Giving Legal Life to the Ex Corde Ecclesiae Norms: Corporate Strategies and Practical Difficulties

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GIVING LEGAL LIFE TO THE
EX CORDE ECCLESIAE NORMS:
CORPORATE STRATEGIES AND
PRACTICAL DIFFICULTIES

NICHOLAS P. CAFARDI*

In August, 1990, when he promulgated the Apostolic Constitution, Ex Corde Ecclesiae, Pope John Paul II was finishing a task that the Church had taken up years ago, in the Second Vatican Council. Paragraph 10 of Gravissimum Educationis, the Council's Declaration on Christian Education, contains a charter for Catholic universities throughout the world. They are, the Council says, to be operated with a "true liberty of scientific inquiry." In Catholic universities, faith and reason should "converge" so that their graduates are "outstanding in learning, ready to undertake the more responsible duties of society, and to be witnesses in the world to their faith."

Since 1971, a discussion had been going on between the Vatican's Congregation for Catholic Education and the International Federation of Catholic Universities on the implementation of the Council's vision for Catholic higher education in a formal papal pronouncement. As a result of these discussions, a number of meetings in Rome, and the reactions of many persons in the higher education field to previous draft documents, the pope finally issued Ex Corde Ecclesiae, almost twenty years later. This is a significant document—a papal constitution establishing norms for Catholic colleges and universities throughout the world. The pope's constitution is very faithful to the spirit and tone of the Council document. He states again the need for freedom of inquiry at Catholic universities, while emphasizing that faith and reason never reach opposing goals, since they both seek the truth.

The papal constitution contains two parts. The first is general and pastoral in tone, the second more juridic, establishing norms for Catholic universities and colleges throughout the world. The bishops of each country were directed to prepare national adaptations of these universal norms and particularize them for their own country. After much discussion and consultation with Catholic higher education officials, the American bishops adopted

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1. Ex Corde Ecclesiae was issued on August 15, 1990. An English text was published in 20 ORIGINS 265-76 (1990).


3. Id. at 735.

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norms for the United States in November, 1996. These norms were forwarded to Rome for approval by the Congregation for Catholic Education. To the surprise of many, these norms were sent back to the bishops with the request that a more juridical version be prepared, taking into account the application of canons 807 through 814 of the Code of Canon Law (which deal specifically with Catholic higher education). These canons are important because they are the source of the requirement that only the Church can designate a university as "Catholic," that teachers in Catholic institutions must have integrity of doctrine and probity of life or be dismissed, and that persons teaching the sacred sciences (philosophy, theology, sacred scripture, canon law) must have a "mandate" to teach.

The bishops went back to the consultation rooms and drafting tables. They have now released a second draft of norms implementing Ex Corde Ecclesiae for American Catholic colleges and universities. As might be expected, these norms contain a more juridic section that was not in the first draft, and they do take into account the applicable sections of the Code of Canon Law. The release of these redrafted norms, which (it must be emphasized) still constitute a draft, has caused much consternation on Catholic campuses and among Catholic commentators. The noted magazines America and Commonweal have addressed the issue, and the topic has even made its way into the pages of The New York Times, The Boston Globe and The Chronicle of Higher Education. The general consensus seems to be that this revised draft raises dangerous implications. The old alarm bells are already going off. We will lose our government aid. We will lose our accreditation. We will lose our academic credibility. We will become an intellectual ghetto. We will be sued. All these and many more dire circumstances are predicted to occur if the bishops' norms, as drafted, become effective.

8. 1983 Code C. 812; the Vatican's request that these canons be taken into account for the American bishops' norms was rather ironic. The Canon Law Society of America, in its commentary on the 1983 Code of Canon Law had previously opined that these canons, cc. 807-814, were for various cultural, historical and canonical reasons not applicable to the Church in the United States, and the author of that opinion, Monsignor Frederick McManus, formerly of the canon law faculty at the Catholic University of America, was a "resource person" for the bishops' Ex Corde Ecclesiae Implementation Committee. See [THE CODE OF CANON LAW: A TEXT AND COMMENTARY], 571-72 J. Coriden et al. eds. (1985).
I wish, with this article, to address one very basic issue: assuming that the draft norms are finalized in a version close or identical to the current version, what legal steps would a Catholic college or university have to take to implement them, and what legal difficulties might this implementation create? If we need to fear the implementation of these norms, we had best put flesh on the bones of the bogeyman. In that way, we will have at least a better understanding of the problem that arguably confronts us.

The draft *Ex Corde* norms do require that steps be taken to implement the norms and make them a part of the Catholic college's or university's basic legal structure. Catholic colleges and universities are to do this and then report back in five years to the local diocesan bishop exactly what legal steps they have taken to meet this goal. This will not be possible without the cooperation of the religious bodies who founded and are still active at American Catholic colleges and universities, and without the cooperation of the laypersons whom they have chosen to be their collaborators in the management of their higher education apostolate.

In my experience, Catholic colleges and universities fall into two broad legal categories. They are either nonprofit corporations with a two-tiered legal structure, or nonprofit corporations with a one-tiered legal structure.

In the two-tiered structure, persons in a management position at the religious institute that founded the school are the corporate members. They meet infrequently-usually once a year-and their main corporate task is to appoint the board of directors. They may have other corporate authority as well, such as to amend corporate articles and bylaws, to merge or dissolve the corporation, or to approve the sale of major corporate assets. But the members' corporate powers are such that, aside from the power to choose directors, they rarely if ever come into play. The lower tier in this structure, the board of directors, does all of the corporate heavy lifting. This board is predominantly lay, although some persons from the founding religious institute, even corporate members wearing two hats, may sit here. This board of directors oversees the daily management of the corporation.

In the one-tiered nonprofit corporations, there are no corporate members. Rather, there is a self-perpetuating board of directors. All corporate authority is centered in this body. Very often, there will be a bylaw that requires a certain percentage of seats on this board—usually a third or more—to be held by members of the religious institute that founded the college or university. The more drastic corporate acts, such as merger, dissolution, sale of major assets, corporate restructuring, appointment of a new college president, typically require a super-majority of the board (two-thirds plus one).

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13. Id.

14. This type of corporation is described extensively in Adam J. Maida & Nicholas P. Cafardi, *Church Property, Church Finances and Church-Related Corporations* 147-70 (1984).
This gives the religious directors an effective veto, assuming that they vote as a bloc with their one third of the seats.15

This is not the place for a long dissertation on the juridical status, under canon law, of American Catholic colleges and universities. Much ink has been spilled on the question of whether, either by incorporating or by relying upon predominantly lay boards, these institutions have lost their "canonical" or officially Catholic character.16 It is enough to say that "Catholic" is their continuing self-characterization, and it is difficult to understand how any institution could be "Catholic" in any meaningful sense of that word and not be subject to the Church's law. My presumption, and the presumption of the Apostolic See and the American bishops, is that the Church's law applies to them. This includes, if they are ever finalized, the Ex Corde norms. Institutions that desire to be Catholic should expect to be subject to the Church's law.

This message should be communicated to corporate members and board members of Catholic colleges and universities. But it need not, nor should it, be communicated in some heavy-handed fashion. Indeed, I suspect that it was this very fear of a heavy-handed hierarchical involvement in their affairs that led the American Catholic higher educational establishment to come up with the "non-canonical" theory to begin with. As former U.S. Deputy Assistant Secretary for Education Kenneth Whitehead states in his study of federal funding for Catholic colleges, "As far as Catholic colleges and universities are concerned, the evidence examined in this inquiry suggests that these colleges first decided they wanted to have 'institutional autonomy' and 'academic freedom' — and only then decided to adduce supposed government requirements for giving out aid as the principal reason they needed to have these two things."17 Any study of the implementation of the Ex Corde norms must take this mind-set into consideration. It is an indisputable part of the American Catholic higher educational story.

Assuming, however, that this message is communicated in good will—and not as a power play—and that those possessing the legal authority to make fundamental changes in the corporate structures of American Catholic colleges are willing to accept the message in good will, what corporate changes do the Ex Corde norms require them to make?

The changes, surprisingly, are quite few. As one might suspect, they lie primarily, but not exclusively, in the area of theological instruction, but there are other alterations to corporate documents and structures that the draft norms would require. First of all, the draft norms seek to have the religious institutes or dioceses that sponsor colleges or universities retain enough legal

15. This type of corporation is described in Pime v. Loyola University of Chicago, 803 F. 2d 351, 352 (7th Cir. 1986).
power within the corporate structure to "preserve and strengthen the Catholic identity of the university."  How would this be accomplished?

In the two-tiered corporate structures, meeting this requirement is simply a matter of ensuring that the corporate members— who should have a significant overlap with the same persons who manage the affairs of the sponsoring religious institute or diocese—retain enough reserved powers in the corporation to protect Catholic identity. Reserving to themselves the ability to establish corporate philosophy, to make or approve major corporate changes, and to appoint or approve the appointment of major corporate officers would certainly accomplish this end.

In the one-tiered structure, this task may be more difficult. Assuming that the sponsor still holds a bloc of seats on the board of directors, then these corporate powers—relating to corporate philosophy, corporate change and senior level appointments—would need to be in the list of those corporate actions that require a super-majority, guaranteeing the acquiescence of the religious sponsor.

Second, the draft norms require the university "to take steps to ensure that all professors are accorded 'a lawful freedom of inquiry and of thought, and of freedom to express their minds humbly and courageously about those matters in which they enjoy competence.'" This guarantee of academic freedom would not be out of place in the university's bylaws or statutes, and the wording of the draft norms would copy well into these documents. Similarly, a Catholic university is required by the draft norms to respect the religious liberty of every individual. A footnote to this requirement specifies that emphasizing a university's Catholic identity is not to be used as an excuse for "religious indoctrination or proselytization." Again this requirement would not be out of place in a university's bylaws or statutes.

Third, a Catholic university is to acknowledge its "canonical status" and its commitment to Catholic identity "in its mission statement and/or its other

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18. Draft Norms, Art. 1 (3), at 8. This is a paraphrase of the requirement of the Apostolic See in the St. Louis case that the Jesuit sponsors of the university "put in place a mechanism through which the society exercises control with respect to the president and the board of trustees. . . to ensure that the requirements of canon law as they pertain to St. Louis University are followed." See Statement of Archbishop Justin Rigali: Concerning the Sale of St. Louis University Hospital, February 24, 1998 quoting a joint letter of Cardinal Edoardo Martinez Somalo, Prefect of the Congregation for Institutes of Consecrated Life and Societies of Apostolic Life, and Cardinal Pio Laghi, Prefect of the Congregation for Catholic Education to Father Peter Hans Kolvenbach, S.J., Superior General of the Society of Jesus. The full text of the joint letter has not been released.


20. University statutes are a common device used by universities to set forth, in a public fashion, the rules of university life. They are not the equivalent of the university's corporate articles or corporate bylaws, which tend to restrict themselves to legal structures and board powers. These documents (articles and bylaws) tend to be limited to very basic corporate matters and are rarely changed. Statutes can be a bit more expansive, are more easily amended, and deal with the details of university life.


Fourth, an institutional commitment to specified elements of Catholic identity is also required in the mission statement or other official corporate documentation, such as corporate articles or bylaws. The elements of Catholic identity that the draft norms specify are: commitment to be faithful to the teachings of the Church; commitment to Catholic ideals, principles and attitudes in research, teaching, activities, with due respect for academic freedom and individual conscience; commitment to serve the poor, underprivileged and vulnerable; commitment to witness the faith by Catholic teachers and administrators, especially those who teach theological subjects, and respect on the part of non-Catholics for the University’s Catholic identity and mission; commitment to provide courses for Catholic students on moral and religious principles; commitment to the pastoral care of students, faculty, administration and staff; and commitment to provide personal services, such as health care and counseling, to students, administration and faculty in conformity with the Church’s ethical and religious teachings. Since this list is very much a statement of ideals, its placement in the institution’s mission statement would be most appropriate.

Fifth, qualifications for board members are also established in the draft norms. Preferably board members should be Catholic and/or committed to the University’s mission statement. It is normal to state qualifications for board membership in corporate bylaws. In implementing the draft norms, therefore, the section of the University’s corporate bylaws on board membership should be amended to specify a preference for Catholics and a requirement that all board members, whether Catholic or not, subscribe to the institutional values set forth in the mission statement.

Sixth, the draft norms also make it the responsibility of the Board periodically to review corporate activities (instructional, research, service) to ascertain that they are congruent with the mission statement and the Ex Corde norms. This responsibility of the Board is important enough to be listed as one of the Board’s duties in that section of the corporate bylaws devoted to Board activities. An earlier part of the draft norms suggested the creation of a “mission effectiveness committee.” A review of corporate activities in terms of their consistency with the mission statement would seem to be a natural activity for such a committee. Of course, the creation of such a standing committee of the board would require a new section of the corporate bylaws.

Seventh, the draft norms specify that the university president should be a faithful Catholic. A footnote makes clear that this is a strong preference and not an absolute requirement since it talks of the possibility of a non-Catholic president.

27. Draft Norms, Art. 2 (5) (a), (b), (c), (d), (e), (f) and (g) at 9.
28. Draft Norms, Art. 4 (2) (a) and (b) at 11.
29. Draft Norms, Art. 4 (2) (d) at 12.
31. Draft Norms, Art. 4 (3) (a) at 12.
32. Draft Norms, n. 36, at 12.
determinative of who can hold that office, belong in the corporate bylaws. As a result, the implementation of this draft norm would require a statement in the bylaws to the effect that the President of the university is preferably to be a faithful Catholic.

Eighth, in the area of faculty hiring, the draft norms state that the "university should recruit and appoint faithful Catholics as professors so that, as much as possible, those committed to the witness of the faith will constitute a majority of the faculty,"33 Faculty hiring preferences along religious lines is an important enough corporate policy that it belongs in the public record of the university. The obvious place to put such a requirement is in the university statutes and the faculty handbook.34 This requirement could also be made a part of the university's corporate bylaws, but it need not be placed there in order to be effective. Its placement in statutes and handbook would be enough; as we shall see later, the important part about such hiring preferences is that they be made public.

Ninth, the draft norms specify that all faculty are to exhibit academic competence, integrity of doctrine and good character and that the university statutes are to establish a process to remedy the situation when this is not the case.35 Since the norms require that university statutes provide a means to address faculty members who are not academically competent, lacking integrity of doctrine or good character, it makes sense that the same statutes should require these qualities of professors. This requirement need not be in the corporate articles and bylaws. If such requirements are to be imposed, then the university statutes are a proper place for them.

Tenth, Catholic professors who teach theology are required to have a mandate issued by the competent ecclesiastical authority.36 This requirement need not be placed in the corporate articles or bylaws to be legally effective. It is enough that it be stated in the university's statutes. The important part of such a requirement is that it must be publicly stated if it is to be legally enforceable for future hires. It is doubtful that this requirement could be made retroactive for professors who are already tenured at the university, since it adds a material condition to their employment, although it could be a matter of negotiation prior to their assignment to certain courses for which the mandate is required by the department or university. In terms of future hires, however, the necessity of a mandate could be made a part of their employment contract from the start.

Eleventh, disputes over Church teaching are to be handled according to a document previously approved by the National Bishop's Conference, entitled

33. Draft Norms, Art. 4 (4) (a) at 12.
34. The faculty handbook is a common device used by colleges and universities to specify the rules of the institution as they apply to faculty. They typically deal with such issues as faculty hiring, retention and promotion. Some institutions might also place the material that this article has previously suggested belongs in university statutes into the faculty handbook as well. In many institutions, the content of the university statutes would overlap significantly with what is contained in the faculty handbook.
Doctrinal Responsibilities: Approaches to Promoting Cooperation and Resolving Misunderstandings between Bishops and Theologians.\textsuperscript{37} There should be a reference—in the same section of the University’s statutes that refers to the mandate—to this dispute resolution mechanism for theologians. This is important because the norms mandate its use when there is a theological disagreement between the diocesan bishop and a university theologian teaching pursuant to a mandate received from the diocesan bishop. This proposal of the draft norms actually would guarantee theologians at Catholic colleges and universities greater protection than they have today in the absence of such a dispute resolution mechanism.

Twelfth, the draft norms, in matching footnotes, suggest that the diocesan bishop or persons from the religious institute that sponsors a Catholic university should be on the board of directors or trustees of the institution.\textsuperscript{38} Obviously \textit{ex officio} seats on a corporation’s board of directors must be so designated either in the corporate articles or bylaws, more typically the bylaws. The same footnotes also suggest that the University’s annual report should be sent to the diocesan bishop and the sponsoring religious institute. While this suggestion could be handled simply through the sound practice of courtesy, it could also be specified in the corporate bylaws who is to receive copies of the corporation’s annual report. Finally, these same footnotes suggest that there should be some established procedures in place to resolve issues that might arise between the diocesan bishop, the religious institute and the university regarding the university’s Catholic identity. Such procedures could either be a matter of courtesy or, if officially adopted, might (even better) be referred to in the corporate bylaws as a means of resolving such disputes.

As can be determined from the above list, the adoption of the draft norms would require some, but not many, modifications, either in the corporate articles, the corporate bylaws or the statutes of a Catholic university. The norms themselves state that appropriate corporate changes must be made to make the norms a part of the university’s corporate structure.\textsuperscript{39} It is now incumbent on us to analyze what legal difficulties they might create for the Catholic university corporation, once implemented.

The first difficulty is the most obvious one: If these changes are to be adopted, they must come as the result of the free act of the university corporations themselves. The mandating of internal corporate change by a noncorporate body, even when that body is the National Conference of Catholic Bishops, does not just happen by fiat. Those in control of the corporation must agree to make these changes. For that to happen, a good case must be made by those proposing the changes as to why they are necessary or advisable. At least in the literature available to date, that case has not been convincingly made.

\textsuperscript{37} National Conference of Catholic Bishops, \textit{Doctrinal Responsibilities: Approaches to Promoting Cooperation and Resolving Misunderstandings between Bishops and Theologians} (1989).

\textsuperscript{38} Draft Norms, nn. 49 & 50 at 16-7.

\textsuperscript{39} Draft Norms Art. 2 (a) at 7.
It has been suggested that the preference for Catholics—on the board of trustees, as university presidents and as faculty members—raises problems with the federal employment discrimination statutes, namely Title VII of the 1964 Civil Rights Act. The choice of corporate board members is really not an employment practice, so that particular preference for Catholics falls outside the scope of the anti-discrimination legislation. But, at first glance, at least, it would appear that implementation of the Ex Corde norms as to preferential hiring of Catholics as president or faculty might run afloat of the federal civil rights law. On closer examination, however, it appears that Title VII provides three different exemptions for religious organizations in their hiring practices that might protect Catholic universities seeking to implement the Ex Corde norms.

First, Section 702(a) of Title VII provides an exemption from the Act for "a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." The plaintiff’s obvious counter to a Catholic university claiming this exemption would be to assert that the university was so secularized as not to fit within the term "religious corporation, association, educational institution, or society." Certainly, many Catholic colleges and universities have assisted a plaintiff who would make this argument by their own claims not to be an official part of the Church. Oddly enough, however, by making all or even only some of the corporate transformations that the Ex Corde draft norms specify—creating clear links to the institutional Church—a university corporation might well be able to characterize its redesigned self as a truly religious employer.

The test that the federal courts have generally used to determine whether an employer can claim the religious exemption is a "totality of the circum-

40. See the excellent treatment of the preferred hiring aspects of this issue in Robert J. Araujo, Ex Corde Ecclesiae and Mission Centered Hiring in Catholic Colleges and Universities: To Boldly Go Where We Have Gone Before 25 J. U. & C.L. 835 (1999).


1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of any individual's race, color, religion, sex, or national origin; or

2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

41. As noted above, the draft norms also require that, in addition to being Catholics with integrity of doctrine, faculty exhibit "good character," Art. 4 (4)(c) at 13. This is not a religious norm and so will not be dealt with in the text. It would have to be a contractual term between faculty member and university and, unless carefully drafted and evenly bargained for, might be rather difficult to enforce.


stances” test.44 In applying this test, the 11th Circuit Court of Appeals in Killinger v. Samford University said it was appropriate to look at such factors as (1) to what extent does the church own, operate and/or fund the institution; (2) the institution’s reporting requirements to the church; (3) whether faculty members must subscribe to certain religious values incur a penalty if they do not; (4) whether Bible study or attendance at religious services is mandatory for students; (5) whether federal and state agencies have recognized the institution as a religious educational institution and granted it exemptions on that basis.45 Depending on the totality of these circumstances, the federal appellate courts have generally determined whether an institution will be found to be religious or not. Since the Ex Corde draft norms do envision clearer links between the university and the institutional Church, it could well be the case that implementing these norms would result in a university being able to claim the protection of the religious exemption legislated by Section 702(a). Furthermore, the Killinger court stated that there is no authority supporting the notion that an institution must maintain some form of “rigid sectarianism” in order to qualify for Section 702(a) exemption.46

The above language is an obvious reference to the test laid down in Tilton v. Richardson,47 Hunt v. McNair,48 and Roemer v. Board of Public Works,49 relating to federal aid to religiously affiliated colleges. In those Supreme Court cases, the principle was established that, except for those colleges that were “pervasively sectarian,” governmental aid was constitutionally permissible to religiously owned and affiliated colleges and universities. In other words, as long as you can separate the secular from the sectarian at religiously-affiliated colleges and universities (and at “pervasively sectarian” colleges and universities this separation cannot be made), it is constitutionally permissible to aid the secular. Religious colleges and universities, then, can claim Section 702(a) protection and not lose their right to federal aid, pro-

45. Killinger 113 F.3d at 198-99.
46. Id. at 199. Nevertheless, loose affiliation with a religion will not be enough for an institution to make a successful claim for a § 702(a) exemption. The Ninth Circuit has held that where the institution is associated with a religion but “[t]he ownership and affiliation, purpose, faculty, student body, student activities, and the curriculum of the [school] are either essentially secular, or neutral as far as religion is concerned, . . . the [school]. . . reflects a primarily secular rather than a primarily religious orientation.” Therefore, Section 702 may not be invoked. E.E.O.C. v Kamehameha Schs./Bishop Estate, 990 F.2d 461.
47. 403 U.S. 672, (1971).
vided that they are not "pervasively sectarian." As the Killinger court opined, these are not overlapping designations. This is an important legal point, inasmuch as the mantra of those opposing the draft norms is that implementing them will cost Catholic colleges and universities their federal aid. This will not automatically be the case.\textsuperscript{50} Aside from the hiring standards proposed by the norms—and these can be desecularized by specifying that hiring preferences will be given not just to Catholics but also to those people who share the mission and philosophy of the institution—the greatest effect of the norms is in the area of theology. Pursuant to the Tilton line of cases, no federal aid could ever have flowed to the theology department to begin with. That would have been a sectarian aspect of the institution that could not possibly receive aid. So in any analysis of the availability of federal aid to the institution, the operation of the theology department, who can teach there and what they can teach, and the sponsoring denomination's control thereof, should be irrelevant.\textsuperscript{51}

The 1964 Civil Rights Act contains a second important exemption in Section 703(e)(1), that relates to determining when religion is a bona fide occupational qualification.\textsuperscript{52} The U.S. Supreme Court has defined a bona fide occupational qualification (BFOQ) as a qualification which affects an employee's "ability to do the job"\textsuperscript{53} and relates to the "essence"\textsuperscript{54} or "to the central mission of the employer's business."\textsuperscript{55} That the president of a Catholic college should be a practicing Catholic is exactly the kind of bona fide

\textsuperscript{50} See Whitehead, supra note 17.

\textsuperscript{51} This presumes that the effect of theology is not pervasive across the curriculum. Roemer found that mandatory theology classes, taught primarily by Roman Catholic clerics, did not make an institution pervasively sectarian when the courses were only part of an over-all liberal arts curriculum and an atmosphere of academic freedom prevailed. 426 U.S. at 756. An important part of this atmosphere was subscription to the 1940 statement of Principles on Academic Freedom and Tenure of the American Association of University Professors, to which the Catholic colleges in Roemer subscribed, and to which Catholic colleges and universities today still subscribe. The Draft Norms specifically guarantee academic freedom, Article 2 (2) at 8, to all, including theology professors, and, with the disappearance of the "core curriculum" at most Catholic colleges and universities, it is doubtful that a course in specifically Catholic theology is mandatory at more than a handful of institutions. Catholic colleges and universities would seem to be in less danger today from a Roemer standard than they were in 1976.

In citing the Tilton line of cases and applying the reasoning of the Court as explained therein, I do not mean to endorse their characterization of religiously-affiliated higher education as "pervasively sectarian" or not as a test for government aid, nor even to imply that this would be the standard if the Court were to decide such cases today. It is necessary to deal with these precedents, however, because much of the criticism from the academy of the Ex Corde norms relies on the Tilton line of Supreme Court decisions.

\textsuperscript{52} This section states: "Notwithstanding any other provisions of this subchapter, (1) it shall not be unlawful employment practice for an employer to hire and employ employees, . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-1(e)(1)(1994).


\textsuperscript{54} Id. at 203 (quoting Dothard v. Rawlinson, 433 U.S. 321, 333 (1977)).

\textsuperscript{55} Id. (quoting Western Airlines v. Criswell, 472 U.S. 400, 413 (1985)).
occupational qualification that the law was designed to protect against claims of discrimination. The same protection could be claimed for a requirement that professors of theology be practicing Catholics as well. It is a legitimate BFOQ for the job.

A third critical exemption was written into the Civil Rights Act in Section 703(e)(2), exempting from the coverage of the Act any "school, college, university, or other educational institution [that hires] employees of a particular religion if such school, college, university or other educational institution . . . is, in whole or substantial part, owned, supported, controlled or managed by a particular religion or religious corporation, association or society."56 In both of the typical Catholic college corporate structures—the two-tiered structure with a significant religious presence at the corporate membership level, or the one-tiered structure with a significant religious presence at the board of directors level—a convincing argument can be made that the corporation is either supported, controlled or managed by the religious sponsor.57 When this is considered in conjunction with the Ex Corde norm on preferring Catholics for board membership,58 the case for religious support, management or control of American Catholic colleges and universities is made even stronger.

The Ex Corde norms, if implemented, would therefore appear not to present any significant difficulties with the 1964 Civil Rights Act in terms of religious preferences for hiring at Catholic colleges and universities. There remains a very real question, however: Does that fact that an institution is religious enough to merit the Civil Rights Act exemptions mean that such a college or university has become too religious to receive federal aid? The answer is: Probably not. The Killinger court stated very clearly that these were two separate issues and that a college could qualify for the Civil Rights Act exemptions without being "rigidly sectarian." There is admittedly some unfortunate language in both Hunt and Roemer which indicates that the decisions may have relied on the fact that "there are no religious qualifications for faculty membership,"59 and that "no instance of church considerations into college decisions was shown."60 These dicta could be used to create the argument that implementation of the Ex Corde norms, which do involve religious considerations for faculty (hiring Catholics is preferred and all professors are to exhibit "integrity of doctrine") and which do involve Church

57. In Fime v. Loyola Univ. of Chicago, 803 F.2d 351 (7th Cir, 1986), Judge Posner, concurring, asked "[i]s the combination of a Jesuit president and nine Jesuit directors out of 22 enough to constitute substantial control or management by the Jesuit order?" He would have answered yes "[i]f the governance arrangements of Loyola are typical of those of Catholic universities. . . ." Id. at 357-58. We know, in fact, that the arrangement at Loyola is one of two very typical corporate structures for Catholic colleges and universities in the United States.
58. Draft Norms, Art. 4 (2) (a) and (b) at 11.
considerations in college decisions, would make those Catholic colleges that followed *Ex Corde* susceptible to losing their governmental aid.\textsuperscript{61}

How could these issues be dealt with? For colleges who wish to implement the *Ex Corde* norms, softening the hiring requirement to include not just Catholics but some others who accept the values of the colleges’ mission statement could avoid part of the first hurdle (a religious hiring test). The draft norm’s standard for “integrity of doctrine” for all professors is more problematic. Tests for “integrity of doctrine” have been upheld at the grade school level for Protestants teaching at Catholic schools under Section 702,\textsuperscript{62} but employing such tests at the college level, while perhaps protected by Section 702, would come very close to making the institution susceptible to a “pervasively sectarian” characterization. It is not clear what the draft norms mean by “integrity of doctrine” for all professors, but whatever it means, it does not sound like a good idea.

In terms of Church considerations entering into college decisions, it is clear from the norms that the bishops do not want to control the colleges. While they want the colleges and universities to act like Catholic institutions, those requirements are meant to be self-policing.\textsuperscript{63} The bishops’ input should be limited to that area where they really want input, namely the teaching of theology. This should prove harmless to the receipt of federal aid inasmuch as federal aid is already prohibited from flowing to the theology department. Since this part of the college or university is by case law unaided and unaidable, how it conducts its affairs—provided the teaching of theology never becomes a pervasive part of the institution—should not be a part of the analysis of whether the rest of the college or university (the secular or non-sectarian part) can receive federal aid.

The point of all this is that there are ways to make the *Ex Corde* norms legally effective at American Catholic colleges and universities without undermining their ability to attract direct governmental aid. There is some question whether that consideration should even drive this debate, inasmuch as direct governmental aid to the institution, governed by the *Tilton* line of cases, is a rather small part of overall governmental aid, estimated at only

\textsuperscript{61} It should be noted that this would apply only to federal aid that went directly to the college. *Tilton* and *Hunt* dealt with building funds, *Roemer*, with institutional grants. Direct federal aid to students attending these colleges by far the largest amount of federal aid received would not be affected. Whitehead puts the amount of direct student aid at over 93% of total aid, which means this entire legal issue of whether American catholic colleges and universities meet the *Tilton*, *Hunt*, and *Roemer* standards deals with less than 7% of total aid received. *Whitehead, supra* note 17, at 71. It should also be noted that *Tilton*, *Hunt*, and *Roemer* were all decided pursuant to the infamous *Lemon v Kurtzman*, 403 U.S. 602 (1971) tripartite test (secular purpose, neutral effect, no excessive entanglement), which Catholic educational institutions almost never passed, and whose effectiveness today is in serious doubt. See Agostini v. Felton, 521 U.S. 203 (1997) (the test, while referred to in part, was not even used); See also, Columbia Union College v. Clarke, 159 F.3d 151 (4th Cir. 1998) (the issue was decided, in favor of the college, on free speech grounds).

\textsuperscript{62} Little v. Wuerl, 929 F.2d 944 (3d Cir. 1991).

\textsuperscript{63} Draft Norms, Art. 2 (5) (a), (b), (c), (d), (e), (f) and (g) at 9.
seven percent. The vast majority of aid — direct to the student — accounts for the rest and is not governed by the *Tilton* restrictions. The draft norms provide absolutely no threat to direct student aid.64 There is also the legitimate question that, if a religiously-affiliated college or university has to sell its soul to receive government aid, is the transaction worth it. Where is the institution's greater loyalty, to the Church that founded it or to the government who would restrict its religious nature?

This conclusion does not mean that there will not be any lawsuits if the norms are enacted.65 There probably will be, and, sad to say, they will probably be brought by those inside Catholic higher education, disgruntled board members and faculty. Lawsuits, after all, are the way that Americans show their dislike for institutional policy. But the fear of such legal action need not stop or prevent the well-intentioned and sensitive adoption of the *Ex Corde* norms at American Catholic colleges and universities, because in the long haul, the odds are that the plaintiffs will lose.

Would implementing the *Ex Corde* norms affect a college's accreditation? Every accrediting body in the United States acknowledges that it respects the right of an institution of higher learning to be religious. The Northwest Association of Schools and Colleges recognizes that "Institutions may hold to a particular political, social, or religious philosophy."66 The Southern Association of Colleges and Schools goes so far as to say that it recognizes that the board of directors or trustees "represents the interests of the founders, the

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64. See Witters v. Washington Dep't of Services for the Blind, 474 U.S. 481 (1986) and Mueller v. Allen, 463 U.S. 388 (1983). State financial aid programs that are wholly neutral in offering aid to a class of recipients defined without any religious criteria, some of whom themselves then decide to attend religiously-affiliated institutions, are constitutionally permissible.

65. For example, I have dealt here only with federal standards. The issues presented by state statutes and state constitutions are a different matter. See the excellent treatment of this issue in Edward M. Gaffney, Jr., *Tales of Two Cities: Canon Law and Constitutional Law at the Crossroads*, 25 J.C. & U.L. 801 (1999). On the federal level, there is an inevitable tension between the religious exemptions of the Civil Rights Act and the *Tilton et al.* line of cases that prohibits direct aid to pervasively sectarian institutions. The argument could be made, for example, that if an institution is religious enough to avoid governmental scrutiny of its hiring practices under the Civil Rights Act, then it is too religious to receive direct government aid. Killinger v. Samford Univ., 113 F.3d 196 (11th Cir. 1997) supports the idea that it is not an either/or proposition, but is valid only in the Eleventh Circuit. Even the *Tilton* cases, however, permit religious governance or ownership of an institution and a significant religious presence — in *Hunt v. McNair*, 413 U.S. 734, 743 (1973), the Southern Baptist Convention appointed all of the college's board of trustees, had to approve major financial transactions and had the sole right to amend the corporate charter, — in *Roemer v. Board of Pub. Works*, 426 U.S. 736, 755-56 (1976). There was a formal affiliation with the Catholic Church, mandatory theology classes taught by clerics, and at least some classroom prayer. None of this matters as long as there is institutional autonomy and academic freedom which allows the separation of the sectarian from the secular aspects of such institutions. See Roemer, 426 U.S. at 758, n. 21. The *Ex Corde* norms mandate both institutional autonomy and academic freedom. See Draft Norms at Art. 2 (1) and (2) at 8.

supporting religious group, the supporting governmental agency or other supporting party." 67 Even the American Association of University Professors’ famous statement on academic freedom recognizes that “Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment.” 68 The one thing that the accrediting associations require is notice. A person should know when he or she walks in the front door what the requirements and expectations of the hiring institution are. This is really a matter of basic fairness.

Before one gives these accrediting agencies too much credit for open-mindedness, one should recall that they perform a government-like function, one that has been delegated to them in some instances by the departments of education of the various states. 69 As a result, their ability to discriminate on religious grounds is severely circumscribed by the First Amendment. The proof of this argument is the famous case of Oral Roberts Law School and the American Bar Association, the national accrediting agency for law schools. In that case, the evangelist from Tulsa faced down the entire organized bar which was in effect forced to grant his law school the accreditation it sought, despite its overtly religious nature. 70


68. American Association of University Professors, 1940 Statement of Principles on Academic Freedom and Tenure with 1970 Interpretive Comments, AAUP Policy Documents and Reports, 3 (1995). This position was subsequently weakened in the 1970 Interpretive Comments which state that “Most church-related institutions no longer need or desire the departure from the principle of academic freedom implied in the 1940 Statement, and we do not now endorse such a departure.” Id. at 6. The trouble with this is, as Whitehead points out, that the 1970 Interpretive Comments are not endorsed by the same 120 colleges and universities that endorsed the 1940 Statement. The 1970 Interpretive Comments are no more than a committee’s gloss on the original text. See Whitehead, supra note 17, at 54.

69. Without this delegation by the state, most courts have not found accrediting agencies to be state actors. See James D. Gordon, III & W. Cole Durham, Jr., Towards Divers Diversity: The Legal Legitimacy of Ex Corde Ecclesiae, 25 J.C. & U.L. 697 (1999), at n. 110. However, once state action (denial of student aid) is based on an accrediting agency’s decision, the standards of that decision would be open to judicial scrutiny, and a religiously-discriminatory standard would not pass judicial muster.

70. The O. W. Coburn School of Law of Oral Roberts University, Tulsa, Oklahoma, began conducting classes in 1979. The primary objective of the law school was to operate within “a distinctly Christian atmosphere.” The school utilized selection criteria designed to assure that the faculty and students share the same religious orientation and commitment. In May, 1981, the American Bar Association (ABA) denied the school accreditation, finding that the overt religious orientation violated the ABA’s Accreditation Standard 211. That Standard prohibited discrimination in admissions or hiring based on religion. (Verified complaint filed by Oral Roberts University in Civil Action No. 81-C-3171 in the United States District Court for the Northern District of Illinois, Eastern Division. Paragraph 11). Oral Roberts University filed suit in June, 1981, in the U.S. District Court for the Northern District of Illinois, eastern Division, to enjoin this denial and to force the ABA to accredit the law school. The hearing was scheduled for Wednesday, July 15, 1981. The ABA’s House of Delegates coincidentally met the week of July 6, 1981, and redrafted Standard 211. The ABA, however, still refused to accredit Oral Roberts under the new Standard 211. After the hearing in equity on July 15, 1981, the U.S. District Court
Nonetheless, continuing accreditation is important for Catholic colleges and universities. The Higher Education Act of 1965, which establishes the criteria under which students at colleges and universities can qualify for federal aid, requires that the institution which the aid-receiving student is attending be "accredited." Given the broad exemptions in accrediting agency policies about religiously-affiliated schools, and given the further protections of the First Amendment against religious discrimination by the government, or those acting on behalf of the government, there is no risk to accreditation from implementing the Ex Corde norms.

The corporate changes that would be required by the Ex Corde norms are not all that hard to make. They certainly are not impossible. They do not present difficult drafting problems, nor complex questions of corporate governance. They are not prohibited by law, nor would they cause a loss of federal aid or accreditation if they were implemented with a certain finesse. The requests of the norms are rather straightforward, as we have seen.

So what, then, is the difficulty? Why have the norms been so sharply criticized by the American Catholic higher educational community? The problem would appear to be one of accountability. As they currently exist, at least in their civil law dimension and structure, most American Catholic colleges and universities do not have a built-in accountability to the Church. It is clear from the draft norms that the hierarchy wants this accountability, at least in the area of theology—that is a large part of what the norms are about—and they want it structured into the corporate documents in a way that is enforceable.

This, I think, is the root of the problem. The draft norms would insert the diocesan bishop into the life of a university in a way that has not previously been the case. In the United States, even in the days before the drastic corporate changes that were made in American Catholic colleges and universities in the late 1960's, ceding corporate control to predominantly lay boards, the local bishop was not a major figure in the corporate affairs of American Catholic colleges and universities.

Why should this change to more hierarchical accountability be made, and why should it be made now? Looking at things from the bishops' side, it is not difficult to imagine how perturbing it is to be told by the leadership of these large Catholic colleges and universities, that were founded by the great religious orders of the Church, and that have no difficulty being Catholic when they want to be — in pursuit of students, gifts or grants — that they (the bishops) have no role here.

Looking at things from the colleges' and universities' side, they have seen the effect of hierarchical control of the teaching of theology at Catholic Uni-

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ersity on that University's academic reputation. They know the world that they function in best, and in the secularized world of American higher education, religiously-affiliated colleges and universities are looked down on in direct proportion to the sponsoring religious body's involvement at the university. Perhaps that should not be the case, but unfortunately it is.72

My commentary may sound like a lawyer's equivocation, "on the one hand and on the other hand". Yet the fact remains: in defense of the colleges and universities, a strong case has yet to be made for the necessity of these proposed changes by the bishops. Conversely, in defense of the bishops, the reaction of Catholic higher education (that the bishops have no role whatsoever in their institutional life) is indefensible. What then is the solution?

There was great acceptance of the bishops' first draft norms by the American Catholic academic community. Those pastoral norms, which the Vatican rejected as not juridic enough, were a valid, fluid attempt to implement Ex Corde in the United States. The current draft norms would, on any honest reading, without in any way questioning the good intentions of the drafters, seem to go too far in the other direction. This would appear to be an area where a peculiarly American adaption is called for.

Our Church's legal system is one that, while it states universal norms for a universal Church, also creates a system of private laws (privileges) and dispensations.73 For centuries, while Catholics in most of the world were forbidden to eat meat on Friday, whole countries were dispensed from this requirement of the law. Catholic colleges and universities in the United States are thriving. They exist here in greater numbers, with greater resources, and greater academic credibility, than in any other country of the world. There is an ancient adage that advises "if it ain't broke, don't fix it." There is wisdom in that old saw.

Clearly, the sincere but critical comments that the draft norms have elicited from the Catholic academic community establish this area as one where an American adaption of the law, a privilege or a dispensation, is called for. Our bishops can do this if they so choose. But if the academic community is asking the bishops to bend, it should be willing to make some adoptions itself. What those adoptions should be remain to be seen. They will have to come about in a meaningful dialogue with the bishops.

The American legal system is one of the most creative and flexible in the world. Our canonical system is not without the ability to adjust in areas where the application of the law may become difficult. Good faith and good will will be required on both sides, but, working together, surely the bishops and the leaders of American Catholic colleges and universities can devise a means for our ecclesiastical norms to be given legal effect without making an intellectual ghetto of our academic institutions. That is the important task that is now before them. Veni Creator Spiritus.

73. Codex Iuris Canonici, 1983 Code, c. 76-93.