# RELIGIOUS HIGHER EDUCATION IN THE UNITED STATES

A Source Book

Edited by
Thomas C. Hunt
and James C. Carper

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Volume 12

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# Dedication and Acknowledgements

We dedicate this book in thanksgiving to Almighty God who has blessed the editors in countless ways. In particular, we wish to note our wives and children, our parents, our siblings, our teachers, colleagues, friends, and students.

We acknowledge with thanks the assistance of Staci Hunt, Dr. Hunt's daughter, for her work in completing the indexes, and of David Starkey, of the Word Processing Center in the College of Education at Virginia Tech, for his labors in typing and printing the text. Finally, the editors wish to express their gratitude to the Division of Curriculum and Instruction of Virginia Tech for its support of this project.

Thomas C. Hunt
Blacksburg, Virginia
James C. Carper
Columbia, South Carolina

**IN MEMORIAM**

The editors wish to note with sadness the unexpected death of Mary Grant. Ms. Grant died suddenly on June 21, 1994. She had worked with us on several edited books, and, in 1992, had co-authored *Catholic School Education in the United States* with Thomas Hunt, which was also published by Garland Publishing. To her family, friends, and colleagues, we say: *REQUIESCAT IN PACE*!

# CONTENTS

# INTRODUCTION

In 1985, following favorable reviews of the editors' *Religious Schooling in America: Historical Insights and Contemporary Concerns*, Garland Publishing contacted the writers regarding the possibility of producing a reference volume on schools with a religious affiliation in the United States. That phone call has led to five reference works, published on the topics of religious schools, religious colleges and universities, religious seminaries, and Catholic schools in 1986 and 1993, 1988, 1989, and 1992 respectively. Charles Kniker joined the editors in assembling the first work; the writers were solely responsible for the second, third, and fourth works; and Mary Grant joined Thomas Hunt in the publication of the book on Catholic schools.

This volume, titled *Religious Higher Education in the United States*, is an extension and revision of the 1988 book entitled *Religious Colleges and Universities in America: A Selected Bibliography*, and, to some extent, of *Religious Seminaries in America: A Selected Bibliography*, published in 1989. It is an extension of the 1988 and 1989 editions because it contains annotated bibliographies of the various denominational colleges, universities, and some seminaries, and of the relationship of government to these institutions from 1987 through 1993. It qualifies as a revision because each of the chapters begins with a historical essay that serves as an overview.

The reader will note that several of the authors included seminaries in their chapters. The editors left this decision to the authors of the chapters, because the place of the seminary in the higher educational offerings of the denominations varied considerably. Thus, there was no "one best way" of dealing with this question throughout the volume.

Putting together this volume was not without its tragedy. Mary A. Grant, with whom Thomas Hunt co-authored the 1992 volume on Catholic schools, died suddenly on June 21, 1994. The editors are grateful to Anna M. Donnelly, who finished the annotations on Catholic colleges which Ms. Grant had begun. We are also appreciative of the help provided by Brother Emmett Corry, of St. John's University, for enlisting Ms. Donnelly's aid in this effort. To Mary Grant, her family and friends, we utter a solemn "*Requiescat in pace*!"

Thomas C. Hunt
Blacksburg, Virginia
James C. Carper
Columbia, South Carolina

# CHAPTER 1
# Government Aid to and Regulation of Religious Colleges and Universities

**Ralph D. Mawdsley**

## Introduction

Religious colleges and universities have been an integral part of the American higher education scene for over three hundred years. The earliest colleges, such as Harvard and Yale, were private-controlled but considered by many "public," and were started to train persons for the ministry.[1] But in subsequent years all of the pre-revolutionary war colleges, as well as those founded after that war, became increasingly secularized, so that by 1901 only 6.5% of the college students were studying for the ministry, down from 50% in the first half of the eighteenth century.[2] Part of the secularization was reflected in a change in universities from following the Harvard curriculum based on the medieval trivium and quadrivium which required Latin and Greek, courses which were necessary for one entering the ministry. In the mid-eighteenth century, colleges such as Yale,

the College of New Jersey (Rutgers), and Kings (Columbia) began broadening the curriculum by offering other courses such as math, history, geography, and English.[3]

With the decline of private colleges founded in the seventeenth and eighteenth centuries as primary teaching sites for the ministry, preparation for the ministry became the responsibility of the various denominations, each of which founded seminaries for that purpose.[4] The oldest college founded by a religious order that has retained its religious ties seems to be Georgetown University, established in 1791 by the Jesuits.[5] Along with seminaries came a proliferation of liberal arts colleges founded by religious denominations, in part reflecting cultural as well as religious distinctions.[6] Many of these religious colleges and universities have continued to the present time, and, indeed, a cursory review of one of the many descriptive catalogs on colleges and universities will reveal that approximately one-third of the higher education institutions in the United States still claim to have some religious affiliation.

The legal history of these religious colleges and universities (hereafter referred to simply as universities) in their relationships with government is very much identified with the latter half of the twentieth century. The early and famous Dartmouth College case in 1819,[7] where the state legislature sought unsuccessfully to alter the board of trustees established by a royal charter, is an interesting historical artifact, but had nothing to do with the religious nature of Dartmouth College. Litigation regarding religious universities and government aid and regulation is the product of the past 25 years and reflects interpretation of the Establishment and Free Exercise Clauses of the First Amendment. Under the aegis of what has become popularly known as the "doctrine of separation of church and state," religious universities have been scrutinized both as to their eligibility for government aid and their exemption from government regulation. The operative judicial interpretations in determining eligibility or exemption have been the *Lemon*[8] test

for the Establishment Clause and the *Yoder/Smith*[9] tests for the Free Exercise Clause.

## Lemon and Yoder/Smith Tests

Since these tests are the templates for determining eligibility for government aid or exemption from government regulation, an understanding of their requirements is necessary. The *Lemon* test, which was developed in the context of eligibility for government aid, has three components. A court must decide whether: (1) the statute, regulation or government action at issue has a secular purpose; (2) the statute, regulation, or action has the primary effect of advancing or inhibiting religion; and (3) the statute, regulation, or action results in an excessive entanglement between the state and the religious university.[10] Failure of any one of these three components will result in ineligibility for government aid. Although the *Lemon* test was formed in the context of determining eligibility for government aid, the test has been raised in non-aid settings by proponents of separation of church and state to challenge religious practices at secular universities,[11] as well as by authorities at religious universities to challenge government entanglement with religious practices at those universities.[12]

The *Yoder/Smith* tests are the product of two United States Supreme Court decisions 18 years apart. In *Yoder*, the Court established a threefold test to determine whether a government statute, regulation, or action violated the Free Exercise rights of religious claimants: (1) whether the claimant's activity interfered with by the government is motivated by and rooted in a legitimate and sincerely held religious belief[13]; (2) whether the claimant's free exercise of religion has been burdened by the government activity[14]; and (3) whether the government has a compelling interest in its action that justifies the burden on free exercise of religion.[15] Although the compelling interest test frequently did not prevent imposition of government statutes or regulations on religious universities, the test did seem to have

the salutary effect of requiring courts to weigh the effect of government action on religious practices.[16] In 1990, the Supreme Court revisited the Free Exercise Clause and the *Yoder* test in the context of a non-education case, *Employment Division* v. *Smith.*[17] This case, which involved the application of Oregon's criminal statutes to Native Americans who used the hallucinatory drug peyote as part of religious services, determined that free exercise of religion is not a defense when the religious claimant is affected by a "neutral, generally applicable law." On its face, *Smith* would seem to have effectively eviscerated the compelling interest test of *Yoder* since most laws that might affect religious organizations are neutral and uniform in application.[18]

On November 19, 1993, however, President Clinton signed the "Religious Freedom Restoration Act of 1993"[19] which had as one of its purposes "to restore the compelling interest test as set forth in ... *Wisconsin* v. *Yoder* ... and to guarantee its application in all cases where free exercise of religion is substantially burdened." The statute provides that:

> Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, [except that] ... Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person -- (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.[20]

Whether this Act does, in fact, restore the *Yoder* analysis remains to be seen. The act seems to imply that a person's (or university's) religious beliefs can be intruded upon as long as those beliefs are not "substantially burdened." One line of analysis of the Act might suggest that the "substantially burdened" requirement places a higher standard on the religious university than existed prior to *Smith.*[21] A second line of analysis

might suggest that the "substantially burdened" test is not significantly different from the "substantial risk" test in an earlier Supreme Court case, *National Labor Relations Board (NLRB)* v. *Catholic Bishop,*[22] where the Court determined that protection under either the Free Exercise or Establishment Clauses requires evidence that infringement of religious beliefs is real and not speculative.[23]

## Religious Colleges and Universities and Church Control

The legal standard to be applied to religious universities in terms of either eligibility for government aid or exemption from government regulation varies with the amount of control over the universities by churches (or other comparable religious organizations such as synagogues or temples). The extent of church control varies among various universities. Some are owned and controlled by churches or associations of churches; others that once were so owned and controlled have ceased their relationship with the churches. Even those universities that continue to maintain some form of church control may have diminished the extent of that control.[24] Extensive church control that may have included at one time such measures as membership in the church for all faculty and students, written agreement by faculty and students with the church's doctrinal statement, and required attendance by students and faculty at on-campus chapel services may have become so relaxed that participation has become voluntary rather than compulsory.[25] Religious universities may have also undergone change in response to statutory or judicial pressure. A religious belief subscribed to at one time with sincere devotion may have been eliminated when significant penalties against the institution were threatened.[26] Even in the absence of penalties, universities may have diluted church control or religious elements in order to qualify for a benefit not available to religious or pervasively religious universities.[27]

Even if religious universities are not interested in imposing requirements on employees/students, the institutions may have other reasons for advancing a claim that they are religious or church-controlled. For example, religious universities are generally exempt from state unemployment compensation statutes,[28] and church-controlled universities can be exempt from Social Security[29] and ERISA[30] requirements.

Church control carries with it certain benefits for a higher education institution, including exemption from some legislative requirements. For example, religious universities may be exempt from statutes prohibiting discrimination on the basis of religion.[31] Colleges and universities are finding it more difficult, however, to maintain the same level of contacts with churches or church organizations that once had a significant role in establishing their higher education institutions. At stake may be issues of state approval or licensure or eligibility for government financial assistance. Pervasively religious higher education institutions may be ineligible for government aid under either the federal constitution or the constitution of the state in which the university is located.

The difficulty religious universities are having walking the tightrope between church control and eligibility for government benefits was recently addressed by the Virginia Supreme Court.[32] In that case, Liberty University, a religious university that from 1971 to 1989 had advertised itself as an integral part of Thomas Road Church, an independent Baptist congregation in Lynchburg, Virginia, sought $60,000,000 worth of tax-exempt municipal bonds to refinance indebtedness. Until 1989 the university had required faculty members to be members of the church and to subscribe annually to a doctrinal statement; required students to attend church and chapel six times a week; and punctuated university publications with references to the university's religious mission.[33] Subsequent to the city's decision to issue the bonds, the university began a comprehensive review of its policies in preparation for a court challenge to the issuance of tax-exempt bonds to the university as violative of the

Establishment Clause of the U.S. Constitution and a comparable provision in the Virginia Constitution prohibiting the General Assembly from conferring "any peculiar privileges or advantages on any sect or denomination."[34] Church/chapel attendance and membership requirements for employees were eliminated and many of the university's references to its religious mission were diluted or excised from publications. In addition, some of the courses with a religious focus were no longer required for students, and students could be admitted without necessarily having to claim a "born-again" religious experience.[35] Nonetheless, the Virginia Supreme Court ruled that at the time the tax-exempt bonds had been approved by the city, the university was a pervasively religious institution and therefore was not eligible under either federal or state constitutions for the tax-exempt bonds.

Following this state supreme court decision, a challenge was made to the state council of higher education that, if the university was pervasively religious as the state supreme court had ruled, students attending the university should not be eligible for state tuition grants. After a lengthy investigation by the state council, the university agreed to eliminate the doctrinal statement requirement for faculty (which had been interpreted by the state as restrictive of the faculty's academic freedom) and to eliminate virtually all church/chapel requirements for students and faculty.[36]

The role that church affiliation/control plays in eligibility for government benefits or exemption from government regulation has become a significant question in light of a recent non-higher education case, *E.E.O.C.* v. *Kamehameha Schools/Estate*.[37] In that case, a religious school that required all faculty to be Protestants was held by the Ninth Circuit Court of Appeals to not be entitled to one of the religious exemptions under Title VII because the school was not church-controlled. The effect of this decision could be that non-church-controlled higher education institutions might be discriminating against job applicants or employees if they seek to enforce religious requirements. On its

face, *Kamehameha* does not require that an educational institution be church-controlled in order to qualify for a Title VII exemption. A broad reading of *Kamehameha* suggests, however, that a Title VII exemption is not available where there is no church control. This interpretation seems justified at least as to the exemption for religious educational institutions; the court observed that it had found "no case holding the exemption to be applicable where the institution was not wholly or partially owned by a church."[38] The court found support for its position in the statement of a member of Congress that the exemption was "limited to church-affiliated colleges and universities, part of whose mission ... is to propagate the belief of the denomination that is supporting that educational institution."[39]

## Religious Colleges and Universities and Government Aid

The First Amendment to the federal constitution provides that "Congress shall make no law respecting an establishment of religion...." Government aid to nonpublic schools has generated considerable litigation in elementary and secondary religious schools. This litigation has prohibited a wide range of direct financial aid to religious schools.[40] Under what came to be known as the child benefit doctrine, the Supreme Court carved out exceptions to the general prohibition of aid to religious schools.[41] Recent permutations of this doctrine have recognized exceptions for parents.[42] While none of these cases are directly applicable to higher educational institutions, they have established the constitutional parameters for measuring government aid in relationship to establishment of religion.

Although courts have generally been quite restrictive as to direct or indirect government aid permitted to religious elementary and secondary schools, they have been much more supportive of aid to religious universities. Except in rare cases where a court has found a university to be pervasively religious,[43] a wide variety of federal and state aid to religious

universities has been upheld. In *Tilton* v. *Richardson*,[44] a companion case to *Lemon*, the Supreme Court had occasion to interpret the Higher Education Facilities Act of 1963 which provided federal construction grants for colleges and university facilities, excluding "any facility used or to be used for sectarian instruction or as a place for religious worship, or ... any facility which ... is used or to be used primarily in connection with any part of the program of a school or department of divinity." Under the Act, the United States also retained a twenty-year interest in any facility constructed with Title I funds. Four church-related colleges and universities in Connecticut had received federal construction grants under Title I for a variety of campus buildings, including libraries, a science building, a music, drama, and arts building, and a language lab. In a close 5-4 decision, the Court upheld the grants to these colleges and universities, but struck down the twenty-year provision. Under the second *Lemon* "primary effects" test, the Court declared that "[t]he crucial question is not whether some benefit accrues to a religious institution as a consequence of the legislative program, but whether its principal or primary effect advances religion."[45] Evidence that this "primary effect" was not present was that: no religious services or worship were held in the buildings; no religious symbols or plaques were in or on the buildings; the buildings were used solely for nonreligious purposes; and the institutions subscribed to the 1940 Statement of Academic Freedom and Tenure. Under the third *Lemon* "excessive entanglement" test, the Court found that the institutions did not have religious indoctrination as "substantial purpose or activity"[46] because they admitted non-Catholic students and hired non-Catholic faculty and taught religion courses that were other than the Catholic religion.

In the shadow of *Lemon* the South Carolina Supreme Court had occasion to consider the constitutionality under both the state and federal constitutions of the State Education Assistance Act which made, insured or guaranteed loans to residents attending institutions of higher education.[47] In addition to the

Establishment Clause addressed in *Lemon*, the South Carolina Constitution prohibited "the use of the 'property or credit' of the State, 'directly or indirectly' in aid of any church controlled college or school."[48] In finding the Act constitutional under the state constitution, the court held that the Act did not give loan money to colleges and universities because "the emphasis is on aid to the student rather than to any institution or class of institutions.... This is aid, direct or indirect to higher education, but not to any institution or group of institutions."[49] The Act did not violate the Establishment Clause of the U.S. Constitution because "[i]t simply aids and encourages South Carolina residents in the pursuit of higher education, and leaves all eligible institutions free to compete for their attendance and dollars...."[50]

In 1973, the United States Supreme Court addressed the constitutionality of the South Carolina Educational Facilities Authority Act that assisted higher education institutions to construct, finance and refinance projects.[51] Excluded from the Act was "any facility used or to be used for sectarian instruction or as a place of religious worship nor any facility which is used or to be used primarily in connection with any part of the program of a school or department of divinity of any religious denomination." The Act which authorized tax-exempt revenue bonds to be issued to finance projects at higher education institutions required the college to convey to the funding authority title to the project, which in turn would be reconveyed to the college after payment of the bonds. But even after reconveyance, the project could not be used for sectarian purposes. Baptist College at Charleston submitted an application requesting $1,050,000 to refund short-term financing of capital improvements and $200,000 to complete dining hall facilities. Even though the members of the Board of Trustees were elected by the South Carolina Convention, approval of the Convention was required for certain financial transactions, and the charter of the College could be amended only by the Convention, the College was not pervasively religious because there were no

religious qualifications for faculty membership or student admission, and the 60% Baptist representation among the students was the same as the percentage of Baptists in the area where the college was located. The conveyance and reconveyance process did not create an excessive entanglement because the financing authority could not take action against the college as long as rental payments were made.

A fourth case challenged a Maryland statute which provided for state aid in the form of an annual fiscal-year subsidy for private institutions offering associate and baccalaureate degrees.[52] Excluded from the aid were institutions offering seminarian or theological degrees. At the time of the lawsuit, the subsidy amounted to 15% of the state's per-full-time-pupil appropriation for a student in the state college system and approximately 30% of the funds distributed went to church-related institutions. In a lengthy analysis of the distinction between religious elementary/secondary schools and religious colleges, the Court observed that "College students are less susceptible to religious indoctrination; college courses tend to entail an internal discipline that inherently limits the opportunities for sectarian influence; and a high degree of academic freedom tends to prevail at the college level."[53] Factors that the Court identified in finding that four Catholic colleges at issue were not pervasively sectarian were: none of the colleges received funds from, nor reported to, the Catholic Church; Catholic Church representation on the College boards did not influence college decisions; attendance at religious exercises on campus was not required for students; mandatory religion courses were taught within the 1940 Statement of Principles on Academic Freedom of AAUP; before-class prayer in a minuscule number of classes was not pursuant to college policy; and the faculty were hired without having to be Roman Catholic. The Court found no excessive entanglement in the annual funding process because the colleges' secular and sectarian activities were separated and occasional audits would be quick and non-judgmental.

In the year following the Maryland case, the U.S. Supreme Court affirmed a district court decision declaring the Tennessee Student Assistance Act not to have violated the Establishment Clause.[54] The Act made state funds available to students attending "in Tennessee a public college or university, a public vocational or technical institute, or a nonpublic college or university accredited by the Southern Association of Colleges and Schools."[55] The Court quite frankly observed that "some, but not all, of the private schools whose students benefited from this program are operated for religious purposes, with religious requirements for students and faculty and are admittedly permeated with the dogma of the sponsoring organization."[56] The Tuition Grant Program, however, did not have the primary effect of advancing or inhibiting religion under the *Lemon* test because:

(1) Students were not limited to using the funds only for tuition and fees and could not use funds for personal needs such as room and board, bus fare, clothing and health care expenses.[57]

(2) Child benefit doctrine applied in that assistance was available to students attending both public and nonpublic institutions and there was "no proof showing the predominance of benefits to one religious group."[58]

(3) "[T]he emphasis of the aid program is on the student rather than the institution, and the institutions are free to compete for the students who have the money provided by the program."[59]

In a more recent case, the Supreme Court ruled that the First Amendment did not prohibit the State of Washington from extending assistance under a state vocational rehabilitation assistance program to a blind person studying at Inland Empire School of the Bible, a Christian college in Spokane, and who was seeking to become a pastor, missionary, or youth director.[60] In upholding this aid, the Court observed that "[a]ny aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of individuals."[61] Because "the decision to

support religious education is made by the individual, not by the State ... [none of the aid flowing to the school results] from a *state* action sponsoring or subsidizing religion."[62] On remand to the Washington Supreme Court, however, the state court found that even though the aid did not violate the U.S. Constitution, it did violate a provision of the Washington Constitution which provided that "[n]o public money ... shall be appropriated for or applied to any religious ... instruction."[63] In interpreting its own state constitution, the Washington Supreme Court ruled that "the State [paying] for a religious course of study at a religious school, with a religious career as his goal ... falls precisely within the clear language of the constitutional prohibition against applying moneys to any religious instruction."[64] In rejecting the student's free exercise of religion claim, the court found that he "is not being asked to violate any tenet of his religious beliefs, nor is he being denied benefits because of conduct mandated by religious belief."[65]

A significant recent state aid benefit to religious universities is reimbursement by the state to the higher education institution for work taken by high school students. Two recent Minnesota cases of the same name (*Mammenga I* and *Mammenga II*) challenged the constitutionality of that state's Post-Secondary Enrollment Options Act.[66] Under the Act, high school students could take courses at higher education institutions for either secondary or post-secondary credit. If the courses were taken for high school credit, the student did not have to pay tuition, fees, or the cost of books, and instead the state would reimburse the colleges and universities at a cost that was generally considerably less than the actual instructional charges. Evidence at the trial indicated that reimbursement for all colleges was only about 53% of actual costs.[67] Since, in addition to public higher education institutions, high school students could enroll at "a private, residential, two-year or four-year, liberal arts, degree-granting college or university located in Minnesota," some of the students elected to enroll at church-related institutions. The constitutionality of the act was challenged under the state

constitution which provides as follows concerning establishment of religion:

> [N]or shall any money be drawn from the treasury for the benefit of any religious societies or religious or theological seminaries.[68]
>
> In no case shall any public money or property be appropriated or used for the support of schools wherein the distinctive creeds or tenets of any particular ... religious sect are promulgated or taught.[69]

With the exception of Bethel College which was the subject of the second case (*Mammenga II*), the court in *Mammenga I* found for the following reasons that high school student enrollment in church-related colleges and universities did not violate state constitutional criteria comparable to the *Lemon* secular purpose and primary effects tests:

> (1) neither course structure nor course content is controlled by the church or denomination with which the ... colleges are affiliated;
> (2) the ... colleges admit both [high school students and high school graduates] without regard to creed and they select students only if they demonstrate academic excellence and personal maturity through their high school record, activities and personal references;
> (3) the ... colleges do not require attendance at religious services, do not enforce adherence to religious dogma, and do not attempt to indoctrinate or proselytize students;
> (4) the ... colleges all follow the 1940 Statement of Principles on Academic Freedom of the American Association of University Professors such that 'all courses are taught

> according to the academic requirements which are intrinsic to the subject matter, and the individual teacher's concept of professional standards';
> (5) [high school] students may not take religion or theology courses.[70]

In *Mammenga II*, the court determined that Bethel College, a presumptively sectarian school,[71] could receive reimbursement under the Act without violating the state constitution. Once the court decided that benefits to the college were "indirect and incidental as a matter of law,"[72] the court refused to examine whether the college was pervasively sectarian; under Minnesota judicial interpretation of its constitution, "even if a college is pervasively sectarian, state funds may be accorded it, if the benefit to the college is indirect and incidental."[73] The benefit to the college was indirect and incidental because the college had no control over the number of students who selected it, the state's reimbursement amounted to only 42% of the actual costs for tuition, textbooks, materials for fees, and the college separated reimbursement funds from its other funds to ensure state benefits were used only for nonsectarian purposes.[74]

As reflected in the discussion above, what constitutes an establishment of religion has generated considerable litigation, but not nearly the amount of litigation as in religious elementary/secondary schools. The standard for determining establishment of religion has been, for over twenty years, the tripartite test formulated in *Lemon* v. *Kurtzman*, and, despite some deviations by the Supreme Court,[75] the *Lemon* tripartite test has demonstrated a remarkable resiliency. Generally, educational institutions that have pervasive religious characteristics are ineligible for financial aid under the federal constitution. Eligibility for government aid, however, may depend on whether the direct recipient of the aid is considered to be the individual student or the institution. This distinction is reflective of the child benefit doctrine developed by the United States Supreme

Court forty years ago to justify government provision of textbooks and bus transportation to religious schools.

## Government Regulation of Religious Colleges and Universities

Although formulated in the context of evaluating financial assistance to religious educational institutions, the *Lemon* test has been expanded to test government regulation of religious institutions. The *Lemon* test has also become an important vehicle to challenge government regulation of religious higher education. Basically, the argument states that such regulation inhibits religious practice or promotes excessive government intrusion into the operation of the religious organization. An intriguing constitutional issue is how protection under the Establishment Clause of the First Amendment interfaces with protection in the same clause providing that "Congress shall make no law ... prohibiting the free exercise [of religion]." Although the two provisions can be viewed as advancing quite different legal theories, reliance on the Establishment Clause has become prominent because of judicial constraints on religious practices protected by the Free Exercise Clause.

The religious practices of colleges and universities may also raise as an issue whether federal or state governments must attempt to accommodate those practices even if government polices might be subverted. At stake may be revocation of a benefit as significant as tax exemption or a requirement that universities conform to local, state, or federal statutes, any of which may present a conflict between belief and practice that is difficult for the religious institution to resolve. Of concern to the government in local ordinances or state or federal statutes may be the necessity to maintain a consistent national policy on a matter of fundamental social importance. From the government's perspective, religious practices opposing that social policy, however well-meaning, may not be possible to accommodate without fragmenting the important social policy at issue.[76] From

the religious university's perspective, however, conformity to the social policy, however important that policy may seem to be, represents a declaration that the religious belief at issue is of lesser importance than national social policy. While enforcement of the government's social policy in overriding religious practice does not necessarily mean that the religious belief is wrong, a religious university may have difficulty distinguishing between a religious belief that is not wrong but will be penalized if practiced[77] and a religious belief that will be punished because it is wrong.[78]

## NLRB v. Catholic Bishop: Testing the Regulatory Flavor of Government

In *National Labor Relations Board (NLRB)* v. *Catholic Bishop*,[79] the United States Supreme Court determined that the National Labor Relations Act (NLRA) did not apply to lay teachers in Chicago area Catholic elementary and secondary schools for purposes of collective bargaining. The Court avoided the constitutional issues under the Free Exercise and Establishment Clauses by resolving the case on the basis of statutory construction.

In ruling that lay teachers were not subject to collective bargaining under the NLRA, the Court announced a three-step level of analysis for resolving the conflict between statutory language suggesting application to religious institutions and alleged constitutional infringement if the statute were to be applied to those institutions. The first step in the analysis is to determine whether government action presents a "substantial risk" of constitutional infringement.[80] A court need not decide that an infringement has occurred, only that an infringement might occur.[81] If a "substantial risk" of infringement exists, the second step is to determine whether the statute at issue applies to the religious institution.

The second step gives emphasis to a basic principle of the United States Supreme Court that constitutional issues will not

be addressed if a case can be resolved on statutory grounds.[82] Statutory construction primarily concerns a review of legislative history to determine whether the legislative body responsible for the statute intended the statute to apply to the kind of religious institution before the court. A court can take two approaches to determining legislative intent. One approach would find no statutory application unless the legislature affirmatively expressed an intent to include the religious institution.[83] The second approach would find statutory application unless the legislature expressly excluded the kind of religious institution before the court.[84] If the court determines that the legislative intent was to exclude the religious institution before the court, the *Catholic Bishop* analysis is at an end and the court will find in favor of the religious institution. If the religious institution cannot be excluded by examining legislative intent, however, the court must move to the third step and address the merits of the constitutional objections under the Religion Clauses.

The constitutional standard applied in the *Catholic Bishop* third step has depended on whether an objection is raised under the Free Exercise or Establishment Clauses. In the past, courts applied the *Yoder* compelling interest test where the objection was grounded in free exercise[85] and the excessive entanglement part of the *Lemon* test[86] where the objection was grounded in establishment of religion.[87] The difficulty with the third step of the *Catholic Bishop* analysis is that the standards for reviewing the merits of a constitutional objection themselves are under attack. The tripartite *Lemon* test has increasingly been attacked as an inappropriate standard for resolving religious issues, especially those that are outside the financial aid matrix in which the *Lemon* test was formulated.[88] Although the Supreme Court has yet to overrule or alter the *Lemon* test, considerable difference of opinion concerning the viability of the current *Lemon* test can be found on the Court.[89]

Free exercise can also be a defense to government regulation under the third part of the *Catholic Bishop* test. Under the *Smith* analysis, a free exercise claim would have been nullified since

regulatory statutes generally are "neutral, generally applicable laws."[90] Ostensibly, the Religious Freedom Restoration Act of 1993 will place the free exercise defense back into the first and third steps of the *Catholic Bishop* test. The Act's defense that a person's (or university's) religious beliefs have been "substantially burdened" is similar to the "substantial risk" requirement in the first step. Even assuming the first step of the Act has been met, however, there is no assurance that courts will be any more reluctant to find a compelling interest in applying government regulations than existed under *Yoder* prior to *Smith.*

## Government Regulations and Religious Colleges and Universities

Religious universities can be subjected to a wide range of municipal, state, or federal statutes and regulations. Objections to application of these statutes or regulations do not have to involve issues of religious freedom.[91] Discussion of religious universities and government regulation will be limited in this section, however, to those institutions where religion clause issues are raised under either the U.S. or state constitutions.

"Regulatory" can refer to a broad range of statutes, including comprehensive guidelines that could affect management of an institution as well as remedial guidelines that are impacted only when a person files a specific complaint. Application of collective bargaining statutes to religious universities has been cited as an example of the former while nondiscrimination statutes have been cited as examples of the latter. From the standpoint of the religious university, however, both kinds of statutes that call into question the distinctively religious mission of the university can be equally intrusive.

In *Universidad Central de Bayamon* v. *National Labor Relations Board (NLRB)*[92] the First Circuit Board of Appeals, in a close decision, refused to enforce an order of the NLRB directing a Catholic university to bargain collectively with a faculty union. Writing for an evenly divided court sitting *en banc,* Circuit Judge

Breyer found the following factors were adequate to establish Catholic control over the university: the university was part of a larger educational complex that included a seminary and elementary/secondary schools, the latter of which were used by university education for student teaching; the Dominican Order provided gifts of land, scholarships, and administrative salaries; the president of the university was required by the by-laws to be a Dominican priest; a majority of the five-member executive committee of the Board of Trustees was required to be Dominican priests; and the Board of Directors must include the Regional Vicar of the Dominican Order, the Prior of the Convent of Our Lady of the Rosary, and the university president, all of whom were Dominican priests.[93] In finding that *Catholic Bishop* was controlling in prohibiting application of collective bargaining under NLRA to the university, the court identified four reasons to support its conclusion:

1. *Catholic Bishop* did "not distinguish colleges from elementary and secondary schools."[94]
2. The entanglement issue under the third *Catholic Bishop* step of analysis might be implicated because not only did "moral and religious principles" underlie the curriculum and counseling of students, but the University might have to impose sanctions upon faculty that "relate to counseling in the sensitive area of abortion ... [and NLRB] review of such sanctions would place the Board squarely in the position of determining what is 'good faith' Dominican practice in respect to such counseling."[95]
3. The Court in *Catholic Bishop* refused to accept the NLRB's distinction between "completely religious schools" and "merely religiously affiliated schools"; "to promise that courts in the future will control the [NLRB's] efforts to examine religious matters [University's control over priests, seminary, curriculum and religious philosophy] is to tread the path *Catholic Bishop* forecloses."[96]
4. NLRB's reliance on the financial aid cases of *Titlton* v. *Richardson, Hunt* v. *McNair,* and *Roemer* v. *Board of Public*

> *Works* to support government regulation of religious higher education institutions is not appropriate; "in the context of Labor Board jurisdiction, the constitutional concern is one, not of state promotion, but of state interference through regulation."[97]

The power of governmental regulation can have a devastating impact on educational institutions. Nowhere was the impact of this power more evident than in *Bob Jones University* v. *United States*.[98] In *Bob Jones University*, the Supreme Court upheld IRS's enforcement of its regulation revoking tax-exempt status for educational institutions with racially discriminatory policies. Despite the fact that the university's policies prohibiting interracial dating and marriage among students were grounded in religious beliefs and had been practiced by the university since its establishment, the Court upheld imposition of a federal regulation enacted approximately forty-five years after the founding of the university.[99] The Court held that a "fundamental national public policy"[100] could override the sincerely held religious beliefs of the university despite the "substantial impact"[101] denial of tax exemption would have on the operation of a private school. This case highlights the considerable effect of government regulation on religious universities; it does little good to say that revocation of tax exemption will not prevent the university from "observing [its] religious tenets"[102] if an effect of revocation could be closure of the university. The right to hold religious beliefs may not seem so inviolable if the practice of those beliefs will face some regulatory penalty.

The relationship between religious belief and fundamental public policy was more recently raised in *Gay Rights Coalition* v. *Georgetown University*.[103] In this case, student homosexual groups brought suit against the university under a District of Columbia ordinance prohibiting discrimination in the use of or access to facilities and services based wholly or partially on sexual orientation.[104] Despite the university's religious belief opposing homosexuality, the federal appeals court for the District of Columbia determined that providing facilities and services to

homosexual students would not require the university to change its beliefs[105] and in addition would meet the District's interest in "the eradication of sexual orientation discrimination."[106] Citing the decision in *Bob Jones University* as support for the principle that "government has a compelling interest in the eradication of other forms of discrimination,"[107] the appeals court concluded that "discrimination based on sexual orientation is a grave evil that damages society as well as its immediate victims."[108]

Probably, the most important interest that a higher education institution has is the right to confer degrees. Any limitation on that right can affect the institution's ability to attract and retain students. The broad authority of states to regulate education within the state extends to higher education. Apart from issues of reasonableness of regulatory authority and criteria which can apply to all nonpublic universities,[109] attempts to regulate religious universities can raise questions of infringement of religious liberty. The legal issues relevant to state regulation of higher education institutions were thoroughly debated and resolved in the important case of *New Jersey State Board of Higher Education* v. *Board of Directors of Shelton College*.[110]

Shelton College was a higher education institution operated by the Bible Presbyterian Church as part of the church's religious mission. Even though only 30 students were enrolled at the college at the time of the lawsuit, religion pervaded the college with every academic subject "taught from a Christian fundamentalist perspective and students [required to] conform their behavior to religiously derived codes of conduct."[111] Actually, the *Shelton College* case had already had a long history of confrontation between the college and the State of New Jersey. As far back as 1967, the college had lost on free speech, equal protection, and state constitution challenges to the state's authority to set criteria for the conferring of baccalaureate degrees.[112] Following the *Catholic Bishop* analysis, the New Jersey Supreme Court in *Shelton College* found that the state statute prohibiting the conferring of baccalaureate degrees without securing a license from the state department of education applied

to all higher education institutions with no exemptions for sectarian colleges. Thus, the history of the higher education licensing provisions in New Jersey demonstrated "a legislative intent to regulate the conferring of baccalaureate degrees by religious as well as secular institutions."[113] The court assumed that the state legislature in passing the licensing statute "was aware of the existence of religiously oriented colleges."[114] In addressing the merits of the college's free exercise claims, the court rejected the State Board's argument that the licensing statute posed "no direct interference with religious practice ... because [the College's] religion [did] not require attendance at Shelton College."[115] In language that may have some significance under the Religious Freedom Restoration Act, the *Shelton* court concluded that "the New Jersey licensing statutes, as applied to Shelton College, impose[d] *some burden* on the exercise of religion."[116] The licensing requirements were upheld as the least restrictive means to carry out the state's interests in "maintaining minimum academic standards and preserving the basic integrity of the baccalaureate degree."[117] Whatever excessive entanglement arguments might have been viable in *Shelton College* were dismissed by the court as speculative since the college had declined to participate in the licensing process.

*Shelton College* stands for the important principles that states have the authority to regulate religious colleges and universities and that the Religion Clauses will not exempt higher education institutions from regulation unless there is evidence of legislative intent to exempt the institutions or unless a substantial burden to the institution's religious mission can be proved. Religious universities have claimed exemptions on both grounds.

Some statutes contain provisions exempting religious universities from some or all of the statutory requirements. One such prominent example is Title VII, the federal workhorse prohibiting discrimination on the basis of race, color, religion, sex or national origin.[118] Title VII has several exemptions that specifically apply to religious organizations:

(1) The act exempts hiring, discharge or classification based on religion ... where "religion ... is a bona fide occupational qualification (BFOQ) reasonably necessary to the operations of that particular business."[119]

(2) The act exempts employment of persons of a particular religion if the institution is "in whole or in substantial part, owned, supported, controlled or managed by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institutions of learning is directed toward the propagation of a particular religion."[120]

(3) The act does 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 or its activities."[121]

Because the statutory exemptions are so clear, religious universities have generally been successful in litigating restrictive employment practices. In *EEOC* v. *Mississippi College*,[122] a white Presbyterian female part-time instructor who had not been hired for a full-time teaching position in the psychology department, a position subsequently filled by a white Baptist male, was entitled to an evidentiary hearing for the college to present evidence regarding its preference for hiring Baptists. Once the college, which was controlled by the Mississippi Convention, presented convincing evidence of its preference for hiring Baptists, however, EEOC could inquire no further to determine whether the religious discrimination was a pretext for some other kind of discrimination. In *EEOC* v. *Southwestern Baptist Theological Seminary*,[123] an EEOC request for record-keeping information did not have to be honored as to all employees "at the Seminary [that] fit the definition of 'ministers'": all faculty, "[t]he President and Executive Vice President of the Seminary, the Chaplain, the deans of men and women, the academic deans,

and those other personnel who equate to or supervise faculty."[124] Nevertheless, the request had to be honored as to the several hundred full- and part-time support personnel and "those administrators whose functions relate exclusively to the Seminary's finance, maintenance, and other non-academic departments."[125]

*Mississippi College* and *Southwestern Seminary* are unusual in reported case law in that both dealt with religious employment restrictions for large numbers of employees. A more typical pattern among less pervasively sectarian higher education institutions is a more limited religious restriction. In *Prime* v. *Loyola University,*[126] the Philosophy Department's decision to maintain "an adequate Jesuit presence in the Department"[127] of seven Jesuits out of a total 31 faculty was found to be "reasonably necessary to the normal operation of the enterprise."[128] In *Prime,* a Jewish part-time instructor at the university had applied unsuccessfully for one of three full-time positions in the Philosophy Department that the department had determined would be filled by Jesuits in order to maintain the seven-faculty-member "Jesuit presence." In *Maguire* v. *Marquette University,*[129] an unsuccessful female applicant for an associate professor position in the university's theology department alleged sex discrimination because of her position on abortion. Relying on the "Jesuits' influence and control ... in the school's theology department," the court categorically ruled that "definitions of what it is to be a Catholic [is a] question ... the First Amendment leaves to theology departments and church officials, not to federal judges."[130] The court was careful to point out that "[t]here is probably no teaching position at Marquette University which is more closely tied to the University's religious character than that of theology professor. Plaintiff has not applied for a position in one of the more secular departments, such as the plaintiff in *E.E.O.C.* v. *Mississippi College*...."[131] Thus, *Mississippi College,* which actually dealt with a college-wide preference for Baptist faculty, was interpreted by the *Maguire* court to apply to a department rather than the entire college.

More problematic in terms of exemptions for religious universities are statutes that contain no exemption language. The Age Discrimination in Employment Act (ADEA)[132] prohibits discrimination on the basis of age (40 and older). Unlike Title VII, ADEA contains no exemptions for religious organizations and the legislative history is silent regarding the application of the statute to religious organizations.[133] In *Soriano* v. *Xavier University*,[134] the university attempted to claim that ADEA did not apply to it in relation to a claim filed by a discharged employee. In following the *Catholic Bishop* analysis, the court observed that in the absence of a finding of a "substantial risk" to the free exercise and establishment rights of the university, "courts have not rendered large groups of employers immune from liability, as such exemption would substantially frustrate the intent and purpose of the federal laws."[135] The court found "the relatively narrow focus of the ADEA" did "not entangle nor endanger the religion clauses of the first amendment."[136] Further, the court found unwarranted and speculative the university's claims that "constitutional implications may arise in a future case."[137] The *Soriano* court was influenced in its conclusion by an earlier unreported case, *Ritter* v. *Mount St. Mary's College*,[138] where the Fourth Circuit Court of Appeals had held that application of ADEA did not present a significant risk of infringement upon the First Amendment rights of the college.

In addition to the regulatory statutes discussed above, many more are applicable to religious higher education institutions, not the least of which are the Rehabilitation Act of 1973[139] and the Equal Pay Act.[140] Likewise, the new Americans with Disabilities Act (ADA) applies to both religious and secular universities; however, since ADA seems to have made no substantive changes in the Rehabilitation Act of 1973, as amended, religious higher education institutions which participate in Title IV (and other Department of Education) aid programs have already been required to comply with regulations pertaining to disabilities for both students and employees.[141] Most regulatory statutes have generated no litigation challenging application to religious

universities on the basis of an infringement of the religion clauses.[142] Even if such objections were to be made, the outcome can probably be fairly easily predicted from the first and third steps of *Catholic Bishop*: the alleged infringement will be dismissed as speculative; or the infringement will be justified as furthering a substantial government interest.

## Conclusion

Religious colleges and universities are in a time of difficult transition. Many have departed from the religious fervor that brought them into being and have minimized their religious identity. As much as these institutions would like to have minimal church control, however, most would also desire minimal government regulation. Reduction in church control has had the salutary effect of permitting religious higher education institutions to participate in state and federal aid programs, but such reduction has had the less desirable effect of decreasing the likelihood that government efforts at regulating religious institutions will negatively affect religious tenets. Short-term financial survival may drive religious colleges and universities to dilute religious control in order to eliminate the risk of being labeled as "pervasively sectarian," but the long-term cost may be loss of religious distinctiveness and protection under state or federal religion clauses.

## Endnotes

1. John S. Brubacher and Willis Rudy, *Higher Education in Transition*, New York: Harper and Row, 1976, p. 7.
2. *Id.* at 8.
3. *Id.* at 12.
4. *See generally*, Thomas C. Hunt and James C. Carper (eds.), *Religious Seminaries in America* (Garland 1989).

5. Zygano, "Sectarian Universities, Federal Funding, and the Question of Academic Freedom," 85 *Religious Freedom* 136, 137 (1990).

6. *E.g.*, compare Bergendoff, *Augustana: A Profession of Faith* (Augustana College Library, 1969) (Augustana College in Rock Island, Illinois founded by Swedish Lutheran immigrants) with Chrislock, *From Fjord to Freeway* (Augsburg Library, 1969) (Augsburg College founded by Norwegian Lutheran immigrants) and Hansen, *We Laid the Foundation Here: The Early History of Grand View College* (Grand View College, 1972) (Grand View College founded by Danish Lutheran immigrants).

7. *Trustees of Dartmouth* v. *Woodward*, 17 U.S. 518 (1819).

8. *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971).

9. *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972); *Employment Division* v. *Smith*, 494 U.S. 872 (1990).

10. *Lemon*, 403 U.S. at 612-13.

11. *E.g.*, see *Widmar* v. *Vincent*, 454 U.S. 263 (1981) (meetings of students at University of Missouri-Kansas City for religious purposes upheld over *Lemon* test challenge because University had created a public forum under First Amendment free speech clause).

12. *E.g.*, see *Maguire* v. *Marquette University*, 627 F.Supp. 1499, 1503 (E.D.Wis. 1986) (court could not intrude into hiring practices of theology department of Jesuit university as to whether a female applicant's views on abortion were consistent with the university because "such an inquiry would require the Court to immerse itself not only into the procedures and hiring practices of the theology department of a Catholic University but, further, into definitions of what it is to be a Catholic").

13. *Yoder*, 406 U.S. at 215-16.

14. *Id.* at 217-19.

15. *Id.* at 219-34.

16. See *Bob Jones University* v. *United States*, 103 S.Ct. 2017 (1983) (tax revocation upheld for religious university even though university's rules opposing interracial dating and marriage were based on long-held religious beliefs because

government had compelling interest in eradicating discrimination); *New Jersey State Bd. of Higher Education* v. *Board of Directors of Shelton College,* 448 A.2d 988 (N.J. 1982) (state statutes prohibiting any college in state from conferring baccalaureate degree without securing license from State Board of Education were enforceable against religious college whose religious doctrine opposed state licensure because state had a compelling interest in uniform application of higher education laws).

17. 494 U.S. 872 (1990).

18. Situations where government statutes or regulations are directed at a particular religious group would still permit that group to invoke free exercise protection. See *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah,* 114 S.St. 2217 (1993) (city ordinances directed at prohibiting Santeria religion practice of animal sacrifice held unanimously by Supreme Court to violate Free Exercise Clause).

19. 103 P.L. 141 (1993).

20. *Id.* at §3 (a) and (b). The "least restrictive means" requirement of the Act derives from *Thomas* v. *Review Board of Indiana,* 450 U.S. 707 (1981). In *Thomas,* the United States Supreme Court, in upholding the payment of unemployment compensation benefits to a Jehovah's Witness who had been discharged for refusing to work on military equipment because of religious belief, ruled that "[t]he state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling interest." *Id.* at 718.

21. Although the Supreme Court in *Yoder* expressed concern about "a very real threat of undermining the Amish community and religious practice as they exist today ... [representing] almost 300 years of consistent practice with strong evidence of a sustained faith pervading and regulating respondents' entire mode of life," [*Yoder,* 406 U.S. at 218, 219] there is no indication that courts subsequent to *Yoder* gave serious consideration to the substantiality of the burden; rather, they assumed a burden existed and focused on the state's

compelling interests and their effect on religious beliefs. By providing that religious beliefs must be "substantially burdened" before a religious party is entitled to a defense under the Act, interpretation of the Act may have two unanticipated effects: (1) a religious party may have an additional burden of proof to produce evidence of "substantiality," a burden which seemed to be important under the *Yoder* test prior to the Act only as related to the government's compelling interests; and (2) the government may be entitled to a directed verdict and may not have to produce evidence of compelling interest at all where "substantiality" has not been demonstrated to the satisfaction of a trial court. See *Bob Jones University*, 103 S.Ct. at 2035 where the relationship between burden to religion and governmental compelling interests were stated in a confusing manner; on one hand, the Court stated that "[d]enial of tax benefits will inevitably have a *substantial impact* on the operate of private religious schools ...," but then shortly thereafter stated "that governmental interest substantially outweighs *whatever burden* denial of tax benefits places on [the University's] exercise of religious rights" (emphasis added). *Bob Jones University* suggests that, while a court under the *Yoder* test was interested in examining the burden to religion in terms of a compelling interest, it was not necessarily concerned about examining the "substantiality" of the burden in isolation.

22. 440 U.S. 490, 506 (1979). In *Catholic Bishop*, the Supreme Court decided that the NLRB did not have jurisdiction under the National Labor Relations Act over teachers in religious schools.

23. See *N.L.R.B.* v. *St. Louis Christian Home*, 663 F.2d 60, 65 (8th Cir. 1981) (in response to allegation by *Home* that it might have to disclose source and destination of contributions from an affiliated Christian Church if collective bargaining required for its employees, the court observed that "[t]he Home has not demonstrated that such impairment will likely occur."); *Volunteers of America-Minnesota-Bar None Boys Ranch* v. *N.L.R.B.*, 752 F.2d 345, 349 (8th Cir. 1985) (*Ranch*'s claim that NLRB might

intervene if staff were to be disciplined for not carrying out duties related to *Ranch*'s religious tenets held to be insufficient to deprive NLRB of jurisdiction over maintenance, laundry, housekeeping, and child care workers).

24. *E.g.*, see "Georgia Baptists Reject Fundamentalist Plan to Control Mercer University," *Chronicle of Higher Education*, Nov. 18, 1987, at A1; "Trustees Limit Baptist Control Over University," *New York Times*, Oct. 21, 1990, at 47; "Baptists Board OKs New Governing Plan for Baylor University," *Houston Post*, Sept. 11, 1991, at A1; "Fundamentalists Lose Bid to Control Baylor," *Washington Post*, Nov. 12, 1991, at A3.

25. See "Falwell's College Alters Mission to Keep It Alive," *New York Times*, Aug. 19, 1992, at B7.

26. See *Bob Jones University* (although Bob Jones University, which had its tax-exempt status revoked because of racially discriminatory rules of conduct, has not changed its rules as a result of the revocation, the companion institution in the litigation, the Goldsboro Christian Schools, did abolish its discriminatory policy and had its tax-exempt status restored).

27. See Mawdsley, "Access to Tax Exempt Bonds by Higher Education Institutions," 65 *Ed. Law Rep.* 669 (1992).

28. *E.g.*, Ohio Rev. code §4140.01 (B) (h) (i) (Page's 1991) (exempt from unemployment compensation are employees "in the employ of a church or convention or association of churches, or in an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention of churches." In *St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U.S. 772 (1981) the Supreme Court determined that a state unemployment compensation statute did not apply to religious elementary/secondary schools because Congress had never evidenced an intent to include such schools. See *Czigler* v. *Bureau of Employment Services*, 501 N.E.2d 56 (Ohio Ct. App. 1985) (teacher of Hebrew and Jewish religious subjects at Hillel Academy denied unemployment compensation benefits because following elements made school "pervasively sectarian" even

though not controlled by a specific Jewish congregation: reception of funds from Jewish community fund; recognition of traditional holidays and Jewish holy days; student body exclusively Jewish; included among board of directors were rabbis from each Jewish congregation serving in *ex officio* capacity). See also *Murray* v. *Kobayashi*, 431 P.2d 940 (Hawaii 1967) (Kamehameha Schools determined by Hawaii Supreme Court to be exempt from unemployment compensation as a result of connection and affiliation with Bishop Memorial Church, even though the Church was actually controlled by the Schools).

29. 42 U.S.C. §410 (a) (8) (B) ("Service performed in the employ of a church or qualified church-controlled organization," provided an exemption has been filed by the organization with IRS, is exempt from coverage under Social Security).

30. 29 U.S.C. §§ 1002 (A) (33); 1321 (b) (3); 26 U.S.C. § 414 (e) (3) (B) (church benefit plans exempted from reporting and disclosure requirements of Employment Retirement Income Security Act for "a church or ... a convention or association of churches [and] an employee of an organization ... which is controlled by or associated with a church or a convention or association of churches." Under § 414 (e) a church or convention or association of churches is one "which is exempt from tax under section 501," which would distinguish organizations claiming tax exemption only as educational institutions).

31. See *E.E.O.C.* v. *Mississippi College*, 626 F.2d 477 (5th Cir. 1980) (college controlled by Mississippi Baptist Convention could have hiring preference for Baptists over other religions without violating Title VII).

32. *Industrial Development Authority of the City of Lynchburg, Va.* v. *All Taxpayers, Property Owners and Citizens of the City of Lynchburg, Va. and Others*, 400 S.E.2d 516 (Va. 1991) (unpublished opinion).

33. *Id.* at 7-13.

34. Virginia Constitution, Art. I, § 16.

35. See Mawdsley, "Access to Tax Exempt Bonds by Religious Higher Education Institutions," 65 *Ed. Law Rep.* 289, 290 (1991). Cf. "Falwell Tells Employees to Join His Church or Lose Job," *Atlanta Journal Constitution*, March 11, 1989, at A4 with "Falwell's College Alters Mission to Keep Alive," *New York Times*, Aug. 19, 1992, at B7.

36. *Lynchburg Daily Advance*, June 2, 1993, p. 1.

37. 780 F.Supp. 1317, rev'd 990 F.2d 458 (9th Cir. 1993).

38. 990 F.2d at 461, n. 1.

39. *Id.* at 464, quoting from Representative Purcell, 110 Cong. Rec. 2585-86 (Feb. 8, 1964).

40. *E.g.*, see *Committee for Public Educ.* v. *Nyquist*, 43 U.S. 756 (1973) (Court voided New York statute providing limited reimbursement to private school parents in low-income brackets and state tax-relief to middle-income parents); *Meek* v. *Pittenger*, 421 U.S. 349 (1975) (Court struck down Pennsylvania statute authorizing public educators to provide students at nonpublic schools with diagnostic, counseling, psychological, speech, and hearing therapy services); *Grand Rapids School District* v. *Ball*, 105 S.Ct. 3216 (1985) (Court struck down shared time and community education programs that exposed publicly employed teachers to potential influence of the sectarian environment of church-sponsored schools); *Aguilar* v. *Felton*, 105 S.Ct. 3232 (1985) (Court struck down New York's use of Title I funds for the benefit of minorities by paying salaries of public school teachers, psychologists, and specialists who visited parochial schools to teach and serve educationally deprived children from low-income families).

41. See *Board of Education* v. *Allen*, 392 U.S. 236 (1968) (state statute authorizing loan of textbooks to religious school upheld as providing direct benefit to children and not school); *Everson* v. *Board of Educ.*, 330 U.S.1 (1947) (upheld state program reimbursing student bus fares to parents of children attending public or nonpublic schools).

42. See *Mueller* v. *Allen*, 463 U.S. 388 (1983) (Minnesota statute permitting parents to deduct education-related expenses

for both public and private schools upheld as providing direct benefits and not to school, even though over 90% of nonpublic students were in religious schools); *Zobrest* v. *Catalina Foothills School Dist.*, 113 S.Ct. 2462 (1993) (provision of sign-language interpreter in parochial school upheld under IDEA as providing direct benefit to parents and child and not school).

43. See *supra* note 31 where Liberty University was denied tax-exempt bonds as a pervasively religious university.

44. 403 U.S. 672 (1971).

45. *Id.* at 679.

46. *Id.* at 687.

47. *Durham* v. *McLeod*, 192 S.E.2d 202 (S.C. 1972).

48. *Id.* at 203.

49. *Id.*

50. *Id.* at 204.

51. *Hunt* v. *McNair*, 413 U.S. 734 (1973).

52. *Roemer* v. *Board of Pub. Works of Md.*, 426 U.S. 736 (1976).

53. *Id.* at 750.

54. *Americans United for Separation of Church and State* v. *Blanton*, 434 U.S. 803 (1977), affirming 443 F.Supp. 97 (M.D.Tenn. 1977).

55. *Blanton*, 433 F.Supp. at 99.

56. *Id.* at 100.

57. *Id.* at 100, 101.

58. *Id.* at 103.

59. *Id.* at 104.

60. *Witters* v. *Washington Department of Services for the Blind*, 106 S.Ct. 748 (1986).

61. *Id.* at 752.

62. *Id.* at 752-53 (emphasis in original).

63. RCWA Const. Art. I, §11.

64. *Id.* at 1121.

65. *Id.* at 1123, quoting from *Thomas*, 450 U.S. at 718.

66. *Minnesota Federation of Teachers* v. *Mammenga* (Mammenga I), 485 N.W.2d 305 (Minn. Ct. App. 1992); *Minnesota*

*Federation of Teachers* v. *Mammenga* (Mammenga II), 500 N.W.2d 136 (Minn. Ct. App. 1993).

67. *Mammenga* I, 485 N.W.2d at 307.

68. Minn. Const. art I, § 16.

69. Minn. Const. art. 13, § 2.

70. *Mammenga* I, 485 N.W.2d at 307.

71. Bethel College permitted the presumption that it was presumptively sectarian for purposes of summary judgment because the college had permitted discovery regarding its use of state funds received under the Act, but would not comply with discovery requests regarding its sectarian nature. *Mammenga* II, 500 N.W.2d at 138.

72. *Id.*

73. *Id.* at 139.

74. *Id.*

75. See *Lee* v. *Weisman*, 112 S.Ct. 2649 (1992) (in striking down graduation prayers, the Court relied on psychological coercion test rather than *Lemon*); *Marsh* v. *Chambers*, 463 U.S. 783 (1983) (in upholding legislative practice of prayer before each session, Court relied on history of practice that antedated the Constitution and ignored the *Lemon* test).

76. *E.g.*, see *United States* v. *Lee*, 455 U.S. 252 (1982) (Amish employer's free exercise opposition to payment of Social Security tax for work done by Amish employees on the ground that the Amish religion prohibited acceptance of government social payments offset by government interest in soundness of social security system); *Hernandez* v. *Commissioner*, 490 U.S. 680 (1989) (disallowance of contribution as charitable deduction for auditing and training services to Church of Scientology not violative of free exercise because even substantial burden to religious beliefs justified by broad public interest in maintaining a sound tax system).

77. See *Bob Jones University*, 103 S.Ct. at 2035 (despite upholding revocation of the University's tax-exempt status because of its racially discriminatory policies, the Court nonetheless observed that such "[d]enial of tax benefits ... will

not prevent [the University] from observing [its] religious tenets").

78. This distinction between belief and practice is referred to as the belief/action dichotomy which owes its origin to *United States* v. *Reynolds*, 98 U.S. 145 (1879) where the criminalizing of the practice of polygamy was upheld against a free exercise claim that the practice of polygamy was necessary for religious salvation according to a particular religious belief system. See also *Employment Division* v. *Smith* where the Court upheld application of the state's criminal statutes prohibiting the use of peyote to Native Americans who used the drug under controlled conditions in religious ceremonies.

79. 440 U.S. 490 (1979).

80. *Id.* at 506.

81. A "significant risk" of constitutional infringement requires a likelihood of harm, not merely speculation about the possibility of harm. See *supra* note 22 and cases cited.

82. *Catholic Bishop*, 440 U.S. at 500 ("An Act of Congress ought not to be construed to violate the Constitution if any other possible construction remains," citing *Murray* v. *the Charming Betsy*, 2 Cranch 118 (1804). But see *Zobrest*, 113 S.Ct. at 2469-70 (four dissenters, in this decision where the majority had held that permitting publicly paid deaf interpreter in parochial school did not violate establishment clause, argued that the case should have been remanded to a lower court for consideration of statutory and regulatory issues: "[i]f there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought to pass on questions of constitutionality ... unless such adjudication is unavoidable").

83. See *Cochran* v. *St. Louis Preparatory Seminary*, 717 F.Supp. 1413 (E.D.Mo. 1989) (Age Discrimination in Employment Act [ADEA] did not apply to Seminary where there was no language statute or in legislative history suggesting that Congress intended to include church-operated schools under the ADEA). See also *St. Martin Evangelical Church* v. *South Dakota*, 451 U.S. 772 (1981) where the Supreme Court decided that South

Dakota could not impose unemployment compensation on church-controlled schools because Congress had not expressed an intent to include them.

84. See *Soriano* v. *Xavier University*, 687 F.Supp. 1188 (S.D.Ohio 1988) (in refusing to exclude the University operated by the Society of Jesus from ADEA, the court observed that the "ADEA, on its face as well as in its legislative history, gives no indication that religious institutions are exempt from its provisions"). See also *Lukaszewski* v. *Nazareth Hospital*, 764 F.Supp.57, 61 (E.D.Pa. 1991) (in finding that the ADEA applied to the hospital, the court declared "[t]he fact that Congress subjected religious organizations to most of Title VII strongly suggests that Congress also intended to extend ADEA coverage to the institution. The statutory provisions defining the scope of coverage are virtually identical in the two statutes...").

85. See *Catholic High School Ass'n of Archdiocese of New York* v. *Culvert*, 753 F.2d 1161 (2d Cir. 1985) (under *Yoder* analysis, state had compelling interest in applying labor laws to Catholic high school lay teachers because "[s]tate labor laws are essential to the preservation of industrial peace and a sound economic order"); *E.E.O.C.* v. *Southwestern Baptist Theological Seminary*, 651 F.2d 277, 285 (5th Cir. 1981) (providing data to EEOC for non-ministers not so great a burden so as to violate free exercise under *Yoder* test); *E.E.O.C.* v. *Pacific Press Publishing Ass'n*, 676 F.2d 1272 (9th Cir. 1982) (religiously affiliated defendant not exempted under Title VII from sex discrimination claim being filed by discharged female employee because government has compelling interest in "assuring equal employment opportunities"); *E.E.O.C.* v. *Mississippi College*, 626 F.2d at 488 (EEOC's authority to inquire under Title VII into nonhiring of non-Baptist faculty member upheld for religiously-controlled college because the government's "compelling interest in eradicating discrimination is sufficient to justify the minimal burden upon the College's free exercise of religious beliefs...").

86. See *supra* note 9 and accompanying text.

87. See *Lukaszewski*, 764 F.Supp. at 60 (less risk of excessive entanglement where ADEA applied to discharge of custodial employee at religiously affiliated hospital than where NLRA applied to teachers at religiously-controlled Catholic schools in *Catholic Bishop* because "[r]eligious doctrine is a much less important factor in most hospital decisions than it was in religious school decisions to hire and fire teachers"); *DeMarco* v. *Holy Cross High School*, 4 F.3d 166 (2d Cir. 1993), reversing 797 F.Supp. 1142 (E.D.N.Y. 1992) (application of ADEA to former lay teacher who had religious duties, including leading his students in prayer and taking them to Mass, did not pose serious risk of violating nonentanglement part of *Lemon* and therefore, ADEA applied to teacher's age-discrimination claims against school); *Scharon* v. *St. Luke's Episcopal Presbyterian Hospitals*, 929 F.2d 360, 363 (8th Cir. 1991) (discharge of hospital chaplain not subject to ADEA and Title VII scrutiny because "to review such decisions would require the courts to determine the meaning of religious doctrine and canonical law and to impose a secular court's view of whether in the context of the particular case religious doctrine and canonical law support the decision the church authorities have made").

88. See, for example, Esbeck, "The *Lemon* Test: Should It Be Retained, Reformulated, or Rejected?" 4 *Notre Dame J.L. Ethics and Pub. Policy* 513 (1990); Redlich, "Separation of Church and State: The Burger Court's Torturous Journey," 60 *Notre Dame L.Rev.* 1094 (1985).

89. For an analysis of the views of the Justices on the Court prior to *Lee* v. *Weisman*, see Mawdsley and Russo, "High School Prayers at Graduation: Will the Supreme Court Pronounce the Benediction?" 69 *Ed. Law Rep.* 189, 195-202 (1991).

90. *Smith*, 110 S.Ct. at 1601.

91. *E.g.*, see *Corporation of Mercer University* v. *Smith*, 371 S.E.2d 858 (Ga. 1988) (merger of two higher education institutions, both affiliated with the Georgia Baptist Convention, raised issues of application of Georgia statutes concerning standard of care for trustees, but no Religion Clause issues were

raised); *A.H. Belo Corporation* v. *Southern Methodist University*, 734 S.W.2d 720 (Tex. Ct. App. 1987) (determination as to whether Texas Open Records Act applied to private universities, most of which were church-affiliated, raised question of statutory construction but no Religion Clause issues); *Johnson* v. *Lincoln Christian College*, 501 N.E.2d 1380 (Ill. ASpp. Ct. 1986) (application of Mental Health and Developmental Disabilities Confidentiality Act to religious college after college counselor's divulgence of student's homosexuality resulting in college's refusal to confer degree on student raised statutory issue but no Religion Clause issues).

92. 793 F.2d 383 (1st Cir. 1985).
93. *Id.* at 399-400.
94. *Id.* at 401, citing to *Catholic Bishop*, 440 U.S. at 506-07.
95. *Id.* at 401, 402.
96. *Id.* at 402.
97. *Id.* at 403.
98. 103 S.Ct. 2017 (1983).
99. *Id.* at 2022 (the university was founded in 1927 and the racially nondiscriminatory IRS Revenue Ruling was adopted in 1971). *Id.* notes 3 and 4.
100. *Id.* at 2029.
101. *Id.* at 2035.
102. *Id.*
103. 536 A.2d 1 (D.C. 1987).
104. For wording of Ordinance, see 536 A.2d at 4 n.1.
105. *Id.* at 25.
106. *Id.* at 33.
107. *Id.* at 38.
108. *Id.*
109. For a discussion of the authority of states to regulate nonsectarian nonpublic education institutions, compare *Nova University* v. *Educational Institution Licensure Commission*, 483 A.2d 1172 (D.C. 1984) (denial of license for nonresident university to offer a doctoral program in the District of Columbia was upheld on the basis of the reasonableness of the criteria pertaining to

library resources and number of full-time faculty) with *Nova University* v. *Board of Governors*, 287 S.E.2d 872 (N.C. 1982) (North Carolina Supreme Court rejected by the Board of Governors of University of North Carolina that it could establish minimum criteria for out-of-state private universities).

110. 448 A.2d 988 (N.J. 1982).
111. *Id.* at 990.
112. *Shelton College* v. *State Bd. of Educ.*, 226 612 (N.J. 1967).
113. *Shelton*, 448 A.2d at 992.
114. *Id.* at 993.
115. *Id.* at 994.
116. *Id.* (emphasis added).
117. *Id.* at 996.
118. 42 U.S.C. § 2000e-2(a).
119. 42 U.S.C. § 2000e-2(e) (1).
120. 42 U.S.C. § 2000e-2(e) (1).
121. 42 U.S.C. § 2000e-1.
122. 626 F.2d 477 (5th Cir. 1980).
123. 651 F.2d 277 (5th Cir. 1981), reversing in part 485 F.Supp. 255 (N.D.Tex. 1981).
124. 651 F.2d at 284-85.
125. *Id.* at 285.
126. 803 F.2d 351 (7th Cir. 1986).
127. *Id.* at 352.
128. *Id.* at 354.
129. 627 F.Supp. 1499 (E.D.Wis. 1986).
130. *Id.* at 1503.
131. *Id.* at 1504.
132. 29 U.S.C. § 623.
133. See H.R. Rep. No. 805, 90th Cong., 1st Sess., reprinted in (1967) *U.S. Code Cong. & Admin. News*, pp. 2213, *et seq.*; *S. Rep.* No. 723, 90th Cong., 1st Sess. (1967); 113 *Cong. Rec.* 35,228-35,229 (1967); 113 *Cong. Rec.* 31,248-31,257 (1967).
134. 687 F. Supp. 1188 (S.D.Ohio 1988).
135. *Id.*
136. *Id.* at 1189.

137. *Id.*

138. 814 F.2d 986 (4th Cir. 1984).

139. See *Barnes* v. *Converse College*, 436 F.Supp. 635 (D.S.C. 1977) (college required to furnish interpreter at its expense after hearing-impaired teacher admitted as student in its summer program).

140. See *Ritter* v. *Mount St. Mary's College*, 824 F.2d 986 (4th Cir. 1987) (EPA applied to religious university but difference between plaintiff and competitor was sufficient to justify pay differential).

141. See Wenkart, "The Americans with Disabilities Act and its Impact on Public Education," 82 *Ed. Law Rep.* 291 (1993).

142. See Daugherty, "Uniform Management of Institutional Funds Act: The Implications for Private College Board of Regents," 57 *Ed. Law Rep.* 319 (1990) which discusses standard of care for university boards of trustees in mismanagement of funds; Steinbach, "Regulatory Issues on Campus: The Handwriting on the Wall," 53 *Ed. Law Rep.* 1 (1989) where higher education responsibility is discussed under a number of acts, such as the Resource Conservation and Recovery Act, the Clean Water Act, and the Safe Drinking Water Act.

## Bibliographic Entries

1. Cobb, Calvin. "Tax-exempt Status of Racially Discriminatory Religious Schools." 37 *Tax Lawyer* 467 (1984).

   Reflects upon the implications of the *Bob Jones University* case both in terms of tax law and religious practice.

2. Cook, Ann Marie, William Cowden, Eric Heichel, and Elizabeth Saunders. "*Universidad Central de Bayamon* v. *National Labor Relations Board*: Jurisdiction Over Religious Colleges and Universities -- the Need for Substantive

Constitutional Analysis." 62 *Notre Dame Law Review* 255 (1987).

Reviews *Universidad Central de Bayamon* case where the First Circuit Court of Appeals refused to enforce an NLRB order requiring Catholic University to bargain with a faculty union. Presents the argument that the First Circuit was incorrect in its application of *Catholic Bishop* and the *Lemon* excessive entanglement test.

3. Daugherty, Mary. "Uniform Management of Institutional Funds Act -- The Implications for Private College Board of Regents." 57 *Education Law Reporter* 319 (1990).

   Analyzes the responsibility of Boards of Regents at private universities under the Uniform Management of Institutional Funds Act in terms of standard of care, responsibility for restitution, acceptable types of investments, and acceptability of the use of the total return method.

4. Gibney, Mark. "State Aid to Religious Affiliated Schools: A Political Analysis." 28 *William and Mary Law Review* 119 (1986).

   Surveys Supreme Court decisions involving aid to religious schools and criticizes the inconsistent leadership offered by the Court. Indicates that the *Lemon* test needs to be changed and proposes a solution based on proportional religious population representation.

5. Gray, John and Andrew Ciafola. "Student Press Protected by Faculty Academic Freedom Under Contract Law at Private Colleges." 52 *Education Law Reporter* 443 (1989).

Examines validity of the premise that where an institution contractually acknowledges its faculty right to academic freedom, that right in turn protects students from administrative interference with student newspaper publications that are a result of classroom assignments.

6. Lee, Barbara. "The Qualified Academic Freedom Privilege: A Closer Look at *EEOC* v. *Notre Dame*." 41 *Education Law Reporter* 1209 (1988).

Discusses *EEOC* v. *Notre Dame* and its importance as the first case in which a federal court applied an academic freedom privilege to deny disclosure of otherwise discoverable information in a Title VII case where a black faculty member had been denied tenure.

7. Mawdsley, Ralph. "Access to Tax Exempt Bonds by Religious Higher Education Institutions." 65 *Education Law Reporter* 289 (1991).

Discusses the unsuccessful efforts by Liberty University to secure $60,000,000 of tax-exempt bonds in order to consolidate indebtedness. Analyzes the Virginia Supreme Court's decision in light of existing U.S. Supreme Court decisions and implications of the Liberty University decision on other religious universities.

8. Mawdsley, Ralph. "Comparison of Employment Issues in Public and Private Higher Education Institutions." 65 *Education Law Reporter* 669 (1991).

Discusses the difference between public and private universities in terms of constitutional issues, but also discusses similarities in terms of statutory and contractual limitations.

9. Mawdsley, Ralph. "God and the State: Freedom of Religious Universities to Hire and Fire." 36 *Education Law Reporter* 1093 (1987).

   Reviews several important federal cases addressing the right of religious universities to use religious requirements in employment decisions and the impact that statutory, constitutional, and public policy concerns have on the exercise of that right.

10. Mawdsley, Ralph. "Immigration Reform and Control Act: New Problems for Educational Employers." 38 *Education Law Reporter* 1143 (1987).

    Reviews the Immigration Reform and Control Act (IRCA) in light of its philosophy to include employers as part of the enforcement process, its requirements for compliance, its penalties for failure to comply, and problems of implementation.

11. Mawdsley, Ralph. "Judicial Deference: A Doctrine Misapplied to Degree Revocation." 70 *Education Law Reporter* 1043 (1992).

    Examines the few reported cases where universities have revoked degrees. Questions whether universities should use internal review procedures to revoke degrees and suggests that universities should instead have to seek a judicial order to revoke a degree.

12. Mawdsley, Ralph. "Religious Universities and Title VII: The Right to Discriminate on Religious Grounds." 43 *Education Law Reporter* 491 (1988).

    Examines *Amos* v. *Corporation of Presiding Bishop* as it interpreted Title VII and the implication of that case

for religious organizations which seek to impose religious requirements on employees, even those employees who are not directly involved in the religious mission of the institution.

13. McConnell, Al. "Abolishing Separate But (Un)Equal Status for Religious Universities." *77 Virginia Law Review* 1231 (1991).

    Discusses the Liberty University case where the university was denied tax-exempt bonds by the Virginia Supreme Court because of the university's pervasively sectarian program. Argues that denial of such assistance places religious schools in the same disfavored class as racially discriminatory schools and places a formidable barrier to religious practice.

14. McConnell, Michael. "Academic Freedom in Religious Colleges and Universities." 53 *Law and Contemporary Problems* 303 (1990).

    Compares academic freedom in secular and religious colleges and universities especially with regard to the 1940 AAUP Statement of Academic Freedom.

15. McConnell, Michael. "The Selective Funding Problem: Abortions and Religious Schools." 104 *Harvard Law Review* 989 (1991).

    Compares and contrasts the constitutional implications of government funding policies regarding abortions and religious schools. Concludes by offering a theory of selective governmental funding that could promote dispassionate decision making and more predictable results.

16. Morrison, Richard. "Price Fixing among Elite Colleges and Universities." 59 *University of Chicago Law Review* 807 (1992).

    Reviews the consent decree signed between the eight Ivy League schools and the Department of Justice preventing the schools from jointly fixing tuition or financial aid and from exchanging financial aid information on admitted applicants. Discusses generally application of the Sherman Anti-trust Act to colleges and universities.

17. Noonan, John. "A Catholic Law School." 67 *Notre Dame Law Review* 1037 (1992).

    Presents three intellectual aspects of a Catholic law school's origins and activity that make it different from a non-Catholic law school in light of secular accreditation standards of AALS.

18. Nordin, Virginia, and William Turner. "Tax Exempt Status of Private Schools: Wright, Green and Bob Jones." 35 *Education Law Reporter* 329 (1987).

    Examines three separate standards that seem to exist for granting tax-exempt status to private schools depending on the nature of the racial discrimination and the location of the school.

19. Parsons, Mark. "Post-Secondary Options Act Triggers Constitutional Challenge." 68 *Education Law Reporter* 201 (1991).

    Discusses comprehensively the provisions of Minnesota's Post-Secondary Enrollment Options Act (PSEOA) and the several unsuccessful challenges to its

constitutionality. Includes a very helpful chart identifying factors examined by the court as to whether the religious colleges participating in PSEOA were pervasively sectarian.

20. Russo, Charles. "Academic Freedom and Theology at the Catholic University of America: An Oxymoron?" 55 *Education Law Reporter* (1990).

    Discusses briefly the protracted and successful effort by Catholic University to remove Charles Curran as a professor of theology over objections grounded in breach of contract.

21. Smith, Margaret. "Must Higher Education Be a Hands on Experience? Sexual Harassment by Professors." 28 *Education Law Reporter* 693 (1986).

    Examines remedies available to student victims of sexual harassment, directing special attention to sexual harassment by a teacher or professor as a form of professional malpractice.

22. Steinback, Sheldon. "Photocopying Copyrighted Materials: Doesn't Anyone Remember the NYU Case?" 50 *Education Law Reporter* 317 (1989).

    Discusses the New York University case settling a copyright lawsuit involving the use of professor-prepared anthologies that were to be sold to students but had not received permission from copyright owners, and the apparent lack of awareness of the implications for violating the Copyright Act.

23. Steinback, Sheldon. "Regulatory Issues on Campus: The Handwriting on the Wall." 53 *Education Law Reporter* 1 (1989).

    Identifies several prominent existing federal regulations that should be reviewed by officials in higher education institutions to ascertain the current state of compliance. Includes discussion of such Acts as Resource Conservation and Recovery Act; the Comprehensive Environmental Response, Compensation and Liability Act; and the OSHA "Hazard Communication Standard."

24. Thomas, Stephen. "Freedom of Choice in Higher Education: *Witters* v. *Washington Department of Services for the Blind*." 31 *Education Law Reporter* 373 (1986).

    Discusses the *Witters* case, providing state aid to a blind student at a religious college, in light of its facts and consistency with other United States Supreme Court decisions.

25. Thomas, Stephen and Deborah Barber. "The Right to Rescind a Degree." 33 *Education Law Reporter* 1 (1986).

    Reviews in cursory fashion the important case *Waliga* v. *Board of Trustees of Kent State University* that upheld the right of the University to rescind the baccalaureate degrees because of dishonesty.

# CHAPTER 2
# The Educational System of The Church of Jesus Christ of Latter-day Saints

**Robert L. Millet**

An axiom of religious faith among the Mormons was given by Joseph Smith, founder of The Church of Jesus Christ of Latter-day Saints, or LDS, in 1833: "The glory of God is intelligence, or, in other words, light and truth."[1] "In knowledge there is power," Smith explained on another occasion. "God has more power than all other beings, because he has greater knowledge."[2] Thus it was that education assumed a prominent position among Mormon priorities from the very beginning.

## Early Educational Efforts

In the first issue of *The Evening and the Morning Star*, the official Church periodical in Independence, Missouri, is found the following:

> The disciplines should loose [sic] no time in preparing schools for their children that they may be taught as is pleasing unto the Lord, and brought up in the way of holiness. Those appointed to select and prepare books for the use of schools, will attend to that subject, as soon as more weighty matters are finished. But the parents and guardians, in the Church of Christ need not wait -- it is all important that children, to become good should be taught so. Moses, while delivering the words of the Lord to the congregation of Israel, ... says [quotes Deuteronomy 6:6-8] ... If it were necessary to teach their children diligently, how much more necessary is it now, when the Church of Christ is to be an ensign, yea, even a sample to the world for good?[3]

Schools were established for adults as well as children. For several years Joseph Smith directed a number of men in what came to be known as the "School of the Elders" or the "School of the Prophets." Although theology was at the core of all that was studied, instructions were given to the effect that this body of men should immerse itself in a varied curriculum. They were instructed to study "things both in heaven and in the earth, and under the earth; things which have been, things which are, things which must shortly come to pass; things which are at home, things which are abroad; the wars and the perplexities of the nations, and the judgments which are on the land; and a knowledge also of countries and of kingdoms."[4] In addition, Joseph Smith and a number of others taught and studied English grammar and Biblical Hebrew.[5]

The philosophy of education in early Mormon society placed theology at the hub of the wheel, with the secular disciplines serving as spokes. In the mind of Joseph Smith, the other disciplines had meaning only as they drew the same from the religion of the people. From the writings of Parley P. Pratt, an

early Mormon church leader, comes the explication of the place of "the science of theology":

> It is *the science of all other sciences and useful arts,* being in fact *the very fountain from which they emanate.* It includes philosophy, astronomy, history, mathematics, geography, language, the science of letters; and blends the knowledge of all matters of fact, in every branch of art, or of research ... all that is useful, great, and good; all that is calculated to sustain, comfort, instruct, edify, purify, refine, or exalt intelligences; originated by this science, and this science alone, *all other sciences being but branches growing out of this* -- the root (emphasis added).[6]

Sidney Rigdon, former Campbellite minister and later counselor to Joseph Smith, asked the question: "What is religion without intelligence? An empty soul." Rigdon then continued: "Intelligence is the root, from which all time enjoyments flow. *Intelligence is religion and religion is intelligence,* if it is anything" (emphasis added).[7]

Joseph Smith and the Mormons established school systems in Ohio, Missouri, and Illinois. It was in Illinois that interest in formal education reached a peak in the formative period of Church history, for it was in the city of Nauvoo that the Saints were able to live in relative peace (freedom from persecution) for seven years. Having been granted an extremely liberal and broad charter (act of incorporation) by the State of Illinois, the Latter-day Saints set about to establish common schools and a local university. The University of the City of Nauvoo, organized February 3, 1841, "was a strange combination of the traditional church college and the French inspired 'university of the state' under which were combined all educational functions within the state.[8] The University of the State of New York (1784) and the University of Michigan (1817) may have furnished the pattern for the university at Nauvoo, although in Nauvoo both the universal