence] engages in expressive activity."[120]

Both *Roberts* and *Dale* stand for the proposition that an organization may discriminate when its identity is at stake, and that such discrimination is protected against government interference under the mantle of the First Amendment right of association. The extent of this protection depends on many factors, including the "size, purpose, policies, selectivity, [and] congeniality" of the organization and on how important the prohibited practice is to furthering the goals of the

112 *See id.* at 559.
113 *Id.* at 581.
114 468 U.S. 609 (1984).
115 *See id.* at 621.
116 *Id.*
117 530 U.S. 640 (2000).
118 *Id.* at 644.
119 *Id.* at 661.
120 *Id.* at 650.

organization.[121] While the right of association may protect certain familial relationships against the application of anti-discrimination laws, for instance, it may not protect a "large business enterprise."[122] Just as the Jaycees were not allowed to discriminate on the basis of sex (as the interest protected was not sufficiently related to the Jaycees' mission as a social service group), so the Boy Scouts *were* allowed to discriminate on the basis of sexual orientation (as the interest protected was central to the Scouts' mission as a group dedicated to the formation of young men). Thus, as administrators of a Catholic university may believe that the hiring of Catholics is necessary to maintain the university's Catholic identity, the right of association suggests a constitutional right to discriminate based on religion. When coupled with the free exercise claim, this argument should satisfy the exception noted in *Smith*, thus meriting strict scrutiny of a state's anti-discrimination law that takes aim at a religious school's employment practices.

A hybrid claim may also be established by relying on the Establishment Clause as that "other constitutional protection[ ]" demanded by *Smith*.[123] A religious employer may argue, for example, that even the attempt to enforce an anti-discrimination law would excessively entangle church and state. The U.S. Supreme Court, in *Aguilar v. Felton*,[124] found that "pervasive monitoring by public authorities in the sectarian schools infringes precisely on those Establishment Clause values at the root of the prohibition of excessive entanglement."[125] In *NLRB v. Catholic Bishop of Chicago*,[126] the Court cautioned that "[i]t is not only the conclusions that may be reached by [an agency] which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions."[127] Thus, if the religious employer can show that an attempt to enforce an anti-discrimination law would lead to excessive entanglement between the government and the religious body, a hybrid claim that satisfies the *Smith* exception could be brought forth as a defense.

---

121 *Roberts*, 468 U.S. at 620–21.
122 *Id.* at 620.
123 *See* Employment Div. v. Smith, 494 U.S. 872, 881 (1990).
124 473 U.S. 402 (1985).
125 *Id.* at 413.
126 440 U.S. 490 (1979).
127 *Id.* at 502.

C. *The Establishment Clause*

Another vehicle for attaining an exemption from Title VII is offered through the Establishment Clause itself.[128] The Supreme Court has held that this clause prohibits all governmental bodies from either favoring a particular religion[129] or aiding religion in general,[130] although government bodies "may (and sometimes must) accommodate religious practices."[131] Which factors the Court considers when applying the Establishment Clause are not entirely clear. Even before the Court's most recent forays into this jurisprudential jungle in *Zelman v. Simmons-Harris*[132] and *Mitchell v. Helms*,[133] the famous *Lemon*[134] test had come under fire from several of the Justices. Justice Souter, for example, has commented that despite "all the years of its effort, the Court has isolated no single test of constitutional sufficiency" for judging certain Establishment Clause claims.[135] Justice Scalia went a good deal further, expressing agreement with the "long list of constitutional scholars who have criticized *Lemon* and bemoaned the strange Establishment Clause geometry of crooked lines and wavering shapes its intermittent use has produced."[136] Justice Kennedy opined a decade ago that *Lemon* should not be the "primary guide" in Establishment Clause jurisprudence.[137] Chief Justice Rehnquist once wrote that *Lemon* has "no more grounding in the his-

---

128 U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . . .").

129 *See, e.g.*, Larson v. Valente, 456 U.S. 228, 244–46 (1982) (holding that the Establishment Clause's "clearest command" is "that one religious denomination cannot be officially preferred over another"); Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947) (applying the Establishment Clause to the states via the Fourteenth Amendment).

130 *See, e.g.*, Sch. Dist. of Abington Township v. Schempp, 374 U.S. 203, 216 (1963) (claiming the Court had "rejected unequivocally the contention that the Establishment Clause forbids only governmental preference of one religion over another"); *Everson*, 330 U.S. at 15 (ruling that neither state nor federal government may pass laws aiding one religion or all religions).

131 Bd. of Educ. v. Grumet, 512 U.S. 687, 705–06 (1994) (providing that the government "may (and sometimes must) accommodate religious practices . . . without violating the Establishment Clause" (citations omitted)). The Court also stated that states can provide "benevolent neutrality" to religious practices "without sponsorship and without interference." *Id.* at 705.

132 122 S. Ct. 2460 (2002).

133 530 U.S. 793 (2000).

134 *See* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).

135 *Mitchell*, 530 U.S. at 869 (Souter, J., dissenting).

136 Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 399 (1993) (Scalia, J., concurring).

137 County of Allegheny v. ACLU, 492 U.S. 573, 655 (1989) (Kennedy, J., concurring).

tory of the First Amendment than does the wall theory upon which it rests."[138] Justice O'Connor has exhibited discomfort with the *Lemon* test, issuing a "clarification" of it in 1984[139] and discussing it again in a concurrence ten years later.[140]

Notwithstanding the fact that at least two other tests, or at least "refinements" of *Lemon*, have been proposed,[141] and despite the fact that some commentators have argued that the *Lemon* test did not survive *Mitchell*,[142] the plurality's explicit reference to the *Lemon* test in *Mitchell*[143] indicates that *Lemon* is not dead. It could even be argued that *Mitchell* clarifies Establishment Clause doctrine, albeit narrowly. The *Mitchell* plurality noted it was inquiring into only one of *Lemon*'s three elements, i.e., the law's effect, as the "secular purpose" and "excessive entanglement" prongs were not in dispute.[144] The significance of *Mitchell*, then, lies in the manner in which the plurality interpreted the "effect" prong of the *Lemon* test—namely, asking whether the law would result "in religious indoctrination by the government" or whether those directly benefiting from the law would be "define[d] by reference to religion."[145] In any event, given the mercurial status of Establishment Clause jurisprudence, this Article will examine religious exemptions to anti-discrimination laws under multiple tests.

Under *Lemon*, a law will run afoul of the Establishment Clause if it fails to pass any one of the test's three prongs. First, it must have a "secular legislative purpose";[146] second, its principal effect must be one that "neither advances nor inhibits religion";[147] and third, it must not foster "an excessive government entanglement with religion."[148] In *Agostini v. Felton*,[149] the Court essentially "folded the entanglement

138 Wallace v. Jaffree, 472 U.S. 38, 110 (1985) (Rehnquist, J., dissenting).

139 Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring).

140 *See* Bd. of Educ. v. Grumet, 512 U.S. 687, 718–21 (1994) (O'Connor, J., concurring).

141 Justice O'Connor explains the "endorsement" test in her concurrences in *Lynch*, 465 U.S. at 688–94 (O'Connor, J., concurring), and *County of Allegheny*, 492 U.S. at 627–32 (O'Connor, J., concurring). Justice Kennedy's dissent in the latter case contains his suggested "coercion" test, *id.* at 655–67 (Kennedy, J., dissenting), and his majority opinion in *Lee v. Weisman*, 505 U.S. 577 (1992), explains it in more detail.

142 *See, e.g.*, Steven K. Green, *The Ambiguity of Neutrality*, 86 CORNELL L. REV. 692, 708 (2001).

143 *See* Mitchell v. Helms, 530 U.S. 793, 807–08 (2000).

144 *Id.*

145 *Id.* at 808.

146 Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

147 *Id.*

148 *Id.* at 613 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).

149 521 U.S. 203 (1997).

inquiry into the primary effect inquiry," as "both inquiries rely on the same evidence and [because] the degree of entanglement has implications for whether a statute advances or inhibits religion."[150]

Employing the *Lemon* test, the U.S. Supreme Court upheld the religious exemption to Title VII in a 1987 case, *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos.*[151] In *Amos,* the Court held that "determining whether an activity is religious or secular . . . results in considerable ongoing government entanglement" with religious matters.[152] As Justice O'Connor explained, the Section 702 exemption represents "a [g]overnment decision to lift from a nonprofit activity of a religious organization the burden of demonstrating that the particular nonprofit activity is religious as well as the burden of refraining from discriminating on the basis of the religion."[153] According to this line of reasoning, the Court found that *not* allowing a religious exemption from Title VII would violate the Establishment Clause.

This rule was subsequently applied in many cases, including some involving Catholic universities. In *Maguire v. Marquette University,*[154] for instance, a federal district court refused to pursue an inquiry into whether a rejected candidate for a position as a theology professor "is or is not a Catholic," as such a question was "one the First Amendment leaves to theology departments and church officials, not federal judges."[155]

Likewise, in *EEOC v. Catholic University of America,*[156] a three-judge panel of the U.S. Court of Appeals for the District of Columbia found that the application of Title VII to a religious sister's sex discrimination claim would impermissibly entangle church and state in violation of the Establishment Clause. The court also found that as the nun's position as a teacher of church law was "the functional equivalent of a minister," the Free Exercise clause prohibited judicial review of a Catholic university's decision not to grant her tenure.[157]

---

150 Zelman v. Simmons-Harris, 122 S. Ct. 2460, 2476 (2002) (O'Connor, J., concurring) (citations omitted).

151 483 U.S. 327 (1987).

152 *Id.* at 343 (Brennan, J., concurring) (citing *Lemon,* 403 U.S. at 613).

153 *Id.* at 348–49 (O'Connor, J., concurring).

154 627 F. Supp. 1499 (E.D. Wis. 1986), *aff'd,* 814 F.2d 1213 (7th Cir. 1987).

155 *Id.* at 1503; *see also* LARRY WITHAM, CURRAN VS. CATHOLIC UNIVERSITY: A STUDY OF AUTHORITY AND FREEDOM IN CONFLICT 265 (1991) (recounting Judge Frederick Weisberg's aversion to the prospect of a court demanding a religious school hire a particular individual to teach theology against the express will of the institution).

156 83 F.3d 455 (D.C. Cir. 1996).

157 *Id.* at 457.

Similarly, in *Little v. Wuerl*,[158] the U.S. Court of Appeals for the Third Circuit refused to apply Title VII's prohibition against religious discrimination to a Catholic school[159] which had failed to renew the contract of one of its non-Catholic teachers because of the teacher's divorce and remarriage.[160] The court held that applying Title VII to the school's decision would be "suspect because it arguably would create excessive government entanglement with religion in violation of the establishment clause."[161]

These cases demonstrate that the most likely reading of the Establishment Clause in this context would prohibit judicial interference in an employment-related decision by administrators of a Catholic university. Yet even the alternative readings of the Establishment Clause (as applied to a religious exemption for certain kinds of employment discrimination) do not imperil the same result. Under one of two possible alternatives to *Lemon* the Court has used, the "endorsement" test proposed by Justice O'Connor in *Lynch v. Donnelly*,[162] government action is unconstitutional if its "actual purpose is to endorse or disapprove of religion" or "in fact conveys a message of endorsement or disapproval."[163] In *Lynch*, the Court held that a Christmas crèche in a city park did neither, given that other holiday displays were placed alongside the Christmas crèche and that such displays had been used for so long that members of the public would not find the practice to be an endorsement of religion.[164] Under this reading of the Establishment Clause, assuming it applies in the context of exemptions for educational institutions, one could fairly argue that Congress's intent

158 929 F.2d 944 (3d Cir. 1991).

159 *Id.* at 951.

160 *Id.* at 946.

161 *Id.* at 948 (citing Lemon v. Kurtzman, 403 U.S. 602 (1971)); *see also* Bishop Leonard Reg'l Catholic Sch. v. Unemployment Comp. Bd. of Rev., 593 A.2d 28, 33–34 (Pa. 1991) (holding that a teacher who had violated a faculty handbook by entering into a second marriage without an annulment was considered to have breached her contract and was thus ineligible for unemployment compensation benefits, despite claim of Establishment Clause violation by the defendant).

162 465 U.S. 668 (1984).

163 *Id.* at 690 (O'Connor, J., concurring).

164 *See id.* at 692–94 (O'Connor, J., concurring). Some constitutional law scholars reason that long-accepted practices which would be otherwise suspect are sometimes permitted because history has shown "no significant danger of eroding governmental neutrality regarding religious matters." JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 1166 (4th ed. 1991). Another scholar attributes this permissive attitude to a gradual loss of the uniquely religious significance of the practice. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1224 (2d ed. 1988).

behind the Title VII exemption was simply to accommodate religious practice, and not to either "endorse" or "approve" it.[165]

The third version of the Establishment Clause has been termed the "coercion" test,[166] which guarantees that "government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'"[167] While the Court held that a school-sponsored prayer violated this test,[168] it is unlikely (given precedent) that a court would hold as *coercive* an exemption for religiously motivated conduct at an avowedly religious educational institution. It is possible, of course, that a court might arrive at a different result if the case involved a nominally religious school, given the fact that a person's livelihood could hinge on his or her conformity with religious doctrine.[169]

Even if one concludes that allowing religious institutions to practice religious discrimination infringes upon the Establishment Clause, some scholars have argued that free exercise accommodations serve as a "carve out" exception to the Establishment Clause, or at the very least as a middle ground that is neither mandated by the Free Exercise Clause nor prohibited by the Establishment Clause.[170]

In any event, nothing in either the Free Exercise Clause or the Establishment Clause appears to block administrators of an unapologetically Catholic university from discriminating on the basis of religion when making employment-related decisions. In fact, as has been made clear in Parts II.B and II.C, both clauses afford ample protection to universities from both state and federal claims. In addition, as Part II.A has discussed, universities are protected by federal statute under the exemptions in Title VII of the Civil Rights Act. The veracity of this theory is evident upon an examination of the case law.

III. Catholic Higher Education and the Case Law

Dozens of cases have appeared in the reporters that have involved judicial review of an employment decision made by a religious institu-

165 *See generally* Jennifer Mary Burman, Comment, Corporation of Presiding Bishop v. Amos: *The Supreme Court and Religious Discrimination by Religious Educational Institutions*, 3 Notre Dame J.L. Ethics & Pub. Pol'y 629 (1988).

166 The "coercion" test was first employed by the Supreme Court in *Lee v. Weisman*, 505 U.S. 577 (1992).

167 *Id.* at 587 (quoting Lynch v. Donnelly, 465 U.S. 668, 678 (1984)).

168 *See id.* at 599.

169 *See, e.g.*, Pime v. Loyola Univ. of Chicago, 803 F.2d 351, 353–54 (7th Cir. 1986).

170 *See, e.g.*, Douglas Laycock, *Free Exercise and the Religious Freedom Restoration Act*, 62 Fordham L. Rev. 883, 900 (1994).

tion.[171] Fewer have dealt directly with review of decisions by administrators of Catholic universities.[172] Nevertheless, extant cases universally stand for the proposition that Catholic universities seeking to preserve their Catholic identity by hiring Catholic faculty may do so.

In *EEOC v. Mississippi College*,[173] the U.S. Court of Appeals for the Fifth Circuit ruled that a defendant's preference for hiring adherents of a particular religion was a bona fide occupational qualification, in part because the defendant was a "pervasively sectarian" institution.[174] Conversely, in *EEOC v. Kamehameha Schools/Bishop Estate*,[175] the U.S. Court of Appeals for the Ninth Circuit refused to apply Title VII exemptions to a school, as "[t]he ownership and affiliation, purpose, faculty, student body, student activities, and curriculum" was "either essentially secular, or neutral as far as religion is concerned."[176] Far from signaling an end to religious exemptions,[177] *Kamehameha* simply stands as a warning for schools that are considering dropping their religious affiliation, as their latitude in making future hiring decisions may be affected by such an action. For Catholic universities that adhere to Canon Law and the norms of *Ex Corde Ecclesiae*,[178] this danger is nonexistent.

A school should be just as anxious to spell out what is required from its employees in terms of its religious identity. In *Vigars v. Valley Christian Center of Dublin*,[179] a federal district court refused to exempt a religious school from Title VII requirements because it did not prove that an employee's out-of-wedlock birth impaired her ability to function as a role model.[180] The court held that a bona fide occupational qualification (BFOQ) requires a showing that "the person's job must depend upon the discriminatory characteristic."[181] Likewise, in *Dolter*

171 *See supra* Part II.

172 *See, e.g., infra* notes 173–78 and accompanying text.

173 626 F.2d 477 (5th Cir. 1980).

174 *Id.* at 487.

175 990 F.2d 458 (9th Cir. 1993).

176 *Id.* at 461.

177 The Ninth Circuit's ruling in *Kamehameha* has been roundly criticized on these grounds. *See, e.g.*, Araujo, *supra* note 46, at 742–54.

178 *See supra* notes 20–33 and accompanying text.

179 805 F. Supp. 802 (N.D. Cal. 1992).

180 *See id.* at 808.

181 *Id.*; *see also* UAW v. Johnson Controls, Inc., 499 U.S. 187, 201–03 (1991) (holding that in order for a discriminatory job qualification to qualify as a bona fide occupational qualification, it must "affect an employee's ability to do the job," and "must relate to the 'essence' or to the 'central mission of the employer's business'" (citations omitted)).

v. Wahlert High School,[182] a Catholic high school fired an English teacher who had become pregnant while yet unmarried.[183] The federal district court, in denying the school's motion for summary judgment, found that the employer had failed to prove that adherence to Catholic moral teaching was a BFOQ for the teacher's position.[184] Consistent with these cases is *Chambers v. Omaha Girls Club*,[185] in which the U.S. Court of Appeals for the Eighth Circuit accepted a BFOQ defense. In *Chambers*, the Girls Club showed that counseling teenage girls about birth control was central to an employee's duties and justified the firing of an employee who had become pregnant out of wedlock.[186] These cases illustrate the point that a school is much better off—legally and practically—if it gives its employees fair notice of what is expected of them *vis-á-vis* the school's mission and identity.[187]

Courts have applied the same law to Catholic universities claiming a right to engage in employment discrimination on religious grounds.[188] For example, in *Scheiber v. St. John's University*,[189] the Court of Appeals of New York ruled against a Catholic university which claimed it was exempt from a state anti-discrimination law. St. John's fired Donald Scheiber, its Vice-President of Student Life with

182 483 F. Supp. 266 (N.D. Iowa 1980).

183 *See id.* at 267.

184 *See id.* at 271–72.

185 834 F.2d 697 (8th Cir. 1987).

186 *See id.* at 701–02.

187 *See* John Owens, *Professors Schools' Faith-Based Doctrines Raise Concerns, Risk Backlash*, CHI. TRIB., Oct. 6, 2002, at 1 (pointing out that there are approximately one hundred "evangelical Christian schools nationwide that require instructors to commit either verbally or orally to faith-based doctrines"). The impact of these faith-based statements on a school's accreditation status or eligibility for federal aid is beyond the scope of this Article. For an insightful discussion of these topics, see Gerard V. Bradley, Legal Beagle: ECE's Best Friend May Be the Civil Law, Address at *Ex Corde Ecclesiae*: A Conversation "From the Heart of the Church", Catholic University of America (Sept. 18, 1999) (transcript *available at* http://excorde.cua.edu/Bradley.shtml (last visited Apr. 2, 2003)).

188 Curiously, some schools choose not to employ this defense, even when they are entitled to it. *See, e.g.*, EEOC v. Catholic Univ. of Am., 83 F.3d 455, 471 (D.C. Cir. 1996) (Henderson, J., concurring) (noting that "the insulating effect of the First Amendment's religion clauses was never felt by defendant The Catholic University of America (CUA) until the district court's post-trial, and apparently *sua sponte*, request for briefs 'addressing the question whether the First Amendment precludes maintenance and adjudication of Sister McDonough's claims' "); Tagatz v. Marquette Univ., 861 F.2d 1040, 1043 (7th Cir. 1988) ("But [defendant Marquette's] stated policy is not to discriminate against non-Catholics once they are hired; and whether because of this policy or otherwise, Marquette declined to plead the religious exemption as a defense to [plaintiff] Dr. Tagatz's claim of religious discrimination.").

189 638 N.E.2d 977 (N.Y. 1994).

twenty years of service at the school.[190] Scheiber alleged he had been fired because he was Jewish, and sued. In its defense, St. John's relied, among other things, on a statutory exemption permitting "any religious or denominational institution or organization . . . [to give] preference to persons of the same religion or denomination [and may take] such action as is calculated by such organization to promote the religious principles for which it is established or maintained."[191]

The court, however, observed that the law did not contain a blanket exemption for religious organizations, granting them "license . . . to engage in wholesale discrimination."[192] Rather, the exemption was a narrow one allowing for employment preferences when necessary to promote the religious principles of the institution. Thus, the court held that "[a] religious employer may not discriminate against an individual for reasons having nothing to do with the free exercise of religion and then invoke the exemption as a shield against its unlawful conduct."[193] In denying the university's summary judgment motion, the court directed the adjudication of the disputed factual issue of whether St. John's was actually exercising the preference allowed by the statute or engaging in the unlawful discrimination alleged by the plaintiff.[194] Had St. John's followed the general norms of *Ex Corde Ecclesiae*, the likelihood of Mr. Scheiber's filing suit, let alone surviving summary judgment, would have been questionable at best.

Another example from the case law illustrating judicial respect for employment decisions by authentically religious universities is *Pime v. Loyola University of Chicago*.[195] In *Pime*, a Jewish philosophy professor sued a Jesuit university, alleging religious discrimination in violation of Title VII. The school argued in its defense that having a "Jesuit presence" in its philosophy department was a BFOQ.[196] The court agreed, noting that Loyola had "a long Jesuit tradition,"[197] and that "Jesuit 'presence' is important to the successful operation of the university."[198] The court held that earmarking seven out of the thirty-

190 *See id.* at 978.

191 Scheiber v. St. John's Univ., 600 N.Y.S.2d 734, 738 (App. Div. 1993) (Rosenblatt, J., concurring in part and dissenting in part) (quoting N.Y. EXEC. LAW § 296(11) (Consol. 2002)).

192 *Scheiber*, 638 N.E.2d at 980.

193 *Id.*

194 *See id.* Somewhat confusedly, perhaps, St. John's had identified itself as an "equal opportunity employer." *Id.*

195 803 F.2d 351 (7th Cir. 1986).

196 *Id.* at 351–52.

197 *Id.* at 352.

198 *Id.* at 353.

one teaching positions in the philosophy department for Jesuits was "a reasonable determination,"[199] and that

> [i]t appears to be significant to the educational tradition and character of the institution that students be assured a degree of contact with teachers who have received the training and accepted the obligations which are essential to membership in the Society of Jesus. It requires more to be a Jesuit than just adherence to the Catholic faith, and it seems wholly reasonable to believe that the educational experience at Loyola would be different if Jesuit presence were not maintained. As priests, Jesuits perform rites and sacraments, and counsel members of the university community, including students, faculty, and staff. One witness expressed the objective as keeping a presence "so that students would occasionally encounter a Jesuit."[200]

As discussed in Part II.A, Judge Posner warned in his concurring opinion in *Pime* that if the defendant began to soft-pedal its religious identity, it may not be entitled to claim a Title VII exemption:

> If Loyola, perhaps in order to attract financial or other support from non-Catholic sources, has attenuated its relationship to the Jesuit order far beyond that of other Catholic universities, there would be a serious problem in holding that it could nevertheless discriminate freely in favor of Catholics; for remember that the exemption allows the *religious* employer to confine all hiring to members of one religious faith.[201]

One final case deserves special mention, as it encapsulates many of the principles involved in religious employment discrimination discussed in this Article; namely, (1) that the law in this country affords extraordinary protection for religious employers wishing to discriminate on religious grounds; (2) that courts are extremely reluctant to second-guess religion-related employment decisions made by administrators of religious schools; (3) that many bishops and administrators of Catholic universities appear to be either ignorant of their rights in this regard or somehow reluctant to exercise them; and (4) that the fears of legal liability over implementing the *mandatum* requirement that *Ex Corde Ecclesiae* imposes on Catholic theologians are vastly overblown.

In *EEOC v. Catholic University of America*,[202] a Dominican nun brought a Title VII sex discrimination action against the Catholic University of America (CUA) after she was rejected for a tenured post in

199 *Id.* at 354.

200 *Id.* at 353–54.

201 *Id.* at 358 (Posner, J., concurring) (citations omitted) (emphasis added).

202 83 F.3d 455 (D.C. Cir. 1996).

CUA's Canon Law department.[203] Even though Cardinal James A. Hickey, the Archbishop of Washington and *ex officio* the CUA Chancellor, referred to this dispute as a "purely internal, non-ecclesiastical, academic matter," and even though CUA's attorneys did not raise the constitutional issues at trial, the district judge felt compelled by the legal issues involved to address *sua sponte* CUA's constitutional rights.[204] After the one-week trial had concluded, the judge dismissed the case without reaching the merits, concluding that "application of Title VII to [the facts and relationships] would violate both the Free Exercise and the Establishment Clauses."[205] Specifically, the trial judge found that as (the plaintiff) Sr. McDonough's "primary role in the Department of Canon Law was the functional equivalent of the task of a minister," CUA was entitled to discriminate in its employment decisions by virtue of an exemption for religious employers under Title VII.[206]

The U.S. Court of Appeals for the District of Columbia affirmed the trial court's decision,[207] but considerably expounded on the rationale supporting CUA's cause. The appellate panel's majority decision averred that CUA, as a religious organization, had a free exercise right to "decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."[208] Moreover, the court asserted, CUA had a right to invoke the so-called "ministerial exception" under Title VII jurisprudence, which "precludes civil courts from adjudicating employment discrimination suits by ministers [or their functional equivalents] against the church or religious institution employing them."[209] The court went on to assert the continued viability of the "ministerial exception" after the Supreme Court's decision in *Employment Division v. Smith*[210] and even provided a "hybrid" analysis as an alternative argument for CUA's right to have anti-employment laws subjected to strict scrutiny.[211]

---

203 *Id.* at 457.

204 *Id.* at 471 (Henderson, J., concurring).

205 EEOC v. Catholic Univ. of Am., 856 F. Supp. 1, 9 (D.D.C. 1994), *aff'd*, 83 F.3d 455.

206 *Id.* at 10.

207 *Catholic Univ. of Am.*, 83 F.3d at 470.

208 *Id.* at 460 (quoting Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 116 (1952)).

209 *Id.* at 461 (citing, inter alia, Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164 (4th Cir. 1985); EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277 (5th Cir. 1981); McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972)).

210 494 U.S. 872 (1990).

211 *Catholic Univ. of Am.*, 83 F.3d at 462–63.

The appellate panel, like the district judge, found that applying Title VII to CUA would impermissibly entangle the government with religion, as it required the court to opine on "questions of religious doctrine, polity, and practice" and to ascertain the plaintiff's qualifications to "teach in the name of the Church."[212] The trial judge had expressly noted a strong aversion to engaging in a judicial inquiry that would have required him "to choose between [the witnesses'] competing religious visions."[213] In sum, the D.C. Circuit opinion in *EEOC v. CUA* is a *tour de force* of the rights of a Catholic university to engage in religious employment discrimination. What is (perhaps) even more remarkable about this decision, however, is the extent to which the majority gleaned the record for evidence that CUA actually made religion a relevant consideration in the decision not to grant tenure to Sr. McDonough—an effort that did not go unnoticed by the panel's third member, who was prompted to write a concurrence calling attention to CUA's apparent reluctance to assert its own rights.[214]

CONCLUSION

The precepts of Canon Law and the norms of *Ex Corde Ecclesiae* are clear. In order to be considered a Catholic university by the Catholic Church, administrators of the school must abide by church law. This requires them to engage in certain kinds of employment discrimination—on religious grounds—in order to protect the identity and mission of the university entrusted to their care. If bishops or administrators are reluctant, for whatever reason, to engage in proper employment discrimination on religious grounds, they have no basis for blaming the American legal system in general or plaintiff lawyers in particular.

The case law suggests that the *failure* to follow these requirements, not the satisfaction of them, is what threatens a university's legal budget, let alone its identity. Whereas the schools in *Kamehameha* and *Scheiber* subjected themselves to liability when they distanced themselves from an established church or failed to vigilantly maintain their religious identity, the schools in *Pime* and *Catholic University of America* enjoyed more protection under the mantle of the Catholic Church. Under either the religious exemptions of Title VII

212 *Id.* at 465–66.

213 *Id.* at 466.

214 *Id.* at 471 (Henderson, J., concurring).

or the Religion Clauses of the First Amendment, religious institutions have more than enough protection to make employment decisions on religious grounds.[215]

215 *See* Douglas Laycock, *The Rights of Religious Academic Communities*, 20 J.C. & U.L. 15, 33 (1993); *see also* Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1373 (1981) (arguing that "churches have a constitutionally protected interest in managing their own institutions free of government interference").