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ARTICLES

LIBERTY, DIVERSITY, ACADEMIC FREEDOM, AND SURVIVAL: PREFERENTIAL HIRING AMONG RELIGIOUSLY-AFFILIATED INSTITUTIONS OF HIGHER EDUCATION

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I. INTRODUCTION

The nation's collective attention was riveted by the issue of diversity in higher education in April and June of 2003 as the Supreme Court considered arguments and released its rulings in the University of Michigan affirmative action cases.¹ Like those cases, contemporary discourse regarding diversity in higher education has focused almost exclusively on the composition of the student body and, to a lesser extent, the

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1. Gratz v. Bollinger, 539 U.S. 244 (2003); Grutter v. Bollinger, 539 U.S. 306 (2003).

faculty.² Diversity advocates measure success or failure largely by the racial, ethnic, religious, cultural, and gender heterogeneity on individual campuses. This approach focuses on intra-institutional diversity.

A different measure of diversity in higher education is also worthy of attention and study: inter-institutional diversity. This measure of diversity focuses on the variety in size, mission, perspective, and educational or pedagogical approach among the whole universe of institutions of higher education. Inter-institutional diversity in higher education encourages experimentation in pedagogical approaches, as well as the cultivation of specializations and focused inquiry. From agricultural and technical colleges to small liberal arts schools and large research universities, each approach provides a unique piece of the mosaic of higher education. Such inter-institutional diversity in American higher education is worthy of protection and perpetuation, just as intra-institutional diversity is a valid educational goal.³

Religiously-affiliated institutions of higher education make up a small but significant number of post-secondary educational institutions in the United States; thus, adding to that inter-institutional diversity.⁴ Although the number has been declining since the midpoint of the twentieth century, approximately one-third of four-year degree-granting institutions have some sort of current, conscious religious connection or affiliation.⁵ The degree of connection and the formality of the affiliation to a religion or a religious organization can vary drastically from institution

2. This article is not meant in any way to criticize the focus on student body diversity. Instead, this article chooses an alternate "lens" through which to view diversity in higher education and suggests that it is, as well, a worthwhile measure of diversity.

3. See *Colloquy Live: Faith Statements at Religious Colleges*, THE CHRON. OF HIGHER EDUC. (Online Edition) (May 23, 2002), at <http://chronicle.com/colloquylive/2002/05/religious> ("One of the characteristics of American higher educ[ation] is that it is made up of many diverse colleges and universities with diverse perspectives and missions. This provides a very strong mosaic of diverse colleges and universities with great strength to the entire higher education system.") (quoting Anthony Diekema).

4. See GEORGE M. MARSDEN, *THE SOUL OF THE AMERICAN UNIVERSITY: FROM PROTESTANT ESTABLISHMENT TO ESTABLISHED NONBELIEF* 439 (1994). See also ARTHUR F. HOLMES, *THE IDEA OF A CHRISTIAN COLLEGE* 7-9 (Rev. ed. 1987) (describing the educational and religious "distinctives" of the Christian college); Eugene H. Bramhall & Ronald Z. Ahrens, *Academic Freedom and the Status of the Religiously Affiliated University*, 37 GONZ. L. REV. 227, 250 (2001) ("The very existence of religiously affiliated universities offers diversity to both the academy and society in general.")

5. See Stephen L. Carter, *The Constitution and the Religious University*, 47 DEPAUL L. REV. 479, 480 (1998) (citing "most estimates" numbering religious institutions at 800). See also Ralph D. Mawdsley, *God and the State: Freedom of Religious Universities to Hire and Fire*, 36 EDUC. L. REP. 1093, 1094 (1987) (indicating that, of four year universities, slightly more than one third are religiously affiliated).

to institution.⁶ Nevertheless, religiously affiliated post-secondary education has had, and continues to have, a marked influence on American cultural and intellectual life.

Religious colleges and universities have made significant contributions to the history and progress of the nation. “[T]hey enrich our intellectual life by contributing to the diversity of thought and preserving important alternatives to post-Enlightenment secular orthodoxy.”⁷ In post-modern civil society, the injection of religion in the marketplace of ideas is generally discouraged and often treated with outright hostility.⁸ Religious institutions of higher education provide an outlet for a process of seeking truth that is an alternative, or supplement, to the dominant “scientific method” approach.⁹ They allow serious religious scholarship to continue when it might otherwise be shut out of the modern secular academy.¹⁰ Many such institutions provide a safe haven for religious scholars in secular subjects from which to dissent from the majoritarian academic culture and to offer an alternative to the pervasively secular viewpoints emanating from most non-religious institutions.¹¹ The unique approach of many religiously-affiliated institutions – including studying subjects that are not strictly religious through a lens tinted by a religious worldview – produces a population of graduates who are equipped to add to the intellectual diversity of the general working populace and, potentially, to utilize that unique viewpoint in both their public and private pursuits.¹² Additionally, such institutions are integral to the religious life

6. See ROBERT T. SANDIN, *AUTONOMY & FAITH: RELIGIOUS PREFERENCE IN EMPLOYMENT DECISIONS IN RELIGIOUSLY AFFILIATED HIGHER EDUCATION* 24-35 (1990) for a survey of self-proclaimed religiously affiliated institutions of higher education that highlighted these differences. The institutions range from those that are “pervasively religious” to “independent institutions with historic religious ties.”

7. Michael W. McConnell, *Academic Freedom in Religious Colleges and Universities*, 53 *LAW & CONTEMP. PROBS.* 303, 312 (1990).

8. See generally STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* (1993) (criticizing the exclusion of religious thought from the public sphere, and suggesting that religion has a valid and important place in the marketplace of ideas).

9. See Bramhall & Ahrens, *supra* note 4, at 250.

10. See ANTHONY J. DIEKEMA, *ACADEMIC FREEDOM & CHRISTIAN SCHOLARSHIP* 16 (2000) (highlighting several anecdotal examples of anti-religion bias in academia).

11. See McConnell, *supra* note 7, at 315. See also Bramhall & Ahrens, *supra* note 4, at 250-51 (citing a study at Brigham Young University in which 88% of the faculty confirmed a belief that they had greater academic freedom at a religious university rather than less); Carter, *supra* note 5, at 484 (“The religious university, like any other religious institution, can serve [an] important societal function of resistance: of standing up for the possibility that life itself has different meanings than those the dominant culture tries to create.”).

12. See Bramhall & Ahrens, *supra* note 4, at 251. Similarly, Justice O’Connor noted in her majority opinion in *Grutter* that American businesses value the benefits their workers derive from

and constitutionally protected religious liberty¹³ of many citizens; therefore, such institutions are worthy of preservation.

Indeed, “preservation” has immediate significance for religiously-affiliated institutions of higher education. They often face great pressure to conform to secular norms and thus must take proactive steps to stay true to their missions, which are informed and motivated to a great extent by their religious character.¹⁴ Determining what steps are appropriate and acceptable to maintain that religious mission and character, and yet to stay true to the hallmark of open inquiry and academic freedom that is essential to any institution of higher learning, is a difficult task.

In any academic setting, choosing who will teach is an important and often controversial task. Justice Frankfurter identified the responsibility—or rather the right—to make that choice as one of the four essential freedoms associated with higher learning.¹⁵ The role of the professor, especially with regard to the instruction of undergraduate students, has come under increased scrutiny.¹⁶ In the face of this heightened criticism, the choice of who will teach, be promoted, and receive tenure becomes all the more weighty.

At religious institutions of higher education, the choice of who is invited to serve as a professor or staff member includes the same important considerations confronting secular institutions.¹⁷ In addition, their religious nature adds another layer of complexity to the decision. These religious institutions not only must consider an applicant’s or em-

attending schools with diverse student bodies. *Grutter*, 539 U.S. at 308. “[M]ajor American businesses have made clear that the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.” *Id.* If true, then institutions that preserve and promote ideas and viewpoints that add to the diversity of thought are likewise beneficial. Religious institutions of higher education do just that.

13. U.S. CONST. amend. I. See Bramhall & Ahrens, *supra* note 4, at 251; Carter, *supra* note 5, at 480.

14. See Bramhall & Ahrens, *supra* note 4, at 253.

15. *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (quoting The Open Universities in South Africa 10-12, a statement of a conference of senior scholars from the University of Capetown and the University of Witwatersrand). The other three essential freedoms Justice Frankfurter identified were “what may be taught, how it shall be taught, and who may be admitted to study.” *Id.*

16. See, e.g., John Yemma, *Report Faults Research Colleges for Neglecting Students*, BOSTON GLOBE, April 21, 1998, at A3 (discussing a report by the Carnegie Foundation for the Advancement of Teaching urging research institutions in the United States to emphasize teaching among their faculties and give students greater access to full-time faculty); see generally CHARLES J. SYKES, *PROF SCAM: PROFESSORS AND THE DEMISE OF HIGHER EDUCATION* (1988) (discussing notorious lack of presence on campuses by professors and complacency problems created by tenure).

17. See EDWARD MCGLYNN GAFFNEY, JR. & PHILIP R. MOOTS, *GOVERNMENT AND CAMPUS: FEDERAL REGULATION OF RELIGIOUSLY AFFILIATED HIGHER EDUCATION* 34 (1982).

ployee's qualifications for a position or promotion, but they must also determine what role personnel decisions play in the continuing livelihood of the institution's mission.¹⁸ Due to these dual needs, many such institutions utilize some sort of preferential employment scheme based on religious criteria to protect and to perpetuate their religious missions and environments.¹⁹ Thereby, these institutions maintain a critical mass²⁰ of faculty and staff who are sympathetic to or even revel in the religious atmosphere.

Though utilizing some kind of religious test for employment decisions comports with the ideal of religious liberty and preservation of institutional diversity in higher education, it runs counter to our commitment to the eradication of discrimination in all forms. There is clearly a fundamental tension here. Congress has declared discrimination in employment on the basis of religion to be unlawful;²¹ however, Congress also specifically exempted certain religious organizations, including some religious educational institutions.²² These exemptions reflect Congress's respect for constitutionally-protected religious liberty.

This article does not contend, nor to the author's knowledge does anyone contend, that these exemptions were developed solely to preserve institutional diversity in higher education. Congress was concerned, however, that the religious nature of such organizations would be diluted if they were compelled to hire people of different religious beliefs or no belief at all.²³ Given the desirability of maintaining religious institutions of higher education and those institutions' perceived need to use reli-

18. See generally Robert J. Araujo, *'The Harvest is Plentiful But the Workers are Few': Hiring Practices and Religiously Affiliated Universities*, 30 U. RICH. L. REV. 713 (1996) (positing that religious institutions of higher learning must consider the religion's broader missions in hiring practices).

19. In 1978, a survey of religious institutions of higher education revealed that most of the sample reported using a religious preference for certain positions and almost half of the sample reported using a religious preference for all faculty positions. See GAFFNEY & MOOTS, *supra* note 17, at 34.

A more recent survey found that over seventy percent of religious institutions of higher education utilize some form of religious test when hiring the president of the institution, nearly half employ a religious preference for full-time and tenured faculty, and one-quarter do so with regard to all staff. SANDIN, *supra* note 6, at 40.

20. The term "critical mass" assumed significance in the *Grutter* affirmative action case. See *Grutter*, 539 U.S. at 316, 318-20, 330, 333-36. The term is used here with the same general meaning: that a critical mass of certain classes of persons is necessary to offer the benefits of a diverse student body. To implement their missions, religious institutions of higher education require a critical mass of individuals who share or support their particular religious beliefs.

21. 42 U.S.C. § 2000e-2(a)(1) (2000).

22. 42 U.S.C. §§ 2000e-1(a)-2(e)(2) (2000).

23. See *infra* Part II.A.

gious preferences in employment to maintain their missions, this article explores whether such institutions should use the exemptions provided by Congress as a tool – blunt as it may be – to maintain their religious character.

In Part I, two important questions are addressed: first, whether and to what extent religious institutions of higher education *may* discriminate when making decisions regarding hiring, promoting, and terminating administration, faculty, and staff; and, second, even if they *may*, whether they *should* use that ability as a way to preserve the institutional variety religious institutions provide to post-secondary education.

Part II of the article outlines the exceptions relevant to religious institutions of higher education provided in Title VII of the 1964 Civil Rights Act and its amendments (Title VII).²⁴ It propounds an explanation of the original purpose of the exemptions, examines the scope of the exemptions as that scope has been clarified by the courts, and suggests a broad interpretation of the scope where it remains unclear. Part III outlines the constitutionally-compelled exemption to Title VII (and other federal and state law claims) known as the ministerial exception.

In Part IV, the article shifts focus from the legal entitlement of religious institutions of higher education to discriminate when making employment decisions (the “may” inquiry), to the two most important institutional concerns facing religious institutions of higher education (the “should” inquiry). These two, often-conflicting, concerns are the secularization trend among religious institutions of higher education and the value and tradition of academic freedom. Each must be considered before these institutions address whether discriminatory preferencing is a necessary or desirable tool to preserve their religious missions. Finally, in Part V, the article concludes that simply because religious institutions of higher education *may*, in many instances, legally discriminate in employment does not necessarily mean that they *should*. While such institutions rightfully may discriminate in numerous instances, the article ends with a cautionary note against the practice of discrimination in all but those instances where it is critical to preserve the institution’s religious character.

24. 42 U.S.C. §§ 2000e-2000e-17 (2000).

II. STATUTORY COVERAGE

Title VII²⁵ is the major statutory mechanism through which the federal government combats employment discrimination.²⁶ Section 703(a) of Title VII prohibits an employer “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”²⁷ An “employer” is defined in the statute as “a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year. . . .”²⁸ All but the smallest of institutions of higher education fall within the regulatory ambit of Title VII. Therefore, nearly all religious institutions of higher education are bound by the dictates of Title VII in all of their employment decisions, to the extent that such coverage is constitutional. There are, however, exemptions that sometimes allow a religious institution of higher education to make decisions on bases or for reasons otherwise prohibited by Title VII when they hire, promote, and fire employees.²⁹

A. *Exemptions Specific to Religious Educational Institutions: Sections 702(a) and 703(e)(2)*

In drafting Title VII, legislators considered the important interplay between the new responsibilities and constraints being placed on employers covered by the Act and the important liberties that might be intruded upon by applying those responsibilities and constraints to certain

25. *Id.*

26. While state statutes also regulate employment discrimination and are therefore relevant, the coverage of those statutes is beyond the scope of this paper. Furthermore, many state statutes simply mirror the provisions of Title VII and would add little to this discussion.

Other federal civil rights statutes also prohibit discrimination in employment on other grounds. *See, e.g.*, Equal Pay Act of 1963, 29 U.S.C. § 206(d) (2000) (prohibiting wage discrimination based on gender); Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (2000) (prohibiting discrimination on the basis of age involving employees over 40 years of age); Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (2000) (prohibiting discrimination on the basis of disability, record of disability, or perceived disability). Courts routinely interpret these statutes and their respective enforcement schemes consistently with Title VII. Where appropriate, the article notes instances that these statutes are also relevant, most notably in the discussion of the ministerial exception. *See infra* Part III.A.

27. 42 U.S.C. § 2000e-2(a)(1) (2000).

28. 42 U.S.C. § 2000e(b) (2000).

29. *See infra* Part II.A.

types of employers.³⁰ Specifically, Congress was concerned with the right of a religious organization to identify, in employees, the characteristics necessary to carry out the organization's mission.³¹ They were spurred, not in small part, by concerns about how Title VII's demands on employer conduct squared with the religion clauses of the First Amendment.³² Along with churches and religious orders, religious educational institutions garnered attention.

The proponents of the statutory exemptions argued that religious organizations would face a dire struggle to maintain their religious leadership and character without exemption from Title VII's prohibition against discrimination on the basis of religion.³³ Representative Poage, a Texas Democrat, forcefully stated this concern during the 1964 floor debate in the House of Representatives. He argued that religious schools 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 required by some agency in Washington to employ any atheist that comes along and asks for employment when they have a vacancy."³⁴ Inspired by this and similar concerns, Congress carved out two limited exemptions for certain religious organizations: sections 702(a)³⁵ and 703(e)(2).³⁶

The two exemptions, though somewhat different in their precise wording, are remarkably similar in effect. Section 702(a) appears broader in application than at first blush. It provides that Title VII "shall not apply . . . 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."³⁷ Thus, the section applies to religious organizations, including religious institutions of higher education that qualify as "religious educa-

30. See, e.g., Araujo, *supra* note 18, at 755-68 (presenting an in-depth discussion of the legislative debate regarding section 703(e)(2), 42 U.S.C. § 2000e-2(e)(2) (2000)).

31. See *id.*

32. See *infra* Part III for a related discussion of these constitutional concerns and Title VII's coverage.

33. See 110 CONG. REC. 2588 (1964).

34. *Id.*

35. 42 U.S.C. § 2000e-1(a). Throughout this article, this section of Title VII is referred to as either "section 702(a)" or "the religious organization exemption."

36. 42 U.S.C. § 2000e-2(e)(2). Throughout this article, this section of Title VII is referred to as either "section 703(e)(2)" or "the religious education exemption." A subpart of this exemption is referred to as "the curriculum exemption." See *infra* Part II.A.2.b.

37. 42 U.S.C. § 2000e-1(a) (2000).

tional institutions” under the act. In contrast the language of section 703(e)(2) is limited specifically to the education sector. It provides that:

[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, 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.³⁸

Thus, the exemption applies to either of two kinds of religious institutions of higher education: those owned, supported, controlled, or managed by a religious organization or those whose curriculum propagates a particular religion.

There is substantial overlap between the two provisions. In fact, one influential commentator contends that “[t]he proviso [of section 703(e)(2)] is largely subsumed by the broader exemption found in section 702[(a)].”³⁹ This claim somewhat overstates the redundancy. The overlap is less than total and the slightly different wording in the two provisions suggests some important differences.⁴⁰ Therefore, the remainder of this section describes the reach of the two exemptions and probes the ambiguities in the legislative language of each.

1. WHY DO SECTIONS 702(a) AND 703(e)(2) OVERLAP?

As originally enacted, the religious organization exemption covered fewer employment positions than it does today. The section as enacted in 1964 allowed religious employers to discriminate on the basis of religion only with regard to the organization’s “religious activities.”⁴¹ In a series of amendments to Title VII passed in 1972, Congress revisited section

38. 42 U.S.C. § 2000e-2(e)(2) (2000).

39. MACK A. PLAYER, EMPLOYMENT DISCRIMINATION LAW § 5.13 n.30 (Practitioner’s ed. 1988).

40. In addition, judges avoid construing statutory language in a way that renders it duplicative. *See, e.g.*, NEA v. Finley, 524 U.S. 569, 609 (1998) (“Statutory interpretations that render superfluous other provisions in the same enactment are strongly disfavored.”) (internal quotation marks and citation omitted). This is further evidence that relying on such a reading is likely unwarranted.

41. H.R. CONF. REP. NO. 92-899, at 16 (1972).

702(a),⁴² removed the modifier “religious,” and essentially included all activities of a religious organization under the exemption.⁴³ The broadening of the exemption spawned serious debate about its constitutionality. The section’s effect before the modification simply was thought to be reflective of the First Amendment’s demands regarding freedom of religion. The amended section, allowing religious organizations to discriminate on the basis of religion in all of their activities, drew criticism as a violation of the Establishment Clause.⁴⁴ Far from protecting freedom of religion, critics contended, it improperly benefited religious employers, burdening nonreligious employers in comparison.⁴⁵

The Supreme Court addressed the question of section 702(a)’s constitutionality in 1987. A unanimous court declared in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*⁴⁶ that section 702(a) does not violate the Establishment Clause and is a permissible accommodation of religion — though perhaps not compelled by the Free Exercise Clause.⁴⁷ Working through the three-part *Lemon v. Kurzman*⁴⁸ Establishment Clause test, the majority found that the Deseret Gymnasium, a nonprofit and nonreligious arm of the Mormon Church, could fire a janitor for failure to maintain a certificate of good standing with the church.⁴⁹ Several justices qualified their concurrences with the judgment of the majority and filed separate opinions.⁵⁰ Nevertheless, the several opinions share the common understanding that section 702(a)’s exemption is for the most part safe from constitutional

42. Originally, section 702 had no subsections denoted by letter. An amendment necessitated the lettered subsections. For the sake of consistency, clarity, and timeliness, this article refers to the provision as section 702(a), even when the reference is technically an anachronism.

43. H.R. CONF. REP. NO. 92-899, at 16.

44. *See, e.g.*, Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987) (rejecting plaintiff’s claim which relied on this argument).

45. *See id.* at 333.

46. *Id.* at 339.

47. *Id.* at 334.

48. 403 U.S. 602, 612-13 (1971). *See infra* note 249 for an explanation of this three-part test. Justice O’Connor, in her concurring opinion in *Amos*, disagreed with the majority’s use of the *Lemon* test and argued that an endorsement test should be used to determine the validity of the section under the Establishment Clause. She agreed, nonetheless, under the endorsement analysis that section 702 was constitutional as applied in that case. *Amos*, 483 U.S. at 348-49 (O’Connor, J., concurring).

See infra notes 245-255 and accompanying text for a discussion of how recent distrust of the *Lemon* test and the introduction of the endorsement inquiry could make a difference in the outcome of another exemption from Title VII for religious institutions of higher education.

49. *Amos*, 483 U.S. at 330, 339.

50. Notable among the qualifications found in the concurrences is the contention that the case leaves open the question of the constitutionality of section 702(a) as applied to for-profit activities of religious organizations. *Id.* at 344, 346, 349 (Brennan, Blackmun, and O’Connor, JJ., concurring).

challenge and abrogation.⁵¹ Therefore, religious institutions of higher education that qualify for the religious organization exemption need not distinguish between their “religious” and “secular” activities when invoking the exemption.

Section 703(e)(2), on the other hand, has not been significantly revised since it was included in the original Civil Rights Act of 1964. Never challenged on constitutional grounds, it makes no mention of “religious activities,” or of activities at all. It simply covers all employees in religious education.

Why, then, is there overlap between the two sections? What was the perceived need to include religious educational institutions in section 702(a)? The overlap might be explained by a drafting oversight that occurred in conjunction with another amendment to section 702(a) in 1972. Originally, not only was section 702(a) restricted to the religious activities of religious organizations, it also exempted all educational institutions from its coverage for positions related to educational activities.⁵² Presumably, legislators originally included section 703(e)(2) to expand the educational exemption for certain religious educational institutions to cover all employees, not just those involved in educational activities.⁵³ When Congress eliminated the general educational institution exemption in response to widespread discrimination in higher education,⁵⁴ religious educational institutions were added to the section 702(a) list of religious organizations covered by the exemption.⁵⁵ Therefore, the overlap could be explained by Congress’s intent that the amendments in 1972, especially the elimination of the general educational employer exemption,

51. This is clearly true with regard to all activities except perhaps those secular, for-profit activities of an otherwise qualified organization. For an argument that section 702(a) should apply to all activities of nonprofit religious organizations and only the religious activities of for-profit religious organizations, see Scott D. McClure, Note, *Religious Preferences in Employment Decisions: How Far May Religious Organization Go?*, 1990 DUKE L.J. 587, 604-06 (1990).

52. As originally enacted, the section exempted “an educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institution.” 42 U.S.C. § 2000e-1 (1970).

53. A statement by Representative Gathings during congressional debate over section 703(e)(2) supports this presumption. He stated that religious schools should be free to restrict employment of “any employees” by looking to religious criteria without EEOC review or challenge. 110 CONG. REC. 2586 (1964). An isolated comment by a single representative is not binding; however, when that comment offers a reasonable explanation for a seemingly unreasonable redundancy in statutory language, it should not be ignored.

54. See TERRY L. LEAP, *TENURE, DISCRIMINATION, AND THE COURTS* 24-25 (2d ed. 1995) (discussing the House of Representatives report that accompanied the amendment that eliminated the higher education exemption and its particular attention on the abundance of discrimination against women in higher education).

55. See S. REP. NO. 92-415, at 35 (1971); H.R. CONF. REP. NO. 92-899, at 16 (1972).

not be read to change the protection that had always been provided to religious educational institutions in section 703(e)(2). In essence, 702(a) could be read as an emphasis of the exemption in 703(e)(2).⁵⁶

Another explanation for the perceived overlap between the two sections relies on a difference in their general effect and placement. Section 702(a) purports to exempt qualified employers from application of the entire subchapter.⁵⁷ On the other hand, section 703(e)(2) excuses employers from what might otherwise be an unlawful employment practice.⁵⁸ Generally, section 703 is about unlawful employment practices, describing them with reference to proscribed employer, employment agency, and labor organization practices.⁵⁹ Therefore, one could read section 703(e)(2) as an exemption from section 703 only. Such a reading might mean, in practical effect, that a religious institution of higher education that qualifies under section 702(a) would be exempted from Title VII completely. In contrast, an institution that qualified under section 703(e)(2) would only be exempted from section 703. Under this reading, the most notable difference between these two types of institutions would be that the institution qualifying for the section 702(a) exemption would be excused from EEOC reporting requirements, while the institution exempt only under section 703(e)(2) would be subject to those requirements. But, the limited range of employer practices covered under the two exemptions⁶⁰ makes this reading impractical. Courts have not read the two exemptions in this way and have given no indication that they might. Thus, this may be a distinction without a difference.

There does appear to be some amount of clear, perhaps explainable, overlap between the two exemptions. Still, the language in each section is not identical, leaving room for differing judicial interpretation. As a result, some questions of the reach of the exemptions coincide, while others are unique to the specific section.

56. See, e.g., *Montrose Christian Sch. Corp. v. Walsh*, 770 A.2d 111, 124-25 n. 9 (Md. 2001) (indicating that section 703(e)(2) “clarifies” section 702(a)); *Ganzy v. Allen Christian Sch.*, 995 F. Supp. 340, 348 (E.D.N.Y. 1998) (“The religious exemption [of section 703(e)(2)] is emphasized in [section 702(a)] . . .”).

57. 42 U.S.C. § 2000e-1(a) (2000).

58. 42 U.S.C. § 2000e-2(e)(2) (2000).

59. 42 U.S.C. § 2000e-2(a)-2(d) (2000).

60. The exemptions cover only religious discrimination and not discrimination on any other protected characteristic. See *infra* Part II.A.3.a.

2. WHO IS COVERED UNDER THE EXEMPTIONS?

a. Institutions Owned, Operated, Controlled, Supported, Or Managed By A Religious Organization

Just what kind of religious institution of higher education qualifies for an exemption depends, in part, upon which exemption and upon which part of a particular exemption the institution relies. An area of significant overlap between the two sections is the coverage of religious educational institutions under section 702(a) and institutions that are owned, supported, controlled, or managed by a particular religion under section 703(e)(2). To determine qualification for each of those distinctions, courts look to a variety of institutional and doctrinal variables, basically utilizing a “totality of the circumstances” test.⁶¹

Obviously, the “owned, supported, controlled, or managed” language in section 703(e)(2) requires a relationship of some sort with a separate or affiliated religious organization (usually a specific faith, a church or temple, a denomination, or a religious order). Though not clearly mandated by its language, section 702(a) has been interpreted to require a relationship or affiliation as well.⁶² Over the years, a trend has developed regarding the treatment of different types of religious educational institutions. Seminaries as well as parochial elementary and secondary schools are usually presumed to have such a connection to their affiliated religious organization.⁶³ In contrast, whether such a relationship exists in religiously affiliated colleges and universities has been

61. See, e.g., *Hall v. Baptist Mem’l Health Care Corp.*, 215 F.3d 618, 624 (6th Cir. 2000) (“In determining whether the College qualifies for the statutory exemption, the court must look at all the facts to decide whether the College is a religious corporation or educational institution.”); *Killinger v. Samford Univ.*, 113 F.3d 196, 198 (11th Cir. 1997); *EEOC v. Kamehameha Sch./Bishop Estate*, 990 F.2d 458, 460 (9th Cir. 1993) (mandating that “each case must turn on its own facts [to] determine whether the [institution’s] purpose and character are primarily religious.”) (internal quotation marks and citations omitted); *Tsirpanlis v. Unification Theological Seminary*, 84 Fair Empl. Prac. Cas. (BNA) 1715 (S.D.N.Y. 2001); *Siegel v. Truett-McConnell Coll., Inc.*, 13 F. Supp. 2d 1335, 1340 (N.D. Ga. 1994) (“In determining whether a college or school qualifies for the [703(e)(2)] exemption, all religious and secular characteristics must be weighed and considered.”). See also Ralph D. Mawdsley, *Religious Educational Institutions: Limitations and Liabilities under ADEA and Title VII*, 89 EDUC. L. REP. 19, 30 (1994) (“[whether] an educational institution is church affiliated rather than church controlled is decided by a consideration of the facts before the Court.”).

62. See, e.g., *Hall*, 215 F.3d at 624-25; *Kamehameha*, 990 F.2d at 461 n.7 (finding “no case holding the exemption [in section 702(a)] to be applicable where the institution was not wholly or partially owned by a church.”); *Wirth v. Coll. of the Ozarks*, 26 F. Supp. 2d 1185, 1187 (W.D. Mo. 1998).

63. See Mawdsley, *supra* note 61, at 30.

judged by numerous criteria, under the rubric of the totality of the circumstances. The factors upon which they are judged have included:

religious qualification requirements for and/or appointment by the affiliated religious organization of trustees, directors, or top administrators;⁶⁴ a declared religious purpose or mission consistent with the affiliated religious organization;⁶⁵ financial ties to the affiliated religious organization;⁶⁶ a contractual expectation of religious orthodoxy or institutional policy favoring employment of members of a particular religion or religious sect;⁶⁷ the religious make-up of the student body;⁶⁸ a pervasive religious atmosphere on campus;⁶⁹ curricular or extra-curricular religious requirements for students;⁷⁰ recognition by other government agencies (for example, the Internal Revenue Service or the Department of Education) that the institution is religious;⁷¹ and, affiliation with organizations or consortia of religious educational institutions.⁷²

64. See *Killinger*, 113 F.3d at 199; *Kamehameha*, 990 F.2d at 462; *Pime v. Loyola Univ. of Chi.*, 803 F.2d 351, 357 (7th Cir. 1986) (Posner, J., concurring); *Siegel*, 13 F. Supp. 2d at 1341; *Maguire v. Marquette Univ.*, 627 F. Supp. 1499, 1501 (E.D. Wis. 1986), *aff'd in part and vacated in part*, 814 F.2d 1213 (7th Cir. 1987); *Pime v. Loyola Univ. of Chi.*, 585 F. Supp. 435, 437 (N.D. Ill. 1984), *aff'd on other grounds*, 803 F.2d 351 (7th Cir. 1986).

65. See *Hall*, 215 F.3d at 625; *Killinger*, 113 F.3d at 199; *Kamehameha*, 990 F.2d at 462; *EEOC v. Miss. Coll.*, 626 F.2d 477, 479 (5th Cir. 1980); *Tsirpanlis*, 84 Fair Empl. Prac. Cas. (BNA) 1715; *Wirth*, 26 F. Supp. 2d at 1187; *Siegel*, 13 F. Supp. 2d at 1342; *Maguire*, 627 F. Supp. at 1501.

66. See *Hall v. Baptist Mem'l Health Care Corp.*, 215 F.3d 618, 625 (6th Cir. 2000); *Killinger v. Samford Univ.*, 113 F.3d 196, 1989 (11th Cir. 1997); *Pime*, 803 F.2d at 357 (Posner, J., concurring); *Siegel v. Truett-McConnell Coll., Inc.*, 13 F. Supp. 2d 1335, 1340-1341 (N.D. Ga. 1994); *Maguire*, 627 F. Supp. at 1501.

67. See *Killinger*, 113 F.3d at 199; *Miss. Coll.*, 626 F.2d at 479 n.1; *Maguire*, 627 F. Supp. at 1501. One could question the validity of this criterion. In effect, it could be viewed as supporting a claim to a right of religious preference by showing that the institution already practices a religious preference. In reality, the criterion is probably more of an indication that the asserted preference is serious and not a pretext for some other invidious intention.

68. See *EEOC v. Kamehameha Sch./Bishop Estate*, 990 F.2d 458, 462 (9th Cir. 1993); *Pime*, 803 F.2d at 357 (Posner, J., concurring); *Miss. Coll.*, 626 F.2d at 479; *Siegel*, 13 F. Supp. 2d at 1342.

69. See *Hall*, 215 F.3d at 625.

70. See *Hall*, 215 F.3d at 625; *Killinger*, 113 F.3d at 199; *Kamehameha*, 990 F.2d at 462; *Pime*, 803 F.2d at 357 (Posner, J., concurring); *Miss. Coll.*, 626 F.2d at 479; *Siegel*, 13 F. Supp. 2d at 1343.

71. See *Killinger*, 113 F.3d at 199; *Wirth*, 26 F. Supp. 2d at 1187.

72. See *Wirth*, 26 F. Supp. 2d at 1187 (noting the College of the Ozarks' membership in the Coalition for Christian Colleges and Universities, now the Council for Christian Colleges and Universities, and the Association of Presbyterian Colleges and Universities).

No single one of these criteria is sufficient to establish qualification, nor – as discussed below – is the absence of any particular criterion dispositive of qualification.

The appropriate weight given to each criterion in determining whether an institution is qualified for exemption is not entirely clear or consistent. For example, significant financial assistance from a religious organization with which the educational institution is affiliated is important. However, courts do not agree about what amount of assistance is sufficient. Samford University's largest single source of funding was the Alabama State Baptist Convention, which provided seven percent of the University's total budget.⁷³ Loyola University of Chicago's largest single contributor was the Loyola Jesuit Community of Chicago, which provided one-third of one percent of the University's total budget.⁷⁴ While Samford's financial ties to the Alabama State Convention bolstered its argument for exemption from Title VII by sections 702(a) and 703(e)(2),⁷⁵ Loyola's ties to the Jesuit community were viewed as *de minimis* and did not support Loyola's exemption claim.⁷⁶ Consequently, the amount of contribution relative to the total budget is more important than how the contribution compares in amount to other contributions. Yet, no reported case deals with a religious institution that receives more than a small minority of its funding from its sponsoring church, order, or denomination. Thus, it seems odd to expect a particular arbitrarily-set amount of money to come from a religious organization. The largest contributor, even if contributing only a small fraction of the overall operating budget, would exert an undeniable influence over the institution. Nevertheless, both the court that decided Samford University's fate and the court that addressed Loyola University's claim focused on the share of the total budget.⁷⁷ As a result, it is difficult to discern at what level – presumably somewhere between seven percent and one-third of one percent of the total budget – financial ties are too attenuated to contribute to a finding of affiliation, ownership, or control.

Another example of the malleability of the criteria is the weight given to an affiliated religious organization's control or influence over trustees, directors, or top administrators of the institution. The number of

73. *Killinger v. Samford Univ.*, 113 F.3d 196, 199 (11th Cir. 1997).

74. *Pime v. Loyola Univ. of Chi.*, 803 F.2d 351, 437 (7th Cir. 1986). *See also Pime*, 803 F.2d at 357 (Posner, J., concurring) (“[F]inancial contributions from the Jesuit order provide only one-third of one percent of the university's income.”).

75. *Killinger*, 113 F.3d at 199.

76. *See Pime*, 585 F. Supp. at 437.

77. *See Killinger*, 113 F.3d at 201; *Pime*, 585 F. Supp. at 437.

Jesuit trustees at both Loyola University and Marquette University is required to be sufficient to afford the Jesuits veto power over any by-law amendment if the Jesuit trustees vote as a bloc.⁷⁸ This fact was insignificant to the judge deciding whether Loyola qualified for exemption,⁷⁹ but was significant to the judge deciding Marquette's qualification.⁸⁰

Consequently, with any test that considers the totality of the circumstances, it is simply impossible to determine a bright-line rule by which a religiously-affiliated institution of higher education can determine its eligibility for the exemptions. In *Killinger v. Samford University*,⁸¹ a leading case interpreting the language of section 703(e)(2), the Eleventh Circuit approached the exemption more rigidly and offered a glimmer of hope to religiously affiliated institutions of higher education that endeavor to determine their eligibility under that section. Relying on the disjunctive language of 703(e)(2), the court determined that the section "requires only that a college be — 'in whole or substantial part' — 'owned, supported, controlled, or managed' by a religious association."⁸² The court proceeded to give the word *substantial* its ordinary meaning and determined that the financial support from the Alabama State Baptist Convention to Samford University was, by itself, enough for the University to qualify for the exemption.⁸³ The logical implication of the *Killinger* decision is that no multi-factored test is necessary to determine eligibility under section 703(e)(2). Rather, an institution qualifies by meeting any one of the requirements of ownership, support, control, or management. In contrast, section 702(a) allows for no such litmus test, but instead looks to all of the circumstances for an overall impression of religious affiliation.

78. See *Maguire v. Marquette Univ.*, 627 F. Supp. 1499, 1501 (E.D. Wis. 1986), *aff'd in part and vacated in part*, 814 F.2d 1213 (7th Cir. 1987).

79. See *Pime v. Loyola Univ. of Chi.*, 803 F.2d 351, 440 (7th Cir. 1986)(finding that the Jesuit community exercised no actual direction or control over the Jesuit trustees and administrators).

80. *Maguire*, 627 F. Supp. at 1501.

81. 113 F.3d 196 (11th Cir. 1997).

82. *Killinger v. Samford Univ.*, 113 F.3d 196, 200 (11th Cir. 1997).

83. *Id.* at 201 ("We hold . . . that Samford qualifies as an educational institution which is in 'substantial part' supported by a religious association and that the exemption protects Samford in this case."). See also *Siegel v. Truett-McConnell Coll., Inc.*, 13 F. Supp. 2d 1335, 1340-41 (N.D. Ga. 1994) (finding that \$714,934 in support from the Georgia Baptist Convention, and other Baptist associations and churches, to Truett McConnell College was "substantial support by a particular religion" even though "the College receives financial support from other sources" and noting that the money from the Convention "is enough to pay the salaries and benefits of 19 of the 25 full time faculty at the College's Cleveland campus").

b. The Curriculum Exemption

Section 703(e)(2) also exempts educational institutions that have religious curricular goals, even in the absence of any ownership, support, control, or management by a religion or religious organization. These “independent” religious schools qualify for an exemption if their “curriculum . . . is directed toward the propagation of a particular religion.”⁸⁴ Unfortunately, the only federal court opinion to construe the “curriculum exemption” clause of section 703(e)(2) in a serious and thoughtful way,⁸⁵ undermined the protections provided by it. In *EEOC v. Kamehameha Schools/Bishop Estate*,⁸⁶ a panel of the Ninth Circuit Court of Appeals held that the Kamehameha Schools in Hawaii were not eligible for the curriculum exemption, despite a significant Protestant tradition at the schools.⁸⁷ The district court in that case held that the Kamehameha Schools were eligible for the exemption because “religion . . . is an integral part of the child’s daily life at the [s]chools.”⁸⁸ The circuit court panel disagreed, commenting that “religion is more a part of the general tradition of the [s]chools than a part of their mission, and serves primarily as a means for advancing moral values in the context of a general education.”⁸⁹

This holding is striking considering the facts of *Kamehameha*. Every student was required to fulfill a religious education component of the curriculum.⁹⁰ The court called this requirement “limited”⁹¹; however, that characterization is disputable. Structured religious instruction occurred from kindergarten through sixth grade; a religious education teacher taught the classes utilizing Bible stories, prayer, and religious singing.⁹² Only in the seventh and eighth grades did the religious educa-

84. 42 U.S.C. § 2000e-2(e)(2) (2000).

85. *EEOC v. Kamehameha Schs./Bishop Estate*, 990 F.2d 458, 464 (9th Cir. 1993), *cert. denied*, 510 U.S. 963 (1993) (“There is no case law on the curriculum exemption.”).

86. *Id.*

87. *Id.* at 464-65. The schools had been established by Bernice Pauahi Bishop, a member of the Hawaiian royal family, through a charitable trust upon her death. The provision of her will establishing the trust for the purpose of building and maintaining the schools instructed the trustees to “provide . . . a good education in the common English branches, and also instruction in morals and in such useful knowledge as may tend to make good and industrious men and women.” *Id.* at 459. She further instructed that “the teachers of said schools shall forever be persons of the Protestant religion.” *Id.* The case arose when a non-Protestant was denied a substitute teaching position. *Id.*

88. *Id.* at 464 (internal quotation marks and citations omitted).

89. *Id.* at 465.

90. *Id.* at 463.

91. *Id.*

92. *Id.*

tion begin to take on less of a purely Christian orientation.⁹³ At these grade levels, classes dealt with the nature of God and religion and the history of religion in Hawaiian culture.⁹⁴ Students in the high school were required to complete a minimal amount of religious coursework, and all students attended devotional services every other week.⁹⁵ Furthermore, all classes from kindergarten through eighth grade recited a mandatory daily prayer.⁹⁶ Finally, some official school events and activities incorporated religious practices.⁹⁷ Nevertheless, the court found the curriculum exemption inapplicable.⁹⁸

The court's decision can be explained in part by its use of an unreasonably restrictive definition for the word *propagate*. The court appropriately cited the dictionary definition of the word, but its application of that definition to the facts was cramped and narrow.⁹⁹ Faced with the preceding set of facts, the court determined that the "curriculum" of the school — limiting what constituted "curriculum" "to coursework and required school activities"¹⁰⁰ — did not really propagate Protestantism. Notably, the court ignored that *propagation* could and should be read to "incorporate[] the holistic approach to life . . . of the members of each religious community."¹⁰¹ In other words, the possibility of propagating the Protestant viewpoint was not eliminated or even necessarily diminished simply because the school included within its curriculum a comparison of that viewpoint with other religious and cultural viewpoints. Nor did it matter that the school, in accordance with the wishes of the Bishop Estate, emphasized pride in traditional Hawaiian culture and history. Such studies do not automatically render the propagation of Protestantism impossible. Still, the court pointed to these factors as evidence that the school's curricula were not directed at the propagation of a particular religion,¹⁰² despite the dominance of the Protestant viewpoint at the school.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 462.

97. *Id.* (noting mandatory church attendance and prayer requirements for boarding students; athletic team prayers; prayer at mandatory school functions; and Bible quotations on official school publications).

98. *Id.* at 463-64.

99. *Id.* at 464 n.12.

100. *Id.* at 464.

101. Araujo, *supra* note 18, at 727.

102. See *EEOC v. Kamehameha Sch./Bishop Estate*, 990 F.2d 458, 465 (9th Cir. 1993).

The impression left by the court is that the only way for an educational institution to qualify for the curriculum exemption is to develop a singularly-focused curriculum that avoids anything resembling secular study or culture. Apparently, the court determined that propagation of a particular religion requires an institution to proselytize its students directly in its particular religious beliefs in every curricular undertaking.¹⁰³ If so, the institution would be in the business of indoctrinating the students as opposed to educating them.¹⁰⁴ Such aggressive and single-minded tactics, however, cannot be what is required under the curriculum exemption. Rather, to propagate means “to cause to spread out and affect a greater number or greater area.”¹⁰⁵ Certainly, a religious educational institution can propagate a particular religion by presenting that religion in a subtle manner, discussing both the tenets of the religion and its historical and cultural contexts. While perhaps less marked than the blunt approach of proselytizing, such a presentation would nonetheless affect a number of people by the particular religious view. As a result, that particular view would be spread. Guiding its students in understanding the place of a particular religion within the greater scheme of society and history should not be interpreted as watering down the religious purpose of the institution as the *Kamehameha* court held.¹⁰⁶ Instead, it should be viewed as an alternative approach to propagation.

It may very well be that the holding in *Kamehameha* is narrow, based on three peculiar circumstances of that case. First, the schools disavowed any effort to convert students to Protestantism.¹⁰⁷ This admission certainly undermines a contention that the curriculum was intended to propagate Protestant beliefs.¹⁰⁸ Second, *Kamehameha* Schools argued that it should not have been required to hire a non-Protestant because that would violate the terms of the Bishop Trust, potentially rendering it void.¹⁰⁹ Inasmuch as this claim reveals the true motivation of the *Kamehameha* Schools for denying non-Protestants teaching positions, a more committed institution might be able to mount a better case. Finally, the

103. *See id.*

104. For a more developed discussion of the difference between “indoctrination” and “education,” see SANDIN, *supra* note 6, at 256.

105. *Kamehameha*, 990 F.2d at 464 (quoting Webster’s dictionary).

106. *Id.* at 465 (“Courses *about* religion and a general effort to teach good values do not constitute a curriculum that propagates religion. . .”).

107. *See id.* at 463.

108. This fact should not necessarily have been dispositive. It cannot be that an institution is required to have as its mission the conversion of all students into co-religionists. A religion can affect a person without necessarily leading him to convert.

109. *See* EEOC v. *Kamehameha Sch./Bishop Estate*, 990 F.2d 458, 466 (9th Cir. 1993) .

court may not have known how to treat the broad and amorphous “Protestant” religious category under the exception.¹¹⁰ The court noted that the elementary religious education emphasized no particular religion, but “[taught] the basic truths about how God and through his son Jesus Christ teaches us how to live a joyous and fulfilling life.”¹¹¹ While this sentiment is consistent with the belief statements of major Protestant denominations,¹¹² the notion of a united Protestant belief system is foreign to the religious history of the United States.¹¹³ Perhaps if Kamehameha employed only Lutherans or Methodists and presented the corresponding particular view of Protestantism instead of purporting to represent the more nebulous category of all Protestants, the outcome would have been different.

The lasting implications of *Kamehameha* are unclear.¹¹⁴ It is the sole case interpreting the curriculum exemption. One commentator suggests that a broad reading of the case would require some kind of church ownership or control over an educational institution for this exemption to

110. If the court was, in fact, confused by this aspect, its confusion may be warranted. “Protestant” does not so much denote the specific beliefs, but instead a historical origin of the religion. See, e.g., THE OXFORD ENGLISH DICTIONARY VOL. II 2335 (Compact ed. 1971) (defining “protestant” as “a member or adherent of any of the Christian churches or bodies which repudiated the papal authority, and separated or were severed from the Roman communion in the Reformation of the sixteenth century, and generally of any of the bodies of Christians descended from them; hence in general language any Western Christian or member of a Christian church outside the Roman Communion”). *But see infra* notes 111-115 and accompanying text discussing a case allowing a broad “Christian” preference.

111. *Kamehameha*, 990 F.2d at 463.

112. See, e.g., *A Synopsis of the Beliefs of the Presbyterian Church in America*, Official Website of the Presbyterian Church in America, at <http://www.pcanet.org/general/beliefs.htm> (last visited October 21, 2004); *Essential Questions: Christianity and Lutheranism*, Official Website of the Evangelical Lutheran Church in America, at <http://www.elca.org/co/brief.html> (last visited October 21, 2004); The Episcopal Church USA Visitors Center (containing a short synopsis of the Creeds and beliefs of the Episcopal Church USA), at <http://arc.episcopalchurch.org/welcome/belief/belief.html> (last visited October 21, 2004); *United Church of Christ Statement of Faith – original version*, Statement of Faith of the United Church of Christ, at <http://www.ucc.org/faith/faith.htm> (last visited October 21, 2004); *The Baptist Faith and Message*, Official Website of the Southern Baptist Convention, at <http://www.sbc.net/bfm/bfm2000.asp> (last visited October 21, 2004); *Our Beliefs*, Official Website of the Reformed Church of America, at <http://www.rca.org/aboutus/beliefs/> (last visited October 21, 2004); *About the UMC: Our Beliefs*, Official Website of the United Methodist Church, at <http://www.umc.org/interior.asp?ptid=1&mid=519> (last visited October 21, 2004).

113. See Sydney E. Ahlstrom, *The Problem of the History of Religion in America*, 39 CHURCH HISTORY 224, 224-26 (Robert M. Grant et al. eds., 1970) (discussing the diversity of protestant – as well as other – denominations and sects in colonial America).

114. The Supreme Court refused to review the Ninth Circuit’s decision, therefore it is only binding on the courts in the Ninth Circuit. *Kamehameha Sch./Bishop Estate v. EEOC*, 510 U.S. 963 (1993) (denying certiorari to *EEOC v. Kamehameha Sch./Bishop Estate*, 990 F.2d 458 (9th Cir. 1993)).

apply.¹¹⁵ While this reading may stretch the logic of the case to its breaking point, *Kamehameha* quite possibly could lead to a more restrictive reading of the exemption than the statute's plain language requires. The absence of cases discussing the curriculum exemption in the last ten years may suggest both that institutions do not rely on it and that this single interpretation of it has narrowed it to the point of insignificance.

Relying on a practical definition of "propagation," independent institutions of higher education should qualify for the curriculum exemption, so long as the curriculum and student life requirements include distinct religious influences, such as mandatory religious education requirements or devotional service attendance. Allowing such an institution to impose religious requirements on its employees only furthers its unique mission and supports inter-institutional diversity. A religious person's faith can, and usually does, affect his or her approach to the world. In an atmosphere where that belief system is welcomed and required of staff members, its influence can be far-reaching. A professor's religious beliefs and faith often mandate a religious approach to teaching a subject traditionally considered secular.¹¹⁶ The Ninth Circuit, in disallowing the Protestant requirement of the Bishop Estate, made such an atmosphere less likely. Any propagation of Protestantism that had occurred at the schools became more difficult to accomplish.¹¹⁷ After *Kamehameha*, independent religious institutions of higher education can no longer be certain of their qualification for the curriculum exemption if they offer more than a purely sectarian education.¹¹⁸ Remaining true to a religious mission, therefore, becomes a greater challenge. The cause of maintaining vibrant diversity among institutions of higher education took a blow from the *Kamehameha* court.

115. Ralph D. Mawdsley, *Employment Discrimination on the Basis of Religion: Where Should the Line Be Drawn?*, 111 EDUC. L. REP. 1077, 1085 (1996).

116. See Araujo, *supra* note 18, at 752-53. The author of this article can attest, at least anecdotally, to this statement. Having attended a pervasively religious undergraduate institution, a pervasively secular law school, and having taught at a public university, the differences in student/teacher interaction and faculty teaching philosophies and techniques are striking.

117. Cf. Mawdsley, *supra* note 5, at 1108-09 ("To suggest that the business of the religious university is primarily meeting the secular function of providing educational services ignores the religious intensity with which some such universities may view their religious mission and appears to assume that a religious university can afford either economically or philosophically to have some employees who do not have to share in that religious intensity.") (citations omitted).

118. Presumably, independent bible colleges, seminaries, and other similar institutions where the entire curriculum is focused on religious education or the training of clergy, would easily meet the *Kamehameha* court's requirements. Also, faculty members at such institutions are likely to fall under the ministerial exception to Title VII. See *infra* Part III.

3. WHAT IS COVERED UNDER THE EXEMPTIONS?

Knowing which religious institutions of higher education qualify for the exemption under sections 702(a) and 703(e)(2) is only the first step in understanding the coverage of the exemptions. Only certain employment practices are exempted, while other practices remain proscribed by Title VII even to religious employers. Separating those practices, though at times complicated, is the same under both sections. The main ambiguities in the exemptions are the reach of what it means to “hire and employ” or make a decision regarding “employment” and what it means for an employee to be “of a particular religion.” The following section gives a quick overview of the important issues that are implicated by the use of these ambiguous terms.

a. Religious Discrimination Only

Congress by no means created a blanket exemption from Title VII for institutions that qualify under either section 702(a) or section 703(e)(2). Instead, the sections allow qualified employers to make decisions based on one of the proscribed criteria. The exemptions allow employers to limit consideration of and continued employment to individuals and employees “of a particular religion”¹¹⁹; however, nothing in the exemptions excuses an employer from the Title VII prohibitions on race, sex, or national origin discrimination. Only discrimination on the basis of religion was exempted.¹²⁰ As a result, a religious institution of higher education that is otherwise qualified for the exemptions can lawfully restrict employment to co-religionists, though it is by no means bound to do so. That, however, fails to account for numerous other preferences and practices in which the institutions might wish to engage.

Determining whether a person is a co-religionist presents a difficult undertaking. For instance, like the Kamehameha Schools’ Protestant

119. 42 U.S.C. § 2002-e2(e) (2000).

120. See *EEOC v. Miss. Coll.*, 626 F.2d 477, 484 (5th Cir. 1980); *Smith v. Raleigh Dist. of the N.C. Conference of the United Methodist Church*, 63 F. Supp. 2d 694, 701 (E.D.N.C. 1999) (“Although [section 702(a)] permits religious institutions to discriminate based on religion or religious preferences, Title VII does not permit religious organizations to discriminate on the basis of race, sex, or national origin.”); *Ganzy v. Allen Christian Sch.*, 995 F. Supp. 340, 348 (E.D.N.Y. 1998) (“These exceptions to Title VII do not sanction gender discrimination, except where, for example, only men can be priests, as required for certain religious functions.”). See also Joanne C. Brant, “*Our Shield Belongs to the Lord*”: *Religious Employers and a Constitutional Right to Discriminate*, 21 HASTINGS CONST. L.Q. 275, 290-91 (1994) (“[N]othing in Title VII supports the right of a religious employer to engage in sex or racial discrimination.”).

preference discussed in the previous section, the announced preferences or affiliations of religious educational institutions do not always lend themselves to easy distinctions between fellow believers and non-believers. An example of this phenomenon involved the College of the Ozarks in Missouri. In *Wirth v. College of the Ozarks*,¹²¹ a professor at the college alleged that he had been denied pay raises over a seven-year period and, ultimately, was terminated at least in part because he was Catholic.¹²² The professor argued that the College of the Ozarks was not entitled to exemption under sections 702(a) or 703(e)(2), because its president's affidavit indicated that the college endorsed no single denomination of Christianity, but noted that "a strong belief in Christianity is practiced."¹²³ As a result, Professor Wirth argued that, as a Catholic, his views were also Christian and the college could not suggest his termination was exempted by Title VII.¹²⁴ The court rejected this argument, explaining:

Even though a Christian corporation or organization is non-denominational, it nevertheless may subscribe to particular religious views with which other Christians do not agree, and conversely, it may disagree with the religious views of other Christians. . . . [T]he exemptions allow religious institutions to employ only persons whose beliefs are consistent with the views of the religious organization.¹²⁵

Thus, while "Christianity" is clearly a broad descriptor for the religion or religious preference of an institution, this court endorsed the notion that a religious institution could choose, without violating Title VII to hire and to employ only those individuals who endorse or adopt the specific beliefs and views among the many competing conceptions of a particular belief system.¹²⁶ This approach is clearly deferential to the institution's own conception of its religious mission and views.

A seemingly reasonable approach to ferreting out those co-religionists that an institution seeks to employ would be to allow qualified institutions to employ people who understand the mission of the institution and who are willing to comport with the behavior standards associated with the particular religion.¹²⁷ Even this definition involves

121. 26 F. Supp. 2d 1185 (W.D. Mo. 1998).

122. *Id.* at 1187.

123. *Id.* at 1188.

124. *Id.*

125. *Id.*

126. *See id.*

127. *See* Treaver Hodson, Note, *The Religious Employer Exemption Under Title VII: Should a*

some uncertainty. For example, it is unclear whether an institution may lawfully prefer a candidate for employment who has voiced support for the mission of the religious institution over a candidate who remains silent on the issue, regardless of the religious beliefs or background of either candidate.¹²⁸ The former candidate would not have been preferred because she was “of a particular religion,” but because of her willingness to encourage the religious mission. The latter candidate could very well have remained silent because, though perfectly willing to refrain from undermining the mission, his differing religious beliefs forbid him from encouraging the mission. The result could be characterized as discrimination on the basis of religion, though not a preference for a person of a particular religion.

Additionally, it seems reasonable that an employee’s failure to live up to and support the religious behavioral and moral mandates of the particular religion could constitute valid grounds for discharge.¹²⁹ Nevertheless, the circuits are split regarding how broadly to apply that ideal when those mandates require or result in other forms of discrimination.¹³⁰ Nowhere has this been more evident than in cases involving the discharge of an unmarried female employee when she becomes pregnant. Various religions proscribe premarital and extra-marital sexual activity. Often, pregnancy outside of a marriage is considered by such religions to be conclusive evidence of sin.¹³¹ Therefore, when a religious institution fires a pregnant, but unmarried, female employee, it can theoretically do so based on religious grounds (*i.e.*, failure to abide by the religion’s sexual, moral, and behavioral expectations). However, the employer would have engaged in sex discrimination.¹³² if the firing was because of the

Church Define Its Own Activities? 1994 BYU L. REV. 571, 575 (1994).

128. Father Robert John Araujo points out this open question and offers an approach by which a religious school could lawfully engage in such a preference. He calls his plan religious affirmative action/apostolic preference. Araujo, *supra* note 18, at 737, 768-778. Villanova University’s plan for “Mission Centered Hiring” reflects some aspects of this approach. See VILLANOVA UNIV., GUIDE FOR FACULTY SEARCH COMMITTEES 5-8 (Rev. Draft, Ver. 5) (outlining the goals of Mission Centered Hiring, instructing faculty hiring committees about ways to educate candidates about Villanova’s mission, and suggesting interview questions that allow candidates to share their views about and support of the mission), available at <http://www3.villanova.edu/mission/mchiring/hiring5.pdf> (n.d.).

129. See Araujo, *supra* note 18, at 732 (citing *Little v. Wuerl*, 929 F.2d 944 (3d Cir. 1991) and *EEOC v. Presbyterian Ministries*, 788 F. Supp. 1154 (W.D. Wash. 1992)).

130. See *Vigars v. Valley Christian Ctr. of Dublin, Cal.*, 805 F. Supp. 802, 807 n.3 (N.D. Cal. 1992) (describing this developing split in the circuits).

131. As is often the case, technology outpaces legal reasoning. Although no case has presented such facts, an unmarried woman in the twenty-first century can become pregnant without engaging in intercourse (*i.e.*, artificial insemination).

132. Following a series of restrictive Supreme Court cases declaring discrimination on the basis

pregnancy itself and not the proscribed sexual behavior that led to the pregnancy.¹³³

Some circuit courts have declared that when a religious educational institution offers a religious reason for discharging a pregnant employee, the court is then stripped, by means of the exemptions, of its ability to hear the case.¹³⁴ Other circuits disagree. They suggest that in proffering a religious reason for the decision, the institution does no more than meet its burden to articulate a legitimate, nondiscriminatory reason for the firing within the structure of the Title VII burden-shifting case.¹³⁵ As such, the employee is given the opportunity to prove the religious reason is pretext for sex discrimination.¹³⁶ Clearly, the doctrine prohibiting premarital sex is not subject to a court's review for its merit as a religious tenet. Such an inquiry would violate the First Amendment.¹³⁷ Nevertheless, the latter approach forces the religious educational institution to prove that its decision was actually based upon the religious reason. The former approach relieves the institution even of this responsibility.

Although the Supreme Court has yet to resolve the split in the circuits, the latter approach is grounded in a sounder construction of the exemptions. The former approach exaggerates the constitutional concerns at issue. So long as the court accepts the religious belief or doctrine at face value, no First Amendment issue arises.¹³⁸ The exemptions are still important even if the institution must defend its position as required by

of pregnancy not to be a proxy for sex discrimination, Congress amended Title VII with the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (1994), to state that "the terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy." *Id.*

133. For example, if the employer knew that the father of the child of the subject pregnancy was also an unmarried employee, but failed to terminate the father, an obvious conclusion is that religious doctrine was not the motivating factor for the termination of the female employee, but rather her pregnancy was.

134. *See, e.g., Little*, 929 F.2d at 948 (citing and quoting from *EEOC v. Miss. Coll.*, 626 F.2d 477, 485 (5th Cir. 1980)).

135. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *McDonnell Douglas* sets up what has been referred to as the "three-step" minuet of a disparate treatment case under Title VII. First, the plaintiff must establish a *prima facie* case for discrimination. If the plaintiff establishes the basic elements of a *prima facie* case, then the defendant carries the burden of offering a legitimate, nondiscriminatory reason for its decision regarding the plaintiff. If the defendant carries its burden, the burden shifts back to the plaintiff who must show that the proffered reason is a pretext for the discriminatory reason. *Id.* at 804. *See also* *PLAYER*, *supra* note 39, at § 5.40 (expounding on the burden shifting model established in *McDonnell*).

136. *See, e.g., Boyd v. Harding Acad. of Memphis, Inc.*, 88 F.3d 410, 413 (6th Cir. 1996); *Ganzy v. Allen Christian Sch.*, 995 F. Supp. 340, 349 (E.D.N.Y. 1998); *Vigars*, 805 F. Supp. at 808, 810 (denying summary judgment and ordering a trial by a jury to determine whether pregnancy or religion was the reason for dismissal of librarian at religious school).

137. *See Ganzy*, 995 F. Supp. at 350.

138. *Id.*

the latter approach. The proffered religious reason for the decision would not be considered legitimate and nondiscriminatory if the exemptions did not operate to excuse decision-making on that basis. In other words, only those institutions that fall under the exemptions in sections 702(a) and 703(e)(2) have the option of offering a religious reason as a legitimate, nondiscriminatory explanation for the action taken. As a result, religious institutions of higher education can, in some circumstances, defend against claims of discrimination based on sex by showing that the decision was, in fact, based on religious considerations.

Whether the same can be said of race or national origin is not as clear. If an employee of a religious institution of higher education were fired for involvement in an interracial relationship, the public policy of eradicating race discrimination may outweigh any respect for religious liberty contained in the Title VII exemptions.¹³⁹ Even if the institution adhered to a sincerely held religious belief about the inappropriateness of intermingling races, a court may declare such an interest illegitimate.¹⁴⁰

b. Employment Practices

Title VII prohibits much more than just the hiring and firing of individual employees on the basis of race, sex, religion, and national origin. According to section 703(a)(1)¹⁴¹, it is also unlawful to discriminate with regard to “compensation, terms, conditions, or privileges of employment.”¹⁴² The exemption in section 702(a) reads only that “this subchapter shall not apply . . . with respect to the employment of individuals of a particular religion.”¹⁴³ Section 703(e)(2) reads that “it shall not be an unlawful employment practice . . . to hire and employ employees of a particular religion.”¹⁴⁴ Neither section mentions anything about compensation, terms, conditions, or privileges.

139. See Ralph D. Mawdsley, *Limiting the Right of Religious Educational Institutions to Discriminate on the Basis of Religion*, 94 EDUC. L. REP. 1123, 1135-36 (1994) (arguing that eradicating discrimination based on race is a fundamental public policy that overrides any sincerely held religious belief).

140. In a different setting, the Supreme Court determined that a racially discriminatory admissions policy based on a sincerely held religious belief did not excuse a religious institution of higher education from complying with anti-discrimination norms found in the federal tax code and the institution lost its tax exempt status. *Bob Jones Univ. v. United States*, 461 U.S. 574, 603-04 (1983).

141. 42 U.S.C. § 2000e-2(a)(1) (1994).

142. *Id.*

143. 42 U.S.C. § 2000e-1(a) (1994).

144. 42 U.S.C. § 2000e-2(e)(2) (1994).

Because neither of these sections identically tracks the language of section 703(a)(1), it is reasonable to assume that not all employment decisions are exempted under sections 702(a) and 703(e)(2). The most restrictive approach is to suggest that only the decision of whether to hire or not to hire an individual would be included in the exemptions.¹⁴⁵ While courts may treat hiring and discharge decisions differently,¹⁴⁶ courts have applied the exemptions both to decisions to discharge an employee and to hire an employee.¹⁴⁷ The EEOC admits that section 702(a)'s use of "employment" encompasses both hiring and firing, but also contends that section 702(a) does not include terms, conditions, or privileges of employment.¹⁴⁸ It is reasonable to conclude that the exemptions do not cover discrimination in compensation, benefits, insurance, and other similar employment practices on the basis of religion. The Ninth Circuit has so held¹⁴⁹; however, the Ninth Circuit has historically taken a restrictive view of the exemptions¹⁵⁰ and other circuits may not follow its lead.

The most intriguing ambiguity, not contemplated by the Ninth Circuit in its restrictive interpretation, nor directly addressed by the EEOC, is whether promotions are covered by the use of the words "employment" and "hire and employ" in the exemptions. Promotions could be considered a privilege of employment.¹⁵¹ Furthermore, if an institution hires someone who is not of its particular religion, then one can argue that the institution has declared its approval of that person. The question becomes whether that initial approval should constrain the institution from refusing to promote that person beyond a certain level. To answer in the affirmative, one must ignore the varying degrees of importance that many institutions may place on the religion of the people filling different positions or fulfilling different responsibilities.¹⁵² It may be unimportant to an institution whether a remedial writing instructor shares the

145. See Brant, *supra* note 120, at 285 (detailing this restrictive "hiring-only" approach to interpreting the statutes).

146. See Mawdsley, *supra* note 5, at 1106-07 (explaining that courts will probe discharge decisions more thoroughly than decisions not to hire).

147. See, e.g., Hall v. Baptist Mem'l Health Care Corp., 215 F.3d 618, 624 (6th Cir. 2000) (citing Killinger v. Samford Univ., 113 F.3d 196, 198 (11th Cir. 1997); Little v. Wuerl, 929 F.2d 944, 951 (3d Cir. 1991).

148. Religious Organization Exemption, EEOC Comp. Man. (CCH) ¶ 2183, at 2341, 2343 (2004).

149. EEOC v. Fremont Christian Sch., 781 F.2d 1362, 1366-67 (9th Cir. 1986).

150. For example, see *supra* notes 85-118 and accompanying text regarding the Ninth Circuit's overly-narrow interpretation of the curriculum exemption.

151. See McClure, *supra* note 51, at 616-18 and cases noted therein.

152. See *id.* at 621.

institution's religious commitment because he is only marginally associated with the institution and has a limited public profile. The same cannot be said of tenured faculty members or high-ranking administrators. Whether promotions are included in the exemptions is of vital importance to religious institutions of higher education when making the decision of whether to grant, or to deny, tenure to a faculty member.

Title VII should not require a religious college or university to grant tenure to a non-tenured faculty member without regard to his religion. That is simply consistent with the intent of the exemptions. The ministerial exception¹⁵³ to Title VII would cover certain of those positions, but a majority of faculty positions at religious institutions of higher education would not fall under that exception. Therefore, tenure decisions should be included within the exemptions, because tenure decisions and promotions generally are considered to be appointments to a new position rather than promotions.

c. Exemption Available to All Employers: The Bona Fide Occupational Qualification Defense of Section 703(e)(1)

Title VII also offers all employers an opportunity to avoid liability under the Act by proving that the position, by its very character, requires discrimination. The defense is set forth in section 703(e)(1).¹⁵⁴ That section provides the following:

Notwithstanding any other provision of this subchapter, [] 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. . . .¹⁵⁵

On its face, section 703(e)(1), or the bona fide occupational qualification ("BFOQ") defense as it is commonly known, provides no special protection for a religious educational institution per se. Nevertheless, it can provide protection from liability under Title VII for religious institutions of higher education in the limited circumstances available to all employers under the act. The defense is likely, similar to the exemptions specific to religious educational institutions, to protect the institution

153. See *infra* Part III for a detailed discussion of the ministerial exception.

154. 42 U.S.C. § 2000e-2(e)(1) (2000).

155. *Id.*

only from decisions on the basis of religion.¹⁵⁶ The BFOQ defense becomes particularly significant when sections 702(a) and 703(e)(2) are either inapplicable or, for some reason, not invoked.¹⁵⁷

The BFOQ defense is quite limited in its scope and application.¹⁵⁸ Unlike sections 702(a) and 703(e)(2)¹⁵⁹, the BFOQ defense clearly places the burden on the employer to establish its application and defend against a claim of pretext.¹⁶⁰ Therefore, the BFOQ defense is seldom relied upon by religious educational institutions as the sole basis to avoid liability. Notwithstanding its paucity of use by religious institutions of higher education, courts have identified several issues involved that should be of special note to such employers.

Any successful BFOQ defense must show that the asserted qualification is “reasonably necessary to the normal operation of [the] particular business or enterprise” in question.¹⁶¹ This requirement is judged by several criteria, including whether employees with the same qualification fill similar positions to the one in question; whether the BFOQ defense itself is applied consistently in a nondiscriminatory manner; and whether the qualification is applied to an employment decision covered in the section.¹⁶² Furthermore, to qualify as a BFOQ, the discriminatory qualification must “relate to the essence or to the central mission of the em-

156. Section 703(e)(1) applies as a defense to sex and national origin discrimination as well (though not to race discrimination). *Id.* It is unlikely that a religious institution could meet the requirements of the defense on those bases. At any rate, any such invocation would presumably have little to do with protecting or furthering the institution’s religious character, and is therefore beyond the scope of this article.

157. *See, e.g.,* *Pime v. Loyola Univ. of Chi.*, 585 F. Supp. 435, 441-43 (E.D. Ill. 1984), *aff’d* 803 F.2d 351 (7th Cir. 1986) (finding for defendant, a Jesuit institution, on the basis of BFOQ, but rejecting the applicability of section 703(e)(2)).

158. *See* *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977).

159. *See supra* notes 120-135 and accompanying text.

160. *See* *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985). *See also* Susan J. Curry, et. al., Case Comment, *Pime v. Loyola Univ. of Chicago: The Seventh Circuit Extends the BFOQ Defense*, 14 J.C. & U.L. 607, 610 (1988) (“[C]ourts place upon the employer the burden to show entitlement to the BFOQ defense.”).

161. 42 U.S.C. § 2000e-2(e)(1) (2000).

162. Curry, *supra* note 160, at 610-611. Curry argues that the third of these considerations dictates that the BFOQ defense applies only to employment decisions regarding hiring, discharge, or “employment opportunities.” *Id.* This reading of the statute is followed in *EEOC v. Fremont Christian School*, 781 F.2d 1362 (9th Cir. 1986). There the court found that the BFOQ defense could not apply to a decision to discriminate on the basis of religion in the provision of health insurance benefits. *Id.* at 1367.

ployer's business."¹⁶³ That mission, though, cannot be determined by simple reference to customers' or colleagues' preferences.¹⁶⁴

These verbal formulae add little to the understanding of the true scope and function of the defense. How then would a religious institution of higher education go about invoking a successful BFOQ defense? The Seventh Circuit Court of Appeals directly addressed the application of the BFOQ defense in that context. In *Pime v. Loyola University of Chicago*,¹⁶⁵ a panel of the circuit court affirmed a district court judgment finding that Loyola University asserted a valid BFOQ by reserving three tenure-track faculty positions in its philosophy department to be filled by members of the Catholic Jesuit order, the founding order of the University. The Jesuit requirement was upheld as a BFOQ for the purpose of maintaining a significant Jesuit presence in the department "so that students would occasionally encounter a Jesuit."¹⁶⁶ The court, however, failed to offer any analysis of the BFOQ defense. Instead, the majority simply quoted the "reasonably necessary" language of the statute. Moreover, the court determined that reserving three open positions to retain a ratio of seven Jesuit to twenty-four non-Jesuit tenured faculty in the department was a reasonable method for maintaining a Jesuit presence.¹⁶⁷

Unfortunately, because *Pime* generally lacks serious substantive analysis, the opinion offers little practical guidance. First, the court allowed the success of the BFOQ defense to hang on the declaration of the school that a Jesuit presence in the philosophy department was important, rather than on any objective measure of the necessity of that presence to the normal operation of Loyola University.¹⁶⁸ In that vein, the EEOC maintains that *Pime* is no longer valid because it fails to consider whether the claimed BFOQ requirement was the essence of or central to Loyola's mission.¹⁶⁹ These criticisms, however, are specific to the *Pime* opinion and do not undermine the ability of religious institutions of higher education to invoke the BFOQ defense successfully. Although the

163. *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 203 (1991) (internal quotation marks and citations omitted).

164. *See, e.g., Vigars v. Valley Christian Ctr. of Dublin, Cal.*, 805 F. Supp. 802, 808 n.4 (N.D. Cal. 1992).

165. 803 F.2d 351 (7th Cir. 1986).

166. *Id.* at 354.

167. *Id.*

168. *Id.* ("It is true that it has not been shown that Jesuit training is a superior academic qualification, applying objective criteria, to teach the particular courses.")

169. *See EEOC v. Kamehameha Sch./Bishop Estate*, 990 F.2d 458, 466 (9th Cir. 1993). The centrality or essence test was announced in *Johnson Controls*, 499 U.S. at 203, six years after *Pime* was decided. *See supra* note 163 and accompanying text.

centrality and essence were not directly considered by the *Pime* court, one could easily imagine a court finding that the mission of Loyola University is actually to provide an education grounded in the Jesuit tradition. Maintaining a significant Jesuit presence on campus could very well be central to that mission, especially in departments like philosophy, which are marked by contemplation about the human experience and the nature of humankind.

The most piercing criticism of *Pime*, though, comes directly from the concurring opinion of Judge Posner. He contends that the majority does a disservice to Loyola University and employment discrimination law generally by relying on the BFOQ defense to dispose of the case.¹⁷⁰ Instead, he explained that the case should have been dismissed for the plaintiff's failure to present a *prima facie* case of employment discrimination.¹⁷¹ Because the Jesuits are an order within the Catholic Church, being a Jesuit is not formally a religious criterion, according to Judge Posner.¹⁷² The requirement discriminated equally against non-Jesuit Catholics and non-Catholics.¹⁷³ While initially employers might have been tempted to applaud this expansion of the BFOQ defense, there is a danger. It actually exposes defendants to more intrusive litigation. For example, if a religious college reserves certain positions for members of a particular religious order, then that college must defend against a claim of religious discrimination by proving that the requirement is reasonably necessary to its normal operation.¹⁷⁴ On the other hand, if the case had been dismissed by summary judgment because the plaintiff had failed to prove a *prima facie* case, then the institution would not have been required to defend the merits of reserving religious-based slots.¹⁷⁵

Subsequent cases and commentary help to clarify what type of evidence a religious institution of higher education must present in order to be protected by the BFOQ defense. Generally, the institution must show that the religion or religious beliefs of the employee are intimately tied to

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

171. *Id.* at 354.

172. *Id.* at 355.

173. *Id.* at 354 ("It is hard to believe that the philosophy department of the University of Chicago — or of Brandeis University — would be guilty of a *prima facie* violation of Title VII if it reserved a few slots for Jesuits, believing that the Jesuit point of view on philosophy was one to which its students should be exposed; and Loyola should have the same right."). See also Curry, *supra* note 160, at 612 (arguing that either the case was decided wrongly on BFOQ grounds or the opinion must be interpreted as expanding the BFOQ defense to apply not only to religion but also to religious order).

174. This assumes, of course, that the institution would not qualify for exemption under sections 702(a) or 703(e)(2).

175. Curry, *supra* note 160, at 618-19.

the responsibilities of the position. Those qualifications, in turn, must be reasonably necessary to the successful implementation of the institutional mission and goals.¹⁷⁶ Specifically, for a religious requirement to be accepted as a BFOQ, more is required of a religious institution of higher education than simply relying on the fact that the faculty members are expected to serve as models of exemplary religious lives. Not only must the faculty members be expected to model moral behavior and religious orthodoxy, but they must also have a role in monitoring the religious practices or religious education of their students.¹⁷⁷

This restrictive interpretation of the BFOQ defense has enjoyed support in case law. For example, a religion requirement for a private religious school's religion teachers has been accepted as a BFOQ, but the same requirement for the school's teachers of "secular" subjects was not.¹⁷⁸ Similarly, a religious school that fired its librarian for engaging in pre-marital sexual intercourse — evidenced by her out-of-wedlock pregnancy — was denied summary judgment on its BFOQ defense. The school contended that the employee's position required she serve as a "role model,"¹⁷⁹ making moral and chaste behavior a BFOQ.¹⁸⁰ The court stated that the issue would have to be litigated to determine "how central [plaintiff's] moral life was to her job as librarian, whether or not she was truly expected to act as a role model in the [legal] sense, and what impact her pregnancy truly had on her ability to perform either of those functions."¹⁸¹

The narrow BFOQ defense is of limited utility to religious institutions of higher education. They must be able to show that religion is intimately tied to an employee's position in the institution's overall mission. Most positions for which the BFOQ defense might apply would be

176. See Araujo, *supra* note 18, at 733-34 (listing the Congressional requirements of a successful BFOQ defense).

177. See Ralph D. Mawdsley, *Are Non-Church Controlled Educational Institutions Still Entitled to Title VII Religious Exemptions?*, 87 EDUC. L. REP. 1, 12 (1994) ("If a BFOQ is to be available as a defense for employment of faculty under Title VII, [a recent case] requires not only that faculty engage in a prescribed course of conduct, but also that they be the active pedagogical conduits of that conduct to students.")

178. EEOC v. Kamehameha Sch./Bishop Estate, 990 F.2d 458, 466 (9th Cir. 1993).

179. The Eighth Circuit Court of Appeals, in *Chambers v. Omaha Girls Club, Inc.*, 834 F.2d 697 (8th Cir. 1987), held that, "the role model rule qualifies as a [BFOQ]." *Id.* at 705. Several programs involved activities aimed at pregnancy prevention and the plaintiff, a single woman, was fired by the club when she informed them of her pregnancy. *Id.* at 699. Based on the particular circumstances of the case, the court concluded that "the role model rule is reasonably necessary to the club's operations." *Id.* at 705.

180. *Vigars v. Valley Christian Ctr., of Dublin, Cal.*, 805 F.2d 802, 808 (N.D. Cal 1992).

181. *Id.* at 809.

just as likely to fall under one of the more specific exemptions found in sections 702(a) and 703(e)(2). Nevertheless, the defense allowed Loyola University to maintain its Jesuit presence in its philosophy department,¹⁸² permitted Loyola to protect its unique character as a Jesuit institution, and preserved a small part of the overall diversity of higher education.

III. CONSTITUTIONAL CONSIDERATIONS

Courts¹⁸³ and commentators¹⁸⁴ have long struggled with the constitutional implications of applying Title VII to the religious sector with re-

182. See *Pime v. Loyola Univ. of Chi.*, 803 F.2d 351, 354 (7th Cir. 1986).

183. See *generally* Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 330, 349 (1987) (dealing with First Amendment implications of Title VII as applied to nonprofit activities of religious organizations, though not passing on the implications on for-profit activities); *Alicea-Hernandez v. Catholic Bishop of Chi.*, 320 F.3d 698, 702-03 (7th Cir. 2003) (finding that the First Amendment prohibits the court from deciding national origin and gender discrimination claims by Hispanic Communications Manager for the Archdiocese of Chicago); *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 651, 658-59 (10th Cir. 2002) (finding that the First Amendment prohibits the court from being involved in a sexual harassment claim by a gay minister against the church); *EEOC v. Roman Catholic Diocese of Raleigh, N.C.*, 213 F.3d 795, 797, 802 (4th Cir. 2000) (finding that the Free Exercise Clause of the First Amendment bars the court from considering the sex discrimination claim of a female music teacher against a church); *Gellington v. Christian Methodist Episcopal Church*, 203 F.3d 1299, 1304 (11th Cir. 2000) (concluding that the First Amendment prohibits “a church from being sued under Title VII by its clergy.”); *Combs v. Central Tex. Annual Conference of the United Methodist Church*, 173 F.3d 343, 350 (5th Cir. 1999) (“[W]e cannot conceive how the federal judiciary could determine whether an employment decision concerning a minister was based on legitimate or illegitimate grounds without inserting ourselves into a realm where the Constitution forbids us to tread. . . .”); *Bollard v. Calif. Soc’y of Jesus*, 196 F.3d 940, 948, 950 (9th Cir. 1999) (finding that the First Amendment does not prohibit a court from hearing sexual harassment claims from a ministerial employee); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 465, 467 (D.C. Cir. 1996) (finding that the First Amendment prohibits Title VII sex discrimination claims and EEOC’s investigation of that claim involving denial of tenure to canon law professor at Catholic University); *Young v. N. Ill. Conference of United Methodist Church*, 21 F.3d 184, 187 (7th Cir. 1994) (noting that civil courts are not competent to resolve “religious controversies”); *Scharon v. St. Luke’s Episcopal Presbyterian Hosp.*, 929 F.2d 360, 361 (8th Cir. 1991) (dismissing on First Amendment grounds ADEA and Title VII claims filed by hospital chaplain); *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1167 (4th Cir. 1985) (noting that courts are generally not permitted to review ecclesiastical decisions); *EEOC v. S.W. Baptist Theological Seminary*, 651 F.2d 277, 284-85 (5th Cir. 1985) (holding that First Amendment exempts seminary from EEOC filing requirements regarding particular ministerial employees); *EEOC v. Miss. Coll.*, 626 F.2d 477, 485 (5th Cir. 1980) (holding that the First Amendment does not exempt a sectarian college from coverage under Title VII with regard to employees performing secular functions); *McClure v. Salvation Army*, 460 F.2d 553, 560 (5th Cir. 1972) (“We find that the application of the provision of Title VII to the employment relationship existing between . . . a church and its minister would result in an encroachment by the State into an area of religious freedom which it is forbidden to enter by the principles of the Free Exercise Clause of the First Amendment.”).

gard to conduct or institutions that fall outside the statutory exemptions. The First Amendment of the United States Constitution provides, in relevant part, that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”¹⁸⁵ The Establishment Clause and the Free Exercise Clause protect individuals and society from important, but distinct, aspects of governmental encroachment on religious liberty. These concerns arise when courts apply Title VII to constrain religious institutions from making unencumbered employment decisions. The Establishment Clause prohibits the government from becoming excessively entangled with a religious institution and its administration, as may happen in the case of a Title VII employment discrimination claim or investigation. The Free Exercise Clause protects religious individuals and, relevant to this discussion, institutions from certain governmentally imposed burdens on the exercise of that religion. This may occur when the government constrains a religious organization from making an unquestioned decision about who may act on its behalf as an employee. Consequently, under certain circumstances, these constitutional protections may relieve religious institutions of higher education from the dictates of Title VII.

A. *The Ministerial Exception*

Courts originally considered the constitutionality of Title VII as applied to religious institutions in the context of the traditional church/clergy employment relationship.¹⁸⁶ Not long thereafter, however, that inquiry expanded to consider employment relationships at other re-

184. See, e.g., Bruce N. Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 70 COLUM. L. REV. 1514 (1979); Brant, *supra* note 120; 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 (1981); Ira C. Lupu, *Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination*, 67 B.U. L. REV. 391 (1987); Mawdsley, *supra* note 139; Jane Rutherford, *Equality as the Primary Constitutional Value: The Case for Applying Employment Discrimination Laws to Religion*, 81 CORNELL L. REV. 1049 (1996); Laura L. Coon, Note, *Employment Discrimination by Religious Institutions: Limiting the Sanctuary of the Constitutional Ministerial Exception to Religion-Based Employment Decisions*, 54 VAND. L. REV. 481 (2001); Mark F. Kohler, Comment, *Equal Employment or Excessive Entanglement? The Application of Employment Discrimination Statutes to Religiously Affiliated Organizations*, 18 CONN. L. REV. 581 (1986); Shawna Meyer Eikenberry, Note, *Thou Shalt Not Sue the Church: Denying Court Access to Ministerial Employees*, 74 IND. L.J. 269 (1998).

185. U.S. CONST., amend. I.

186. See *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972).

ligious institutions such as colleges and universities.¹⁸⁷ The principal known as the “ministerial exception” to Title VII arose out of this inquiry. The ministerial exception relies on the premise that application of Title VII to the employment relationship between a church and its ministers “result[s] in an encroachment by the State into an area of religious freedom which it is forbidden to enter by the principles of the free exercise clause of the First Amendment.”¹⁸⁸ The ministerial exception also protects the religious employer from governmental entanglement in its administration, which would violate the Establishment Clause.¹⁸⁹ Therefore, courts assume that Congress did not intend Title VII and similar statutes to cover the church/minister relationship.¹⁹⁰ “[T]he ministerial exception is concerned with results, not motives”¹⁹¹; hence, courts do not question whether the religious employer’s announced motive for an employment decision is pretextual. Indeed, a religious institution need not announce any motive for its decision. Courts simply analyze whether a covered relationship is involved. If it is, the court cannot, consistent with the First Amendment, regulate that relationship.

The ministerial exception was first formulated and applied in *McClure v. Salvation Army*,¹⁹² which involved a dispute between the Salvation Army and one of its commissioned officers. An ordained minister, Billie McClure, was discharged from the Salvation Army after several years of training and service.¹⁹³ McClure claimed that the Salvation Army had discriminated against her in the terms and conditions of her employment on the basis of her sex and discharged her because of her complaints to her superiors about the alleged discrimination.¹⁹⁴ The undisputed findings of fact of the district court determined that “[t]he Sal-

187. See *EEOC v. Miss. Coll.*, 626 F.2d 477 (5th Cir. 1980).

188. *McClure*, 460 F.2d at 560.

189. See, e.g., *Gellington v. Christian Methodist Episcopal Church*, 203 F.3d 1299, 1304 (11th Cir. 2000) (“[A]pplying Title VII to the employment relationship between a church and its clergy would involve excessive government entanglement with religion as prohibited by the Establishment Clause of the First Amendment.”) (internal quotation marks and citations omitted); *Scharon v. St. Luke’s Episcopal Presbyterian Hosp.*, 929 F.2d 360, 363 (8th Cir. 1991) (holding that the plaintiff’s Title VII claim is precluded because the resolution of her claim would require excessive entanglement in religious affairs in violation of the First Amendment).

190. *McClure*, 460 F.2d at 560-61 (“We therefore hold that Congress did not intend, through the nonspecific wording of the applicable provisions of Title VII, to regulate the employment relationship between church and minister.”)

191. Charles J. Russo, *The Camel’s Nose in the Tent: Judicial Intervention in Tenure Disputes at Catholic Universities*, 117 EDUC. L. REP. 813, 823 (1997).

192. 460 F.2d at 560.

193. *Id.* at 555.

194. *Id.*

vation Army is a church and Mrs. Billie B. McClure is one of its ordained ministers. . . .”¹⁹⁵

The court set out to determine “whether Title VII . . . applies to the employment relationship between a church and its ministers” and, if it does, whether that is constitutional.¹⁹⁶ In dismissing the case, the court relied on a line of cases declaring that civil courts had no place resolving disputes involving church property; the so-called church autonomy line of cases.¹⁹⁷ Similarly, the *McClure* court held that it could not constitutionally decide the case before it. To avoid passing on the constitutionality of Title VII as applied to the Salvation Army, the court determined that Congress did not intend to cover the church/minister relationship.¹⁹⁸ This holding exempted the Salvation Army from having its employment decisions regarding its “ministers” reviewed, irrespective of the basis for that decision. In so doing, the court created the ministerial exception.

Though the *McClure* court was careful to limit its holding to the facts of that case, it has had a much broader impact, primarily in the way the opinion defined certain terms. Specifically, the ministerial exception’s scope is largely determined by what religious institutions qualify as “churches” and who, among their employees, qualify as “ministers.”

1. WHAT IS A CHURCH?

Courts have interpreted the term *church* to include a diverse array of religious institutions, not only the traditional notion of a group of individuals that regularly gather at a central location.¹⁹⁹ In fact, religiously affiliated institutions including a hospital,²⁰⁰ a seminary,²⁰¹ a Catholic university²⁰² and a liberal arts college²⁰³ have been held to fall within the

195. *Id.* at 554

196. *Id.*

197. *See id.* at 559. For a critique that the court incorrectly relied on these cases and announced a rule based on constitutional assumptions rather than analysis, see Brant, *supra* note 120, at 293-96.

198. *McClure*, 460 F.2d at 560-61 (relying on the “cardinal principal” of statutory construction announced in Justice Brandeis’ concurring opinion in *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 348 (1936)).

199. *See EEOC v. S.W. Baptist Theological Seminary*, 651 F.2d 277, 283 (5th Cir. 1981) (“The local congregation that regularly meets in a house of worship is not the only entity covered by our use of the word ‘church.’”).

200. *See Scharon v. St. Luke’s Episcopal Presbyterian Hosp.*, 929 F.2d 360 (8th Cir. 1991).

201. *See S.W. Baptist*, 651 F.2d at 279.

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

203. *See Hartwig v. Albertus Magnus Coll.*, 93 F. Supp. 2d 200 (D. Conn. 2000). *Hartwig* involves claims pursuant to Connecticut common law. *Id.* at 202. The court found that the ministerial exception applies to state common law claims just as to Title VII. *Id.* at 209-10 n.12 (“[T]he Free

ministerial exception. Not every religiously affiliated institution, however, is a church for purposes of the exception. Similar to sections 702(a) and 703(e)(2), the institution must be somehow church-affiliated and must be of “substantial religious character.”²⁰⁴ Courts focus on three factors in determining whether a religiously affiliated institution is of substantial religious character and, thus, a church for purposes of the ministerial exception. Those factors are: control by a church (in the traditional sense) or some similar religious institution;²⁰⁵ significant financial support from the sponsoring church²⁰⁶; and the purpose to serve a central function of the sponsoring church.²⁰⁷ Therefore, some religiously affiliated institutions, though connected to a church or motivated by a religious commitment, are too loosely connected to qualify as “churches” for purposes of the ministerial exception.²⁰⁸

Exercise Clause analysis discussed herein is applicable to common law causes of action as well as Title VII.”).

204. *Scharon*, 929 F.2d at 362 (quoting *Lemon v. Kurzman*, 403 U.S. 602, 616 (1971)). *See also Hartwig*, 93 F. Supp. 2d at 207 (“The [prior ministerial exception] decisions teach that the resolution of this question depends upon an examination of . . . the nature and extent of the religious affiliation of the institution or business . . .”).

205. *See, e.g., Scharon*, 929 F.2d at 362 (noting that the board of directors of the hospital consists of church representatives and their nominees and that the Articles of Association may not be amended without church authorities’ approval); *S.W. Baptist*, 651 F.2d at 283 (finding that the seminary in question was wholly controlled by the Southern Baptist Convention, a voluntary coalition of Southern Baptist churches); *Hartwig*, 93 F. Supp. 2d at 211 (finding the liberal arts college “closely affiliated with the Roman Catholic Church”); *EEOC v. Catholic Univ. of Am.*, 856 F. Supp. 1, 10 (D.D.C. 1994) (noting that the “Vatican retains the ultimate authority over the Canon Law Department” at Catholic University), *aff’d* 83 F.3d 455 (D.C. Cir 1996). *But see EEOC v. Miss. Coll.*, 626 F.2d 477, 485 (5th Cir. 1980) (holding that a college owned and operated by the Mississippi Baptist Convention is not a church under the ministerial exception).

206. *See, e.g., S.W. Baptist*, 651 F.2d at 283 (“[T]he Seminary is principally supported . . . by the Convention.”).

207. *See, e.g., Catholic Univ.*, 83 F.3d at 464 (finding that Catholic University’s ecclesiastical departments serve the purpose of teaching the doctrines and disciplines of the Catholic Church); *S.W. Baptist*, 651 F.2d at 283 (noting that the “avowed purpose” of the seminary is to train Baptist ministers).

208. Ralph Mawdsley, a former administrator at Liberty University, describes this analysis in a different, but related, way. He suggests that courts evaluate an institution’s “religiosity” along a continuum of decreasing relatedness to a traditional church. Mawdsley, *supra* note 61, at 30. The closer the relationship, the more likely the institution will qualify for constitutional protection under the ministerial exception. *Id.* He identifies three distinct points on the continuum, ranging from the most likely to least likely to receive constitutional protection. *Id.* He calls the three types of institutions that correspond to those points church controlled organizations, church affiliated organizations, and non-church controlled or affiliated (though still religiously motivated) organizations. *Id.*

2. WHO IS A MINISTER?

Institutions that qualify as churches under the ministerial exception employ many individuals fulfilling varying tasks.²⁰⁹ Before determining if the ministerial exception applies to a particular employment relationship, it is necessary to define what qualifies an employee as a minister.²¹⁰ The answer is not always logically apparent. For example, ordination was relevant to the fate of Billie McClure, who, as a commissioned officer, was an ordained clergy member of the Salvation Army.²¹¹ Notwithstanding that, ordination is neither necessary²¹² nor, by itself, sufficient²¹³ to qualify an employee as a minister.

The definition of a minister instead focuses largely on the functional role of the employee within the organization.²¹⁴ Only those positions that involve “activities traditionally considered ecclesiastical or religious”²¹⁵ may be considered ministerial. Thus, courts look to whether “the employee’s primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship.”²¹⁶ Courts often focus on

209. Indeed, in order to even meet the definition of *employer* under Title VII, an organization must have 15 or more employees for a sustained period. *See supra* note 24.

210. As an initial matter, the use of the term *minister* might seem to suggest it is only applicable to certain Protestant denominations and the other relatively few religious sects that use the term *minister* to describe their clergy. That, however, is certainly not the case. *See Smith v. Raleigh Dist. of the N.C. Conference of the United Methodist Church*, 63 F. Supp. 2d 694, 704 n.7 (E.D.N.C. 1999) (“The court does not intend, by its adoption of the terminology ‘church-minister’ exception, to suggest that this line of cases applies only to Protestant institutions and their clergy. The same principles are equally applicable to other religious entities and their clergy, including rabbis, priests, and imams.”).

211. *See McClure v. Salvation Army*, 460 F.2d 553, 555 (5th Cir. 1972).

212. *See Alicea-Hernandez v. Catholic Bishop of Chi.*, 320 F.3d 698, 703 (7th Cir. 2003) (“In determining whether an employee is considered a minister for the purposes of applying this exception, we do not look to ordination but instead to the function of the position.”); *Catholic Univ.*, 83 F.3d at 463-65 (finding that a non-ordained Catholic nun and professor of canon law was a minister); *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1168 (4th Cir. 1985) (“The fact that an associate in pastoral care can never be an ordained minister in her church is . . . immaterial [to the ministerial exception].”).

213. *EEOC v. S.W. Baptist Theological Seminary*, 651 F.2d 277, 284 (5th Cir. 1981) (finding that ordained Baptist clergy working in the physical plant of seminary do not fall within the ministerial exception).

214. *See EEOC v. Roman Catholic Diocese*, 213 F.3d 795, 801 (4th Cir. 2000) (“Our inquiry thus focuses on ‘the function of the position’ at issue and not on categorical notions of who is or is not a ‘minister.’”).

215. *See S.W. Baptist*, 651 F.2d at 284.

216. *Rayburn*, 772 F.2d at 1169. *See also EEOC v. Pac. Press Publ’g Ass’n*, 676 F.2d 1272, 1277 (9th Cir. 1982) (finding that an editorial secretary in a publishing house run by the General Conference of Seventh-Day Adventists was not a minister because she served no religious function).

the employee's relationship to the church and its members or followers. If that relationship renders the employee an "intermediary" between the two, she qualifies as a minister.²¹⁷ In particular, courts are deferential to decisions regarding who speaks on behalf of the church.²¹⁸ On the other hand, an employee of a religious organization who attends to logistical support, clerical administration, physical plant maintenance, and other non-ecclesiastical or religious duties does not qualify.²¹⁹ Consequently, courts carefully scrutinize employees' functions and duties – those they actually performed – in determining whether they are ministers.

3. HOW DOES THE MINISTERIAL EXCEPTION AFFECT RELIGIOUS INSTITUTIONS OF HIGHER EDUCATION?

Given that the terms *church* and *minister* encompass numerous employment relationships, religious institutions of higher education may find in the ministerial exception a limited protection from liability. Not every religious college or university, however, will qualify. Institutions with close doctrinal and financial ties to a church or other clearly religious organization, with behavior and conduct expectations consistent with the belief of that church or organization and with religious studies integrated into the educational experience more likely fall within the definitions required for the exception to apply. In particular, courts generally consider religious colleges and universities offering secular courses and degrees less deserving of exception under this standard than seminaries, schools of divinity, bible schools, and elementary and secondary parochial or sectarian schools.²²⁰ The latter evoke the inference, whether or not deserved, of being more pervasively religious and more like a church in the formal sense.

Examples of this phenomenon are few, but the relevant cases clearly establish the pattern. A pervasively religious, sectarian liberal

217. See *S.W. Baptist*, 651 F.2d at 283 ("In this case, the faculty are intermediaries between the [Southern Baptist] Convention and the future ministers of many local Baptist churches."); *EEOC v. Miss. Coll.*, 626 F.2d 477, 485 (5th Cir. 1980) (finding the ministerial exception inapplicable in part because "[t]he faculty members are not intermediaries between a church and its congregation").

218. See *Alicea-Hernandez v. Catholic Bishop of Chi.*, 320 F.3d 698, 704 (7th Cir. 2003) (involving a position akin to "press secretary" for the Catholic Archdiocese of Chicago); *Roman Catholic Diocese*, 213 F.3d at 805 (finding this principle no less applicable to a music minister than any other type of minister simply because "the voice that speaks is the voice of song"); *Minker v. Balt. Annual Conference of the United Methodist Church*, 894 F.2d 1354, 1356 (D.C. Cir. 1990) ("[D]etermination of whose voice speaks for the church is *per se* a religious matter.").

219. See, e.g., *Weissman v. Congregation Shaare Emeth*, 38 F.3d 1038, 1040 (8th Cir. 1994); *Pacific Press*, 676 F.2d at 1277; *S.W. Baptist*, 651 F.2d at 284.

220. See *SANDIN*, *supra* note 6, at 248; *Lupu*, *supra* note 184, at 430, n.137.

arts college was held not to be a church, though owned and operated by a religious denomination, in *EEOC v. Mississippi College*²²¹ However, in *EEOC v. Southwestern Baptist Theological Seminary*,²²² the court concluded that a seminary, owned by a related denomination, was a church.²²³ Likewise, *EEOC v. Catholic University of America*,²²⁴ established the same for the ecclesiastical departments of the District of Columbia's Catholic University, which are significantly under the control of the Vatican.²²⁵ Finally, in a more recent case, *Hartwig v. Albertus Magnus College*,²²⁶ the court held that Albertus Magnus College, a liberal arts college in New Haven, Connecticut, was "closely affiliated with the Roman Catholic Church" and, thus, qualified for the exception.²²⁷

Not every employee of a religious institution of higher education that passes the "church" inquiry qualifies as a minister. The employee must be performing a suitable ministerial function. Probably the easiest application of the ministerial exception involves the campus minister or chaplain, whose main role is to be the ecclesiastical intermediary between the school community and the church.²²⁸ For teaching faculty members, however, this ministerial function requirement means that the faculty member must be engaged in "instruct[ing] students in the whole of religious doctrine."²²⁹ Therefore, seminary professorships, like those involved in *Southwestern Baptist*,²³⁰ and other religious education positions, like the canon law position in *Catholic University*,²³¹ are particu-

221. 626 F.2d 478, 485 (5th Cir. 1980). *But see* *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455 (D.C. Cir. 1996) (finding the ministerial exception applicable to Catholic University, an indisputably sectarian institution, like Mississippi College). Nevertheless, Catholic University, like Mississippi College, offers many courses of study in addition to religion. The difference in treatment between these two cases certainly reflects the function performed by the particular employees at issue rather than the character of the institution itself. *See infra* text accompanying note 229.

222. 651 F.2d 277 (5th Cir. 1981).

223. *Id.* at 283.

224. 83 F.3d 455 (D.C. Cir. 1996).

225. *Id.* at 464.

226. 93 F. Supp. 2d 200 (D. Conn. 2000).

227. *Id.* at 211.

228. *See* *Schmoll v. Chapman Univ.*, 70 Cal. App. 4th 1434, 1436 (1999) (holding that the ministerial exception applied to campus minister's claims of constructive discharge and sex discrimination pursuant to California's Fair Employment and Housing Act); *S.W. Baptist*, 651 F.2d at 284-85.

229. *EEOC v. Miss. Coll.*, 626 F.2d 478, 485 (5th Cir. 1980); *see also* *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 463-64 (D.C. Cir. 1996) (noting that the stated mission of ministers within the ecclesiastical faculty of Catholic University "is to foster and teach sacred doctrine and the disciplines related to it") (internal quotation marks and citation omitted); *EEOC v. S.W. Baptist Theological Seminary*, 651 F.2d 277, 283 (5th Cir. 1981).

230. *S.W. Baptist*, 651 F.2d at 283.

231. *Catholic Univ.*, 83 F.3d at 465.

larly suited for treatment as ministerial positions. By contrast, professors who teach traditionally secular, non-religious subjects at religious institutions of higher education fall outside the “minister” definition. This holds true even if they are expected, by contractual obligation or otherwise, to model exemplary moral and religious personal and professional lives.²³² Such an ancillary religious function is insufficient, by itself, to render the position ministerial. Nevertheless, a court will consider a lifestyle expectation along with other factors to determine the ministerial function of the position.²³³

Other teaching positions are arguably covered by the exception, but as of yet no court has definitively decided a case involving such positions. Most notably among these are religion professors at sectarian institutions. For instance, the court in *Hartwig* refused to determine as a matter of law whether Hartwig, a former priest who taught in the Department of Religious Studies and Philosophy at Albertus Magnus College, held a ministerial position.²³⁴ The court stated that it required additional evidence regarding “his actual teaching and non-teaching functions,” including whether “he taught Roman Catholic theology, canon law, or similar courses” and whether he “led students in prayer or provided them with spiritual counseling.”²³⁵ In the end, these positions seem to fall somewhere between the seminary professors at issue in *Southwest Baptist* and the educational psychology professor at issue in *Mississippi College*, and require a fact-intensive analysis, much as *Hartwig* indicated.

Non-teaching positions are likewise evaluated by function. Support staff, clerical workers, and administrators involved with non-academic, non-religious departments are not ministers.²³⁶ Such employees perform no religious function and, therefore, the institution receives no constitutional protection from Title VII for decisions involving those employees. Academic administrators and other employees with religious responsibilities, however, may fall within the ministerial exception. The *Southwestern Baptist* court found just that with regard to “[t]he President and Executive Vice President of the Seminary, the chaplain, the deans of

232. See *Miss. Coll.*, 626 F.2d at 485 (“That faculty members are expected to serve as exemplars of practicing Christians does not serve to make the terms and conditions of their employment matters of church administration and thus purely of ecclesiastical concern.”).

233. See *supra* notes 214-219 and accompanying text. See also *S.W. Baptist*, 651 F.2d at 283 (noting that the faculty at the seminary is required to teach by example, but that the modeling expectation alone would not be controlling) (internal citations omitted).

234. *Hartwig v. Albertus Magnus Coll.*, 93 F. Supp. 2d 200, 211-12 (D. Conn. 2000).

235. *Id.*

236. See *S.W. Baptist*, 651 F.2d at 285.

men and women, the academic deans and those other personnel who equate to or supervise faculty” at the seminary.²³⁷

In sum, the ministerial exception does cover certain religiously-oriented positions at institutions with strong ties to their sponsoring church or denomination. For those few positions that the exception covers, its impact is significant. The institution may make decisions regarding hiring and firing, as well as terms and conditions of employment, based on the race, sex, and national origin,²³⁸ as well as religion, of the employee.²³⁹ Because the ministerial exception is a blanket exception to Title VII, courts will not probe the reason for an employment decision. Furthermore, the ministerial exception has been applied to exempt an institution, for those qualifying positions, from Equal Employment Opportunity Commission reporting requirements.²⁴⁰ Taking all of this into account, the exception provides an institution with significant autonomy in filling and administering the covered positions, as well as freedom from potentially burdensome government regulation.

B. *The Continuing Validity of the Ministerial Exception*

Commentators have pounced on the ministerial exception. Some criticize the McClure court for employing sloppy constitutional analysis.²⁴¹ Others offer alternative constructions of how a legitimate ministerial exception should work.²⁴² Still others denounce the exception as unconstitutional and inequitable.²⁴³ While the Supreme Court has never directly addressed the validity of the ministerial exception,²⁴⁴ relatively

237. *Id.* at 284-85.

238. Religious institutions of higher education have no reason to discriminate on any basis other than religion if their goal is to protect their religious nature, which in turn preserves institutional diversity. Therefore, the ministerial exception merely provides a broad grant of discretion to these institutions in that regard. The ministerial exception, as it relates to the subject of this paper, only protects those decisions that, while based on religion, also correlate with another protected category (e.g., no women priests).

239. *See contra* 42 U.S.C. §§ 2000e-1-2000e-2(e)(2) (2000) (exempting only decisions based on religion); *see supra* Part II.A.3.a.

240. *See S.W. Baptist*, 651 F.2d at 287.

241. *See, e.g., Brant, supra* note 120, at 292-94; Lupu, *supra* note 184, at 396-97.

242. *See, e.g., Bagni, supra* note 184; Laycock, *supra* note 184; Lupu, *supra* note 184; Kohler, *supra* note 184.

243. Rutherford, *supra* note 184 at 1067.

244. The Supreme Court refused to review cases in which the ministerial exception was unambiguously presented. *See Young v. N. Ill. Conference of United Methodist Church*, 513 U.S. 929 (1994) (denying certiorari to *Young v. N. Ill. Conf. of United Methodist Church*, 21 F.3d 184 (7th Cir. 1994)); *S.W. Baptist Theological Seminary v. EEOC*, 456 U.S. 905 (1982) (denying certiorari to *EEOC v. S.W. Baptist Theological Seminary*, 651 F.2d 277 (5th Cir. 1981)).

recent developments in Supreme Court reasoning both under the Establishment Clause and the Free Exercise Clause for a time raised legitimate questions regarding the continuing validity of the ministerial exception. As discussed below, however, the lower federal courts have largely rebuffed these concerns and the ministerial exception seems fairly unsailable for the time being.

Establishment Clause concerns have traditionally been of secondary importance to the free exercise concerns when defining the ministerial exception.²⁴⁵ Nonetheless, establishment concerns have influenced the scope of the exception from its inception.²⁴⁶ The specific concern under the Establishment Clause is that the government will “involve itself too deeply in [a religious organization’s] affairs”²⁴⁷ and become entangled in the church’s role of defining acceptable religious beliefs and practices. Such entanglement concerns stem from the three-prong Establishment Clause inquiry announced by the Supreme Court in *Lemon v. Kurzman*,²⁴⁸ which prohibits an “excessive government entanglement with religion.”²⁴⁹ The Court, in *Lemon*, explained that the determination of whether there is excessive entanglement is determined by three factors: the character and purpose of the institution affected, the nature of the aid to or burden upon the religious organization’s affairs, and the resulting relationship between the state and the religious organization.²⁵⁰ This in-

245. See, e.g., *McClure v. Salvation Army*, 460 F.2d 553, 558 (5th Cir. 1972) (focusing primarily on free exercise concerns); Bagni, *supra* note 184, at 1544.

246. See e.g., *McClure*, 460 F.2d at 558 (questioning whether “the provisions of Title VII . . . violate either of the [r]eligion [c]lauses of the First Amendment”) (emphasis added).

247. *County of Allegheny v. ACLU*, 492 U.S. 573, 591 (1989).

248. 403 U.S. 602, 612-13 (1971).

249. *Id.* The three prong analysis is used to determine whether a specific government action violates the Establishment Clause. To pass constitutional muster, the action must: (1) have a secular legislative purpose; (2) have a principal or primary effect that neither advances nor inhibits religion; and, (3) not foster an excessive government entanglement with religion. *Id.*

250. *Id.* at 615. The Court of Appeals for the District of Columbia Circuit found that the Establishment Clause would be violated if the court were to look into allegation of sex discrimination leveled against the Catholic University of America by a female canon law professor who had been denied tenure. The court found entanglement problems in the following four distinct aspects of the case:

1. The evaluation of the quality of the professor’s writing and teaching by her colleagues involved whether her scholarship was in accord with church teaching. For the court to question or probe this inquiry would have impermissibly entangled it in a religious decision.
2. The Committee on Appointments and Promotion, a representative body of faculty university-wide, made its decision based in part on the lack of recommendation from the priests in the canon law department. For the court to suggest that this procedure was illegitimate would again entangle it in the religious affairs of the department.
3. Any inquiry into whether the university’s proffered explanation of nondiscriminatory

quiry has guided courts in deciding whether the ministerial exception should apply and to what extent.²⁵¹

The entanglement inquiry has repeatedly come under attack, especially in the last decade. Most notably, it is unclear whether entanglement by itself is enough to violate the Establishment Clause.²⁵² The Supreme Court, for its part, has shown growing dissatisfaction with the *Lemon* test²⁵³ and appears less and less tied to it as a doctrinal structure.²⁵⁴ In fact, the entanglement inquiry may not even exist any longer as a distinct prong of the Establishment Clause analysis, but instead as an element of the primary effect inquiry.²⁵⁵

Furthermore, the Supreme Court has come to rely more and more on the endorsement inquiry, first espoused by Justice O'Connor in *Lynch v. Donnelly*.²⁵⁶ It focuses on whether a reasonable observer, who is aware of the history and context of the situation, would perceive the government to have endorsed or disapproved of religion.²⁵⁷ While Justice O'Connor equates her endorsement test with the primary effect

reasons for the denial of tenure was pretext for discrimination and would have required the court to assign and weigh credibility among witnesses offering religious views.

4. Allowing the EEOC's investigation to proceed to fruition would have lead future tenure decisions to be made with a mind toward avoiding litigation rather than selecting the best person for the position. This would impermissibly allow a government agency to influence considerations by a religious organization.

See *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 465-67 (D.C. Cir. 1996). See also Theresa J. Fuentes, Note, *Title VII, Religious Freedom, and the Case of the Nontenured Nun*, 65 GEO. WASH. L. REV. 743, 747 (1997).

251. See, e.g., *Catholic Univ.*, 83 F.3d at 465; *Scharon v. St. Luke's Episcopal Presbyterian Hosp.*, 929 F.2d 360, 361-62 (8th Cir. 1991); *EEOC v. S.W. Baptist Theological Seminary*, 651 F.2d 277, 286 (5th Cir. 1981).

252. See, e.g., Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 674 (1980). Cf. *S.W. Baptist*, 651 F.2d at 285 n.5 (noting that the entanglement claim presents an uncomfortable fit under either of the two First Amendment religion clauses and such claims may at some point necessitate a new test).

253. Chief among the critics of *Lemon* and the entanglement inquiry is Justice Scalia, who has likened it to a horror show monster that must be repeatedly killed. *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring).

254. For example, the majority opinion in the Court's most recent Establishment Clause case, *Zelman v. Simon-Harris*, never cites *Lemon*. See *Zelman v. Simon-Harris*, 536 U.S. 639 (2002).

255. See *Agostini v. Felton*, 521 U.S. 203, 218, 232-33 (1997). See also *Zelman*, 536 U.S. at 668-69 (O'Connor, J., concurring) ("In *Agostini v. Felton*, we folded the entanglement inquiry into the primary effect inquiry. This made sense because both inquiries rely on the same evidence, and the degree of entanglement has implications for whether a statute advances or inhibits religion.") (internal citations omitted).

256. 465 U.S. 668 (1984).

257. *Id.* at 690 (O'Connor, J., concurring). See also *Zelman*, 536 U.S. at 655; *Id.* at 669 (O'Connor, J., concurring); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 119 (2001); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring in part); *Wallace v. Jaffree*, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring).

prong of *Lemon*,²⁵⁸ which in turn seems to have engulfed the entanglement inquiry,²⁵⁹ that does little to clarify the fate of a judicially-created doctrine that is based on entanglement concerns standing alone, as the ministerial exception seems to be.²⁶⁰ Nevertheless, some courts continue to analyze ministerial exception cases under the rubric of excessive entanglement, with little or no consideration of these issues.²⁶¹ Other courts, however, have recognized a shift in the Establishment Clause jurisprudence and have limited the protection that it provides to religious institutions under the entanglement inquiry.²⁶²

To a greater degree than Establishment Clause considerations, free exercise concerns illuminate much of the territory staked out by the ministerial exception. The ministerial exception was developed under the “compelling interest” test as explicated in *Wisconsin v. Yoder*²⁶³ and *Sherbert v. Verner*.²⁶⁴ That test required a government action that imposed a limit on the free exercise of religion to be based on a compelling government interest and to be narrowly tailored to meet that interest.²⁶⁵ The compelling interest test, however, was repudiated in the landmark case of *Employment Division, Department of Human Resources of Ore-*

258. *Zelman*, 536 U.S. at 669 (O’Connor, J., concurring).

259. *Id.* at 668-69.

260. In fact, wholesale adoption of the endorsement analysis could turn the tables on the ministerial exception. Under an endorsement test, the ministerial exception itself is arguably a violation of the Establishment Clause. See Eikenberry, *supra* note 184, at 284-85 (making a similar argument). In all likelihood, a challenge based on this contention would look much like the challenge to Title VII’s section 702(a) exemption in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 349 (1987). See *supra* notes 41-45 and accompanying text for a detailed discussion of this case. Applying her endorsement analysis there, Justice O’Connor clearly agreed with the majority in upholding section 702(a), stating that the reasonable observer should perceive the legislative enactment as an accommodation rather than an endorsement of religion. *Id.* at 349 (O’Connor, J., concurring).

261. See, e.g., *Gellington v. Christian Methodist Episcopal Church*, 203 F.3d 1299, 1304 (11th Cir. 2000); *Bollard v. Cal. Soc’y of Jesus*, 196 F.3d 940, 948 n.2 (9th Cir. 1999) (recognizing that alternative analytical frameworks to the *Lemon* test have been advocated, but noting that “the Court has not yet reached consensus on *Lemon*’s successor,” and opting therefore to analyze the case under the entanglement inquiry); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 466 (D.C. Cir. 1996); *Schmoll v. Chapman Univ.*, 70 Cal. App. 4th 1434, 1440-42 (1999).

262. See, e.g., *Hartwig v. Albertus Magnus Coll.*, 93 F. Supp. 2d 200, 212-15 (D. Conn. 2000) (applying the entanglement analysis to a common law claim, albeit in a way that is less protective of the religious institution’s autonomy); *Smith v. Raleigh Dist. of the N.C. Conference of the United Methodist Church*, 63 F. Supp. 2d 694, 715-19 (E.D.N.C. 1999) (finding that a limited inquiry into the conduct and supervisory structure of the church for purposes of a sexual harassment claim by a lay employee of a church would not result in excessive entanglement and recognizing the post-*Agostini* conflation of entanglement and effect).

263. 406 U.S. 205 (1972).

264. 374 U.S. 398 (1963).

265. *Id.* at 402-03.

gon v. Smith.²⁶⁶ Justice Scalia, speaking for the court, wrote “the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).”²⁶⁷ Therefore, no exception from such a law is compelled on free exercise grounds. Justice Scalia avoided directly overturning the compelling interest test by explaining that the cases in which the test previously applied involved conjunctions of free exercise and some other constitutional protection.²⁶⁸ He referred to such claims as “hybrid situations.”²⁶⁹ Claims of that type would presumably still require analysis under the compelling interest test.

The ministerial exception was thought to be required by compelling interest analysis. The *Smith* decision, therefore, undermines the free exercise basis for the exception. Title VII, though not a criminal law like the one at issue in *Smith*,²⁷⁰ is almost certainly a neutral law of general applicability.²⁷¹ Thus, no exception is required unless the *Smith* rule is somehow inapplicable to the ministerial exception.²⁷²

Three arguments, though admittedly not conclusive, can be advanced for why this interplay between the ministerial exception and the *Smith* rule may actually be the case. First, the ministerial exception in its original form was not a constitutional doctrine at all. Rather, the Fifth Circuit Court of Appeals in *McClure v. Salvation Army*²⁷³ held that Congress never intended Title VII to apply to the relationship between a church and its ministers.²⁷⁴ The lack of specificity of the statutory text

266. 494 U.S. 872 (1990).

267. *Id.* at 879 (internal quotes and citation omitted).

268. *Id.* at 881-82.

269. *Id.* at 882.

270. At least one commentator seized on the fact that *Smith* dealt specifically with a criminal law, suggesting that the case might not apply in the civil context. See Mary Ann Glendon, *Law, Communities, and the Religious Freedom Language of the Constitution*, 60 GEO. WASH. L. REV. 672, 683-84 (1992).

271. See *Vigars v. Valley Christian Ctr. of Dublin, Cal.*, 805 F. Supp. 802, 809 (N.D. Cal. 1992); Brant, *supra* note 120, at 308-09 (“While the identifying characteristics of a ‘neutral and generally applicable’ law remain uncertain, federal anti-discrimination laws like Title VII are likely to qualify under any of the proposed standards.”).

272. The Religious Freedom Restoration Act of 1993 (“RFRA”) purported to restore the compelling interest test despite *Smith*. 42 U.S.C. § 2000bb, *et. seq.* (2000). However, the Supreme Court declared the RFRA unconstitutional as it applies to state law. *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997). Consequently, the RFRA may not provide a safe haven for the ministerial exception from federal law either, as one court found. See *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 467-68 (1996).

273. 460 F.2d 553 (5th Cir. 1972).

274. *Id.* at 560-61.

supported this notion.²⁷⁵ The exception was originally grounded in statutory interpretation. *Smith*, it is argued, is inapplicable because it deals solely with constitutional exemptions.²⁷⁶ The new development in *Smith* does not change the original intention of the Congress that passed Title VII.²⁷⁷ But this argument is disingenuous at best. The *McClure* court relied heavily on compelling interest analysis under the Free Exercise Clause to reach the conclusion that either Title VII was unconstitutional as applied to the Salvation Army or that the relationship between McClure and the Salvation Army was not covered by Title VII.²⁷⁸ The court then used a canon of statutory construction in order to avoid the constitutional question.²⁷⁹ Subsequent cases considering the ministerial exception have never referred to the exception in anything other than constitutional terms.²⁸⁰ The assertion that the ministerial exception is based on statutory interpretation cannot shield it from scrutiny under *Smith*. Ultimately, the inquiry comes down to whether or not the exception is constitutionally compelled even if it is based on statutory interpretation.

A second argument that the ministerial exception survives *Smith*, depends on distinguishing between the individuals who were at issue in *Smith* and the institutions or organizations that are at issue under the ministerial exception.²⁸¹ This argument depends on reading *Smith* as only standing for the notion that an individual should not be excused from complying with neutral laws of general applicability. If so, “[i]t does not follow . . . that *Smith* stands for the proposition that a church may never be relieved from such an obligation.”²⁸² Every court that has directly addressed this issue since *Smith* has relied on this notion.²⁸³ This conclusion is based on two grounds. First, the ministerial exception is

275. *See id.* at 560.

276. *See Catholic Univ.*, 83 F.3d at 462.

277. *See id.*

278. *McClure*, 466 F.2d at 558-61.

279. *Id.* at 560.

280. *See, e.g.*, *Alicia-Hernandez v. Catholic Bishop of Chi.*, 320 F.3d 698, 702-03 (7th Cir. 2003); *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 655-59 (10th Cir. 2002); *EEOC v. Roman Catholic Diocese*, 213 F.3d 795, 800 (4th Cir. 2000); *Gellington v. Christian Methodist Episcopal Church*, 203 F.3d 1299, 1304 (11th Cir. 2000); *Combs v. Cent. Tex. Annual Conference of the United Methodist Church*, 173 F.3d 343, 345-46, 350-51 (5th Cir. 1999); *Catholic Univ.*, 83 F.3d at 460; *Young v. N. Ill. Conference of United Methodist Church*, 21 F.3d 184, 187 (7th Cir. 1994); *EEOC v. S.W. Baptist Theological Seminary*, 651 F.2d 277 (5th Cir. 1981).

281. *Roman Catholic Diocese*, 213 F.3d at 800.

282. *Catholic Univ.*, 83 F.3d at 462.

283. *Roman Catholic Diocese*, 213 F.3d at 800 (citing *Gellington*, 203 F.3d at 1302-04; *Combs*, 173 F.3d at 347-50; *Catholic Univ.*, 83 F.3d at 461-63).

fundamentally different from the type of exception that was sought by the *Smith* plaintiffs, primarily because it was sought by the organization rather than an individual.²⁸⁴ In essence, the difference that the concern in *Smith* was that if the compelling interest test is applied in cases where an individual's religious beliefs are at issue, then the individual's legal obligations would depend entirely on his religious beliefs and allow him "to become a law unto himself."²⁸⁵ That concern simply does not exist in the context of the ministerial exception, especially on the individual level with which the *Smith* court seemed so concerned. Second, the ministerial exception never relied on compelling interest analysis; instead, "all of [the ministerial exception cases] rely on a long line of Supreme Court cases that affirm the fundamental right of churches to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."²⁸⁶

Finally, even if *Smith* does apply to Title VII as a neutral law of general applicability and the free exercise issues involved with the ministerial exception cannot be distinguished from *Smith*, ministerial exception cases may qualify as "hybrid situations." The opinion in *Smith* distinguished cases presenting hybrid situations where the court is presented with more than one constitutional claim. The court in *Catholic University* found that this built-in exception to *Smith* was enough to save the ministerial exception.²⁸⁷ Because it is almost always premised on both Free Exercise and Establishment Clause concerns, the ministerial exception uniformly presents a sort of hybrid claim; however, the hybrid situations to which Justice Scalia referred were somewhat different.²⁸⁸ Those presented two distinct constitutional claims, like free speech²⁸⁹ or

284. *Roman Catholic Diocese*, 213 F.3d at 800; *Gellington*, 203 F.3d at 1303-04; *Combs*, 173 F.3d at 349; *Catholic Univ.*, 83 F.3d at 462 (noting that the dangers warned of in *Smith* are not threatened by the ministerial exception).

285. *Gellington*, 203 F.3d at 1303-04 (quoting *Employment Div. of Human Res. v. Smith*, 494 U.S. 872, 885 (1990)) (internal quotation marks omitted).

286. *Catholic Univ.*, 83 F.3d at 462-63 ("[W]e cannot believe that the Supreme Court in *Smith* intended to qualify this century-old affirmation of a church's sovereignty over its own affairs.") (quoting *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94 (1952)). See *supra* notes 199 and 261 and accompanying text discussing the reliance on this line of cases and authority suggesting that perhaps the reliance is misguided.

287. *Catholic Univ.*, 83 F.3d at 467. Interestingly, the subsequent cases that cited favorably the reasoning in *Catholic University*, such as *Roman Catholic Diocese*, *Gellington*, and *Combs*, make no mention of this point.

288. See *Smith*, 494 U.S. at 881-82.

289. See *Follett v. McCormick*, 321 U.S. 573, 577 (1944); *Murdock v. Pennsylvania*, 319 U.S. 105, 108 (1943); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

the right of parents to direct the education of their children,²⁹⁰ along with free exercise. Especially considering the overlap of issues between entanglement analysis and free exercise analysis, it would be surprising if the Supreme Court treated the ministerial exception as presenting such a hybrid situation.²⁹¹

Despite these nagging uncertainties about the constitutional underpinnings of the ministerial exception, courts have continued to treat it as an important safeguard for religious institutions to make important employment decisions free from governmental interference. For now, the ministerial exception appears to be an entrenched constitutional doctrine.

Most religious institutions of higher education have several positions that are indisputably ministerial. Those positions are often filled by the people the institution looks to for religious leadership, guidance, and decision-making. Therefore, the ministerial exception not only protects important religious liberties, it also provides religious institutions of higher education the authority to insist that the individuals who fill those important positions are committed to the religious mission and to do so free from any governmental interference or inquiry into those decisions. Accordingly, the ministerial exception can be seen as a most important tool in maintaining inter-institutional diversity as it relates to religious institutions.

IV. INSTITUTIONAL CONSIDERATIONS

Having addressed the easier, though not necessarily clearer, issues of whether, under what circumstances, and upon what bases a religious institution of higher education may discriminate when making employment decisions, it is important to focus on the more difficult normative question of whether an institution should use that ability to preserve its institutional identity and enrich the diversity of higher education. Such an undertaking is difficult in that so many considerations influence that decision. The exemptions and the constitutional protections outlined above do not specifically address the unique situation of religious higher education. Instead, they focus on the entire enterprise of religiously affiliated or motivated education, from pre-school to graduate studies. This normative question, however, must be addressed by focusing on the unique aspects of higher education. Two concerns of that sort are vitally

290. See *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972).

291. See Brant, *supra* note 120, at 311-15 (discussing how a religious institution is unlikely to present a cognizable hybrid situation).

important in forming any policy regarding the use of religious preferences: the trend toward secularization among religious institutions of higher education and the value of academic freedom. These two considerations are often in conflict and the latter is sometimes identified as one of the causes of the former.²⁹² Still, a religious institution of higher education must take account of both in order to make an informed judgment on the necessity or propriety of using discrimination to preserve its religious character.

A. *Secularization*

Starting with the advent of publicly supported higher education, there has been a slow but undeniable shift in the make-up of the post-secondary education system in the United States. Whereas privately-run, religious educational institutions once offered the only post-secondary education in the United States, they are now the exception to the rule.²⁹³ In fact, independent and nonpublic higher education has been declining on all fronts, not just religious. Between 1970 and 1982, 167 independent institutions of higher education closed, sixty-seven of which were religious.²⁹⁴ Nevertheless, the more subtle, but ultimately more troublesome, trend is that of the increasing pressure on religious institutions of higher education to give up their unique religious approach and heritage. This is the trend toward secularization. It is spurred by competition with nonreligious institutions for influential intellectuals to fill the faculty, in order to attract more students from among a finite population.

The secularization trend was foreshadowed by developments throughout the early part of the twentieth century in the elite academic institutions. George M. Marsden offers an exhaustive account of this story in his book, *THE SOUL OF THE AMERICAN UNIVERSITY*. In it, he explains how religion, which had been the guiding force for institutions like Harvard University, Yale University, and other elite institutions, lost its place in the direction and even the discourse of these institutions. Finally, during the 1960's the last vestiges of religious orientation were shed and these institutions became completely secular.²⁹⁵ The institutions, which had been affiliated with the mainline Protestant denominations, turned their backs on their religious heritage. This, however, does

292. See, e.g., HOLMES, *supra* note 4, at 73.

293. Bramhall & Ahrens, *supra* note 4, at 230 n.11 (collecting examples of scholarly study of the secularization trend).

294. Mawdsley, *supra* note 5, at 1094-95 n.7.

295. See MARSDEN, *supra* note 4, at 433, 439.

not explain why such a development is worthy of note. Harvard and Yale continue to be among the most prestigious post-secondary institutions in the world. Some argue this is not in spite of severing their religious affiliations, but because of it.²⁹⁶ Many people believe that religion cannot be the unifying force in the intellectual pursuit of the modern university.²⁹⁷ Therefore, why should an institution care about secularization?

There are definite losses when a formerly religious institution of higher education sacrifices that religious identity. First, related to the defining idea of this article, diversity and institutional variety suffers. Second, there is a psychological loss to the individuals committed to its preservation and to the community with which the institution had been affiliated.²⁹⁸ Still, neither of these is a direct attack on religious liberty. If the institution makes a considered internal choice to forego any religious affiliation, then the losses suffered may be widely felt, but are not of tremendous societal concern.²⁹⁹ Unfortunately, not all such shifts are based on a freely-made institutional choice, but rather result from outside pressures. In fact, the current trend toward secularization is marked less by considered institutional choice than by “secularization-by-default.”³⁰⁰

The external pressures that lead religious institutions of higher education to continue chipping away at their religious foundation can be segregated into two types. The first type of pressure is reputational. This phenomenon is neither as sinister nor as devastating as the second. Although its genesis is an outside pressure, the ultimate choice is internal. Religious institutions of higher education, no different from their secular counterparts, feel pressure to attract outstanding faculty. Students, academics, and society in general judge an educational institution at least in part by its faculty members and their accomplishments. Therefore, institutions vie for the most academically-gifted faculty members. A good school requires a good faculty. Refusing to consider all but a small number of possible candidates for a faculty position can severely limit an institution’s ability to attract top scholars.³⁰¹ Yet, this is exactly what religious institutions of higher education do when they use preferential

296. See SANDIN, *supra* note 6, at 260.

297. A committee at Harvard University took just this view in 1945 in its report on “General Education in a Free Society.” See SANDIN, *supra* note 6, at 260.

298. Douglas Laycock, *Academic Freedom, Religious Commitment, and Religious Integrity*, 78 MARQ. L. REV. 297, 305 (1995).

299. See *id.*

300. Araujo, *supra* note 18, at 716.

301. *Id.* at 719.

hiring criteria based on religion. Because the orientation and mission of the school are largely governed by the desires and character of the faculty,³⁰² religious institutions of higher education are often forced into a tough decision between attracting outstanding faculty and maintaining their religious mission. The trend toward secularization occurs with the decision to go with the outstanding faculty, even if they do not share a commitment to the religious mission of the institution.

The second external pressure comes in the form of the accreditation process. The infringement on religious liberty in this instance is more pronounced. Accreditation organizations are often relied on by governments to determine the suitability of a particular degree, especially in the professional studies.³⁰³ Because of this power, an accreditation organization can exert pressure on an institution to conform to the organization's ideal of the proper make-up of a faculty, student body, and curriculum.³⁰⁴ Often, these institutions are criticized for not being diverse enough.³⁰⁵ In effect, the accreditation process prizes conformity on the institutional level to promote diversity on the faculty level. This exercise has been referred to as "academic homogeneity promoted in the name of diversity."³⁰⁶

Some accreditation organizations have been reluctant to accredit institutions that cling to their religious ideals and take steps to preserve their religious nature. A striking recent example of this phenomenon involves Patrick Henry College in Virginia, which sought accreditation by the American Academy for Liberal Education ("AALE"). Initially, AALE denied Patrick Henry College's application for preaccreditation for alleged noncompliance with AALE's Mission Standard Five,³⁰⁷ regarding free thought and free speech, and General Education and Cur-

302. *Id.*

303. For example, many state judiciaries delegate authority to the American Bar Association ("ABA") accreditation process and only allow graduates from ABA accredited institutions to sit for the state's bar exam. See Princeton Review, *What You Should Know about Law School Accreditation*, at <http://www.princetonreview.com/law/research/articles/find/accreditation.asp> (last visited Sept. 23, 2004).

304. See Douglas Laycock, *The Rights of Religious Academic Communities*, 20 J.C. & U.L. 15, 25 (1993).

305. See MARS DEN, *supra* note 4, at 436.

306. *Id.* at 437.

307. Mission Standard Five states: "Liberty of thought and freedom of speech are supported and protected, bound only by such rules of civility and order as to facilitate intellectual inquiry and the search for truth." AMER. ACAD. FOR LIBERAL EDUC., STANDARDS & CRITERIA FOR INSTITUTIONAL ACCREDITATION & PREACCREDITATION 7 (2004), available at <http://www.aale.org/edstand.htm>.

riculum Standard Eight,³⁰⁸ regarding basic knowledge in the biological sciences. Both are standards of the AALE's Standards and Criteria for Institutional Accreditation and Preaccreditation.³⁰⁹ Of concern to the AALE was Patrick Henry College's Statement of Biblical Worldview, with which all Patrick Henry College faculty members must comply. In particular, the Statement of Biblical Worldview required

[a]ny biology, Bible, or other courses at [Patrick Henry College] dealing with creation will teach creationism from the understanding of scripture that God's creative work, as described in Genesis 1:1-31, was completed in six twenty-four hour days. All faculty for such courses will be chosen on the basis of their personal adherence to this view. [Patrick Henry College] does not intend to limit biblically-based discussion of this issue; provided, however, that evolution, "theistic" or otherwise, will not be treated as an acceptable theory.³¹⁰

This requirement troubled AALE through its apparent limitation on acceptable thought and speech (i.e., academic freedom concerns),³¹¹ and because it appeared purposely to keep students in the dark regarding widely accepted scientific theory about the origin of life (i.e., liberal education and basic knowledge concerns).³¹²

Patrick Henry College viewed AALE's denial of preaccreditation as "blatant viewpoint discrimination" and as an affront to the college's freedom of thought and belief.³¹³ Michael Farris, President of Patrick Henry College, touched on the very issue underlying this article (albeit intemperately) in criticizing AALE's denial: "One would think that hav-

308. General Education and Curriculum Standard Eight reads as follows:

The general education requirement ensures a basic knowledge of mathematics and the physical and biological sciences, including laboratory experience, intermediate knowledge of at least one foreign language, the study of literature and literary classics, the political, philosophical, and cultural history of Western Civilization, and the foundations and principles of American society. Variations from this norm are allowable in cases where the outstanding character of other elements of the general education program assures substantial compliance with these standards.

Id. at 9.

309. See Letter from Jeffrey Wellin, President of AALE, to Michael Farris, President of Patrick Henry College (April 30, 2002), available at <http://www.phc.edu/news/dos/200205103.pdf> (copy on file with the author).

310. *Id.*

311. See *infra* Part IV.B. for a discussion of academic freedom concerns as they relate to religious institutions of higher education.

312. See Letter from Jeffrey Wellin to Michael Farris, *supra* note 310.

313. Patrick Henry College, *Patrick Henry College Denied Accreditation for Creationist Views: College Will Appeal Discriminatory Ruling*, (May 9, 2002), at <http://www.phc.edu/news/docs/200205100.asp>.

ing diverse views among colleges would somehow fit into an age that worships at the 'temple of diversity' but true diversity is not tolerated."³¹⁴ The Statement of Biblical Worldview is clearly part of Patrick Henry College's attempt to insure that the religious mission upon which it is founded is respected and preserved. In part, this is accomplished by allowing only professors who share the same religiously-informed beliefs regarding the origin of life (or at least who will support that belief by teaching it as true) to teach in biology and religion classes. This is the very freedom that the Title VII exemptions were implemented to protect.

Patrick Henry College appealed AALE's decision.³¹⁵ The appeal resulted in a compromise of sorts. Patrick Henry College explained and eventually altered its Statement of Biblical Worldview to reflect that it did not prohibit teaching or discussion of evolution, but only that it expected faculty to treat creationism as true.³¹⁶ AALE acceded, sustaining the appeal on the liberal education and general knowledge grounds and remanding the decision to AALE's Board of Trustees.³¹⁷ The Appeals Committee found no substantial evidence to support the Board's initial determination that Patrick Henry College violated General Education and Curriculum Standard Eight.³¹⁸ At the time of the denial, no biology courses had yet been taught at Patrick Henry College.³¹⁹ As a result, the Appeals Committee could not credit the Board's speculative concern that students might not be fully informed regarding the biological sciences.

314. *Id.*

315. See Notice of Intent to Appeal from Michael Ferris, President of Patrick Henry College, to AALE (May 8, 2002), available at <http://www.phc.edu/news/docs/200205102.pdf>.

316. See Patrick Henry College, *Patrick Henry College Statement of Biblical Worldview* (adopted Sept. 28, 2002), available at <http://www.phc.edu/docs/StatementofBiblicalWorldview.asp>. The revised portion dealing with "Creation" reads as follows:

Any biology, Bible or other courses at [Patrick Henry College] dealing with creation will teach creation from the understanding of Scripture that God's creative work, as described in Genesis 1:1-31, was completed in six twenty-four hour days. All faculty for such courses will be chosen on the basis of their personal adherence to this view. [Patrick Henry College] expects its faculty in these courses, as in all courses, to expose students to alternate theories and the data, if any, which support those theories. In this context, [Patrick Henry College] in particular expects its biology faculty to provide a full exposition of the claims of the theory of Darwinian evolution, intelligent design and other major theories while, in the end, teach creation as both biblically true and as the best fit to observed data.

Id. (emphasis added to highlight revised portion).

317. See Decision of AALE Appeals Committee, Appeal of Patrick Henry College (Aug.16, 2002), available at <http://www.phc.edu/news/docs/200208161-1.pdf>.

318. *Id.* at 4-5.

319. *Id.* at 5.

The proof would be in the actual teaching of the class, not in generalized concerns about the Statement of Biblical Worldview.

The Appeals Committee, however, found sufficient evidence in the Statement of Biblical Worldview to sustain the AALE Board's original decision that Patrick Henry College failed to comply with Mission Standard Five's requirement of free thought and speech, the academic freedom concerns.³²⁰ Nevertheless, the Appeals Committee remanded the decision to the Board on the basis that the Denial Letter appeared to be premised on the violation of both Standard Five and Standard Eight.³²¹ A violation of only a single standard, in the Appeals Committee's judgment, might have resulted in a different decision on the preaccreditation application.³²²

True to the Appeals Committee's prediction, several months later – following the revision to the Statement of Biblical Worldview – AALE granted preaccreditation to Patrick Henry College.³²³ On the whole, however, that determination resolved little of the underlying distrust, if not hostility, that AALE and its standards manifest toward pervasively religious (especially fundamentalist) institutions.³²⁴ The two parties ended up talking past each other, presumably in an attempt to save face.³²⁵ While the compromise position that was ultimately reached may

320. *Id.* at 3-4. This is true despite the fact that AALE's Criterion 5.2 of Mission Standard Five provides that: "Any limitations on freedom of speech related to an institution's affirmation of particular religious principles or beliefs must be clearly specified, published, and appropriately disseminated. **It is especially important that such limitations be clearly described in an institution's recruitment and informational materials for students, faculty, and administrative personnel.**" AMER. ACAD. FOR LIBERAL EDUC., *supra* note 307, at 7 (emphasis added); Decision of AALE Appeals Committee, *supra* note 317, at 3-4. The Appeals Committee, AALE's Board, and even Patrick Henry College agreed that, if read too broadly, Criterion 5.2 would swallow the rule of Mission Standard Five. Therefore, the Appeals Committee determined that "there is some point at which a religious institution's restrictions on freedom of speech, even if clearly disclosed, may be too great." *Id.* at 4. So, despite Patrick Henry College's apparent compliance with Criterion 5.2, the Appeals Committee found that the Statement of Biblical Worldview provided "an evidentiary basis for the Board's conclusion that the point had indeed been crossed." *Id.*

321. *Id.* at 5.

322. *Id.*

323. *See, e.g.,* Patrick Henry College, *AALE Reverses Decision* (Nov. 13, 2002), at <http://www.phc.edu/news/docs/200211130.asp>; Megan Rooney, *On Appeal, Christian College's Creationism Stance Passes Muster with Accreditor*, THE CHRON. OF HIGHER EDUC. (Online Edition) (Nov. 15, 2002), at <http://chronicle.com/daily/2002/11/2002111505n.htm> (copy on file with author).

324. *See* Decision of AALE Appeals Committee, *supra* note 317, at 4 n.3 ("Although Criterion 5.2 seems to suggest that only religious institutions limit freedom of speech and free inquiry, the Appeals Committee notes that secular institutions often formally or informally proscribe certain points of view, especially religious ones.")

325. *See* Rooney, *supra* note 323, ¶ 8. Jeffrey Wallin, President of AALE, said of the Patrick Henry College controversy, "This is a great example of accreditation at work . . . They didn't meet

have been the best result, it did little to inspire confidence that accreditation organizations can proceed without pressuring, unwittingly or purposely, religious educational institutions to secularize their policies and curricula or to undermine (or even to abandon) those policies that arguably most protect the religious mission and character of those institutions.³²⁶

Religious institutions of higher education may see religious preferences in hiring, promotion, and tenure decisions as a way to combat the secularization trend; however, such institutions cannot do so without risking adverse consequences. First, reducing the number of people qualified to fill a faculty position almost certainly results in a reduction of academic qualifications among the remaining candidates. Second, accreditation organizations have become increasingly hostile to such tactics. Such institutions find themselves in a sort of “damned if they do, damned if they don’t” situation.

B. Academic Freedom

The thrust of academic freedom is that there should be no limitations on thought, scholarship, or the pursuit of truth in the academy of higher learning. That notion is “a constituent element in the very foundation on which the modern university rests.”³²⁷ In fact, academic freedom is a value so deeply entrenched in the definition of the modern institution of higher learning that it is widely considered “the most cherished tradition of education. . . .”³²⁸ Moreover, many scholars and courts suggest that it is a liberty interest of constitutional origin.³²⁹ This cherished tradi-

our academic standards so they changed their policies and submitted evidence of the change.” *Id.* At the same time, Patrick Henry College officials denied changing their policies, instead restating them to clarify its position. Michael Farris, president of the college, stated, “Our belief in creationism has not changed.” *Id.* ¶ 10.

326. In part for this reason, Bob Jones University in South Carolina has foregone the accreditation process altogether. See Bob Jones III, *President’s Column*, *BJU REV.* (Spring 2003), available at <http://www.bju.edu/aboutbju/pca/spring03> (last visited Sept. 11, 2003); see also Shawn Zeller, *Bob Jones Versus the ‘Unsaved,’* 31 *NAT’L J.* 1312 (2003) (noting that students at Bob Jones are ineligible for federal financial assistance as a result of the lack of accreditation).

327. Lonnie D. Kliever, *Academic Freedom and Church-Affiliated Universities*, 66 *TEX. L. REV.* 1477, 1479 (1988).

328. SANDIN, *supra* note 6, at 254. *But see* Bamhall & Ahrens, *supra* note 4, at 231 (“History demonstrates that academic freedom has not been an essential element in an institution’s efforts to claim university status.”).

329. See, e.g., William W. Van Alstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review*, 53 *LAW & CONTEMP. PROBS.* 79, 80 (1990). See also *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967); *Omosogbon v. Wells*, 335 F.3d 668, 676 (7th Cir. 2003) (“Academic freedom rights are rooted in the First Amend-

tion is something that confronts religious institutions of higher education, whereas their elementary and secondary counterparts are not so constrained. This is because the classical notion of academic freedom fails (presumably purposefully rather than inadvertently) to include elementary and secondary education.³³⁰ As a result, a religious institution of higher education must consider the impact that a preferential hiring plan would have on academic freedom.

Academic freedom clearly has a revered place in American higher education, but dates back just a half century in its modern form. The American Association of University Professors (“AAUP”) and the Association of American Colleges (“AAC”) authored the most influential and long-standing practical definition of what constitutes academic freedom in the modern university. In the 1940 Statement of Principles on Academic Freedom and Tenure (1940 Statement), the AAUP and the AAC sought to standardize the definition of academic freedom and prescribe procedural guidelines aimed at protecting the exercise of that freedom.³³¹ Declaring that the “common good” of institutions of higher learning “depends upon the free search for truth and its free exposition,” the 1940 Statement outlines three instances when the freedom of the teacher to pursue those goals must be respected: in research and publication; in teaching and classroom discussion; and in public speech and expression.³³²

The 1940 Statement has been referred to as the “Bible” and the “Constitution” of the academic profession.³³³ While the 1940 Statement has no legal effect, it has since been endorsed or adopted by many learned societies and academic administrative associations.³³⁴ A series of interpretive comments were added in 1970 to clear up some ambiguities and reflect certain changed values.³³⁵ Also in 1989 and 1990, the language was changed to remove gender-specific references.³³⁶ Other than these minor adjustments and clarifications, the 1940 Statement has been

Amendment.”).

330. SANDIN, *supra* note 6, at 268.

331. See AM. ASS’N OF UNIV. PROFESSORS, POL’Y DOCUMENTS AND REP. 3-5 (1984).

332. *Id.* at 3-4.

333. Ralph S. Brown, Jr. & Matthew W. Finkin, *The Usefulness of AAUP Policy Statements*, 59 EDUC. REC. 30, 35 (1978).

334. See AM. ASS’N OF UNIV. PROFESSORS, POL’Y DOCUMENTS AND REP., *supra* note 331, at 7-9; Walter P. Metzger, *The 1940 Statement of Principles on Academic Freedom and Tenure*, 53 LAW & CONTEMP. PROBS. 4 (1990).

335. See AM. ASS’N OF UNIV. PROFESSORS, POL’Y DOCUMENTS AND REP., *supra* note 331, at 5.

336. See Metzger, *supra* note 334, at 407.

the authoritative document shaping the understanding of, and prescribing the procedures necessary to protect, academic freedom.

Despite the unifying effect of the 1940 Statement, academic freedom and religious pursuits have never coexisted in friendly company. The very notion of academic freedom had its genesis in the United States as a backlash against expectations of religious orthodoxy. Until the mid-nineteenth century when academic freedom in the modern sense began evolving, scholarship was judged by its conformity with scriptural truth. Faculty and administrators at institutions such as Harvard, Yale, and Princeton questioned this benchmark for judging true scholarship and began valuing the freedom to pursue truth in what they saw as a more open intellectual environment.³³⁷ Cognizant of this, but also aware of the important part religious educational institutions play in religious liberty as well as the history of American education, the AAUP and the AAC included the "limitations clause" in the 1940 Statement. It reads: "Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment [of the teacher]."³³⁸ Thus, the limitations clause would seemingly settle any tension between religious commitment and academic freedom by allowing for religious commitment to trump academic freedom so long as that policy is stated at the outset.

In practice, the limitations clause has not been a settlement of the religion/academic freedom tension. In fact, the limitations clause has been the subject of significant debate and controversy. In 1967, the AAUP's Special Committee on Academic Freedom in Church Related Colleges and Universities authored a report and recommendation, which found that such institutions should not use a religious employment privilege to avoid dealing with issues of diversity and academic freedom.³³⁹ The recommendation was never formally adopted, but it was the first in a series of attacks on the limitations clause that has weakened its protection for religious institutions. For example, the 1970 interpretive comments to the 1940 Statement attempt to clarify the limitations clause by stating that "[m]ost church-related institutions no longer need or desire the departure from the principle of academic freedom implied in the 1940 Statement, and we do not now endorse such a departure."³⁴⁰ How-

337. See McConnell, *supra* note 7, at 306.

338. AM. ASS'N OF UNIV. PROFESSORS, POL'Y DOCUMENTS AND REP., *supra* note 331, at 3. Note how the limitations clause is similar to the AALE's Criterion 5.2 of Mission Standard Five, as discussed *supra* in notes 307 and 320 and accompanying text.

339. SANDIN, *supra* note 6, at 287.

340. AM. ASS'N OF UNIV. PROFESSORS, POL'Y DOCUMENTS AND REP., *supra* note 331, at 5.

ever, it was unclear whether this comment was meant to repeal the limitations clause or was simply a statement of distaste for its use.³⁴¹ Then, in 1988, a report by AAUP's Committee A on Academic Freedom & Tenure claimed that all religious institutions are subject to the requirements of the 1940 Statement even if the limitations clause is invoked.³⁴² Committee A's report warned institutions that invoke the limitations clause that they give up "the moral right to proclaim themselves as authentic seats of higher learning."³⁴³ Moreover, the chairman of the committee thought that the committee's policy repealed the limitations clause altogether, but the committee members later recanted that interpretation and said that the report simply meant that religious schools were subject to the 1940 Statement *including* the limitations clause.³⁴⁴

More recently, however, the AAUP has begun anew the dialog about the limitations clause through a series of conferences regarding academic freedom and religion.³⁴⁵ This turn of events suggests a tempering of the intolerance toward the limitations clause.³⁴⁶ It appears, therefore, that the limitations clause is still valid, though at times the AAUP has done little to hide its contempt for the exception.³⁴⁷

An institution that tries to adhere to both a religious commitment and a commitment to the value of academic freedom faces a difficult task. Employment decisions, both hiring and tenure, can have a profound impact on academic freedom.³⁴⁸ As illustrated by the ideological battles waged at law schools not all that long ago—especially at Harvard Law School, over the propriety of critical legal studies and the treatment of scholars who endorse the philosophy—issues regarding who will be hired or receive tenure at nonreligious institutions can tear at the intellectual and collegial atmosphere of an institution and stir up fears of an academic witch hunt.³⁴⁹

341. See Laycock, *supra* note 298, at 302.

342. *Id.* at 303.

343. Committee A on Academic Freedom & Tenure, *The "Limitations" Clause in the 1940 Statement of Principles*, ACADEME Sept.-Oct. 1988, at 55.

344. McConnell, *supra* note 7, at 310-11.

345. See DIEKEMA, *supra* note 10, at 86.

346. Martin D. Snyder, *Academic Freedom and Religion*, ACADEME, May-June 2003, at 103.

347. Cf. Bramhall & Ahrens, *supra* note 4, at 228-29 n.4 (pointing out that nearly one half of all institutions that the AAUP identified on its censure list were religiously affiliated).

348. See Laycock, *supra* note 298, at 298-300.

349. See, e.g., ELEANOR KENLOW, *POISONED IVY: HOW EGOS, IDEOLOGY, AND POWER POLITICS ALMOST RUINED HARVARD LAW SCHOOL* (St. Martin's Press 1994); Phoebe A. Haddon, *Academic Freedom and Governance: A Call for Increased Dialogue and Diversity*, 66 TEX. L. REV. 1561 (1988) (discussing the divisive environment at Temple University School of Law following the dismissal of the dean of that law school).

At religious institutions of higher education, preferential hiring, promotion, and termination can be attacked not only on the ground that it is an affront to academic freedom,³⁵⁰ but also on the basis of discrimination. Faculty distrust of administration and public consternation are often the inevitable result.³⁵¹ In fact, religion and religious institutions have become, in the minds of many, a direct hazard to the ideal of academic freedom.³⁵²

No doubt because of the potential pitfalls referenced in the preceding paragraphs, numerous arguments have been presented regarding why religious institutions should not be held to the modern notion of academic freedom. First, the AAUP's 1940 Statement focuses on only one aspect of academic freedom, the freedom of the faculty member. The institutional facet of academic freedom is almost completely ignored.³⁵³ This notion of academic freedom would allow the institution the autonomy to make decisions about its academic mission free from public interference,³⁵⁴ and should lead to maximum respect for the limitations clause, as well as preservation of inter-institutional diversity. Also, the rigid imposition of academic freedom on religious institutions has been a significant contributing factor in their secularization. Respecting the limitations clause may help both intellectual advancement, by freeing scholars to explore a particular strain of thought, and freedom of religion, because that strain of thought is religious.³⁵⁵

Nevertheless, the pressure to afford full academic freedom, even at religious institutions, remains intense. As evidence of this, the AAUP was correct when it asserted that many religious and church-related

350. See DIEKEMA, *supra* note 10, at 29-33 (discussing the controversy at Calvin College surrounding the publication of *The Fourth Day*, Professor Van Till's exploration of the relationship between Christian faith and natural science).

351. See *id.*

352. SANDIN, *supra* note 6, at 283.

353. Notably, Justice Souter has recognized this facet of academic freedom in a recent concurring opinion he authored. *Board of Regents v. Southworth*, 529 U.S. 217, 237 (2000) (Souter, J., concurring) ("Our understanding of academic freedom has included not merely liberty from restraints on thought, expression, and association in the academy, but also the idea that universities and schools should have the freedom to make decisions about how and what to teach.").

354. See, e.g., Mark G. Yudof, *Three Faces of Academic Freedom*, 32 LOY. L. REV. 831 (1987).

355. McConnell, *supra* note 7, at 304 ("To impose the secular norm of academic freedom on unwilling religious colleges and universities would increase the homogeneity — and decrease the vitality — of American intellectual life."). *But see* Bramhall & Ahrens, *supra* note 4, at 231 (criticizing McConnell's outright rejection of academic freedom and arguing that a "secular paradigm" of academic freedom can apply, and yet still allow a religiously affiliated university to limit it to preserve its religious character without forfeiting its status in the "legitimate" academic community).

schools no longer need or desire to invoke the limitations clause.³⁵⁶ Chief among these institutions are the national universities associated with the Catholic Church.³⁵⁷ In 1967, twenty-six Catholic educators signed what has become known as “The Land O’ Lakes Statement.”³⁵⁸ It stated that “[t]o perform its teaching and research functions effectively, the Catholic university must have a true autonomy and academic freedom in the face of authority of whatever kind, lay or clerical, external to the academic community itself.”³⁵⁹ Catholic institutions have wrestled publicly with this dual commitment – to religion on the one hand and academic excellence through academic freedom on the other.³⁶⁰ Some have done so quite successfully and have raised the standard for other institutions.³⁶¹

356. Anthony J. Diekema, former president of Calvin College, which is affiliated with the Reformed tradition of historic Christianity, suggests that religious institutions of higher education may, in fact, embrace the secular notion of academic freedom. DIEKEMA, *supra* note 10, at 5; *see also* Bramhill & Ahrens, *supra* note 4, at 231 (making the same claim). Diekema notes, however, that academic freedom and notions of academic orthodoxy are not necessarily mutually exclusive and certainly not limited to religious institutions. DIEKEMA, *supra* note 10, at 12-27; *see also* The Chronicle of Higher Education, *supra* note 3, ¶¶ 5, 20, 22 (quoting Anthony Diekema: “There are orthodoxies everywhere, of all sorts and shapes, which can, and often do, militate against academic freedom [T]here are many orthodoxies and dominant views within secular higher education that militate against a religious perspective It’s interesting to note that because orthodoxies exist everywhere within departments, particularly within divisions of institutions, academic freedom isn’t totally protected anywhere.”) (on file with the author); *see also* Bramhill & Ahrens, *supra* note 4, at 239-45 (arguing that there are always limitations on academic freedom imposed by the institutional realities of the academy, by the AAUP’s policies (e.g., unprofessional or dishonest speech), and by Constitutional law); Carter, *supra* note 5, at 494 (“Academic freedom . . . has always been a cabined freedom”); VILLANOVA UNIV., *supra* note 128, at 3-4 (noting Villanova’s commitment to academic freedom, but also pointing out that “[n]o university . . . seeks to represent in its faculty every perspective. In addition to the primary criterion of competence in one’s field, a wide and diverse range of ethical, social, political, cultural and intellectual values, in fact, informs hiring decisions at all universities, without prejudice to academic freedom. Religious values have no less legitimate a claim to inform such selection”).

357. Charles E. Curran, *Academic Freedom and Catholic Universities*, 66 TEX. L. REV. 1441, 1441-42 (1988).

358. *Id.* at 1442.

359. *Id.*

360. *See generally* THE CHALLENGE AND PROMISE OF A CATHOLIC UNIVERSITY (Theodore M. Hesburgh ed., 1994) (presenting a series of essays by faculty at the University of Notre Dame on the challenges faced by a Catholic university).

361. Villanova University, for instance, is deliberate and methodical when determining the role hiring decisions that take into account the candidates view on the school’s religious mission and character will play in the preservation of its mission, an initiative it calls “Mission Centered Hiring.” VILLANOVA UNIV., *supra* note 128, at 2. Villanova’s Office for Mission Effectiveness canvassed its own faculty and consulted other like institutions about the notion of mission centered hiring. *See* CHRISTOPHER M. JANOSIK, MISSION CENTERED HIRING FOR FACULTY: FOCUS GROUP EVALUATION OF THE RESOURCE GUIDE 1-2 (2001), *available at* <http://www3.villanova.edu/mission/mchiring/mcheval.pdf>. In doing so, Villanova has continued to

A religious institution of higher education cannot engage in preferential hiring without considering the impact on academic freedom. It should also consider alternative plans that would result in less encroachment on academic freedom. If a religious institution decides to use a religious test or preference of some sort, it should, at the very least, announce that intention and the reason therefore.³⁶²

Not only would that bring the institution into compliance with the limitations clause, it also would enhance the legitimacy of the decision. Otherwise, applicants may be surprised by a religiously-motivated hiring decision and may bring claims based on Title VII or other civil rights laws. Also, a tenure candidate who was hired and then subsequently refused tenure for religious reasons could feel trapped and coerced.³⁶³ The institution has nothing invested in such an ambush and should avoid it, premised on professional courtesy, public relations, and legal pragmatism.

V. CONCLUSION

Despite the strong policy against discrimination in employment, Congress and the courts have defined several limited exemptions from Title VII for religious organizations, including religious institutions of higher education.³⁶⁴ The exemptions protect and promote religious liberty. This article suggests that those exemptions, as they relate to discrimination on religious grounds, should be interpreted broadly to guarantee institutions the greatest amount of religious liberty.

Once given that freedom to discriminate, religious institutions of higher education must decide whether to use it. However, answering the question of whether an institution *may* discriminate does not answer the ultimate question of whether it *should* do so. This article has pinpointed and explained a value that legitimizes the use of discrimination by those schools in limited circumstances: maintaining institutional diversity in

maintain academic freedom as a defining norm of its mission. See VILLANOVA UNIV., *supra* note 128, at 3.

362. For a related discussion of these issues in terms of faculty who are required to sign faith statements, see generally Beth McMurtrie, *Do Professors Lose Academic Freedom by Signing Statements of Faith?*, THE CHRONICLE OF HIGHER EDUC., May 24, 2002, at A12; *Colloquy Live*, *supra* note 3.

363. See Laycock, *supra* note 304, at 31. Cf. JANOSIK, *supra* note 361, at 2 (noting, as part of negative feedback to Villanova University's draft resource guide for Mission Centered Hiring, that "[u]ntenured faculty felt that the values emphasized in the draft appeared to be in conflict with those expressed in the rank and tenure policies to which they were currently responding").

364. See *supra* Parts II and III.

higher education. While this may be a valid goal, such institutions must still consider the important institutional concerns that are implicated by utilizing religious litmus tests for employees. Combating the increasing pressure to secularize may lead an institution to consider using – or to conclude it must use – a religious preference to maintain a sympathetic faculty core. In doing so, an institution must be vigilant to tread lightly, lest it invite the ire of the academic establishment. Not only would unfettered use of discriminatory tactics put it at risk of losing accreditation, it would risk the appearance of rejecting the defining norm of the modern university; namely, academic freedom.³⁶⁵

Therefore, religious institutions of higher education must carefully consider when and for what positions they exercise their right to discriminate on the basis of religion.³⁶⁶ A religious preference should only be used when the institution deems it necessary to preserve its mission. Furthermore, any such preference should be announced and explained. No faculty member or administrator should feel blindsided by an employment decision based on a religious preference. In many instances, a preference may not be necessary. Notre Dame, for example, always hires the most academically qualified individual for the position, but takes steps to encourage Catholics to apply. Therefore, the pool of applicants is usually Catholic-heavy, and there is correspondingly a better chance that the most qualified individual will be Catholic.³⁶⁷

Protecting the religious distinctiveness of these institutions is a valid and laudable goal. On the other hand, eliminating discrimination is an equally justifiable goal. Therefore, as participants in the public marketplace of ideas, religious institutions of higher education must be ever cognizant of the message they send, especially in their role as educators and molders of minds. Institutions that want to remain relevant and respected in the academic community cannot be seen as overtly hostile to civil rights and equitable treatment. And they cannot be in the business of teaching those sentiments to their students. If a religious college or university does take that approach by utilizing its right to discriminate in

365. See Carter, *supra* note 5, at 494 (“[A] true university must not make the error of creating such orthodoxy that nobody ever is allowed to question anything the religion teaches.”).

366. Aside from a generalized concern for religious freedom, no institution should care to be exempted from the prohibition on race, sex, or national origin discrimination unless such a result is inherent to a specific religious tenet of the institution’s affiliated faith. Even then, it could be that the policy against such discrimination, especially on account of race, is enough to outweigh any religious liberty interest. Moreover, discrimination on those grounds by religious institutions of higher education would not lead to the preservation of the kind of institutional variety in higher education that this article argues must be encouraged.

367. Laycock, *supra* note 298, at 298.

situations that are not required for the preservation of its religious mission and to maintain that critical mass of sympathetic faculty and administrators, then that institution may justifiably find itself marginalized in the academic community.

Society, and more specifically academia, should respect the right of its religious members to set up institutions of higher education and to preserve the religious mission of the institutions through discrimination if necessary. Nevertheless, religious institutions of higher education should not unnecessarily invoke that privilege.