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Recommended Citation

Robert A. Destro, ABA and AALS Accreditation: What's 'Religious Diversity' Got To Do With It?, 78 MARQ. L. REV. 427 (1995).

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ABA AND AALS ACCREDITATION: WHAT'S "RELIGIOUS DIVERSITY" GOT TO DO WITH IT?

ROBERT A. DESTRO*

A tendency toward enthusiasm and a chivalrous instinct have more than once been weighed as evidence of a lack of judgment.¹

INTRODUCTION

Whether viewed from the perspective of the accreditors or from the perspective of those seeking their approbation, accreditation is a process fraught with inherent tensions. Regardless of the identity, character, or mission of the institutions involved, the process is a subjective one, and the stakes are high for all concerned.

These tensions are most clearly in evidence when accreditation agencies turn their focus from relatively objective standards such as faculty, facility, or library size to critically important, yet perennially controversial, issues such as the scope and meaning of academic freedom; the appropriate mix of vocational or skills training for academic offerings; and access issues such as diversity, civil rights, and nondiscrimination. Because accreditation standards are the means by which accrediting agencies seek to impose their understanding of what constitutes an "acceptable" educational program on those subject to their authority, accreditation standards that focus on these topics are often equally, if not more, controversial than positions taken on the underlying issues.² Even if they are not enforced, such standards constitute a direct threat to the good name—if not the very existence—of any institution that does not share the accrediting agency's perspective on the disputed standard.

When the institution to be accredited is religiously affiliated, or has a mission that is explicitly religious in nature,³ two equally controversial issues must be added to the mix: the first is the centuries-old question of

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1. DAVID SHRAGER & ELIZABETH FROST, *THE QUOTABLE LAWYER* 151 (New York Publishing Associates 1986) (quoting LLOYD P. STRYKER, *FOR THE DEFENSE* (1947)).

2. See *infra* notes 47-49 and accompanying text.

3. See, e.g., *EEOC v. Kamehameha Sch./Bishop Estate*, 990 F.2d 458 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 439 (1993).

religion's role in the academy, and the second is the way accreditation rules deal with this question.

The subject of this essay is whether, and under what circumstances, the religious commitment of an institution *should* become an issue in the law school accreditation process. Originally presented at the March 1994, Marquette University Conference on Religiously Affiliated Law Schools, this essay begins with the commonly shared assumption that some tensions do exist between religiously affiliated law schools and their accrediting agencies, the American Bar Association (ABA), and the Association of American Law Schools (AALS). For present purposes, the task will be to differentiate those tensions that arise from the accreditation process itself, and those that arise from the religious identity or mission of the institution.

The first question is whether there are tensions in the accreditation process between religiously affiliated law schools, the ABA, and the AALS. The short answer is "yes." Given the perennially controversial nature of the issues involved in the accreditation process, it would be surprising if such tensions did *not* exist.

The second question, therefore, is whether there is something about the ABA and AALS accreditation process or standards that gives rise to tensions that are unique to the relationship between religiously affiliated law schools, the ABA, and the AALS. The answer to this question is also "yes." In some contexts, such as academic freedom, the accrediting standards of both the ABA and AALS explicitly single out religious institutions for special scrutiny because of their religious commitments. In other contexts, the ABA and AALS mission, diversity, and community concepts may differ in important ways from those of certain religiously affiliated institutions. In these contexts, accreditation standards represent a claim of authority to curtail the religious institution's ability to provide legal education in a manner that is faithful to their respective missions.

Notwithstanding these difficulties, accreditation standards would not exist unless there was at least some reason to believe that they serve a public purpose. I assume the validity of that purpose here. I also assume the good faith of those charged with the duty to interpret and apply the standards. The goal of this essay is twofold: to propose a conversation about existing tensions, and to suggest a process for developing a mechanism for their reduction.

I begin by recognizing that tensions do exist between religiously affiliated law schools, the ABA, and the AALS, and that some of the tensions are exacerbated by one of the most commonly held assumptions in

the academy: “[t]he idea of institutional neutrality—the view that a university cannot put the stamp of its approval or disapproval on a disputed truth-claim and still be faithful to its social trust.”⁴ In the accreditation context, the truth claims made by particular religions, or more properly, the commitment of the educational institution to the truth claims made by the religion with which it is identified, can (and have) become key issues between the accrediting agency and the institution to be accredited.

It is also important to acknowledge at the outset that, like discussions of policies that center on race, discussions of official policy centering on religion are exquisitely sensitive. Even to enter into the discussion is to run the risk that the result will exacerbate existing tensions or create new ones. Nonetheless, the discussion cannot be avoided. Accreditation standards are backed up by the coercive power of the state,⁵ and the tensions are, in some cases, symptomatic of real philosophical and religious differences on topics about which reasonable persons of good faith can differ.

To shed light on those differences, and on the manner in which they affect the accreditation process, it is necessary to select a framework for the discussion that is both fair and familiar to those who will be participating in it. For present purposes, the most appropriate device is a “self-study.”

The self-study is the very heart of every accreditation process, including that of the ABA. As a result, it is as familiar as an old shoe. What I propose, however, is not so familiar. It is time, I believe, for both the ABA and the AALS to commit themselves to the same kind of introspective self-scrutiny of *their accreditation norms* that ABA Standard 201(a) requires on a regular basis from every law school.⁶

4. Walter P. Metzger, *The 1940 Statement of Principles on Academic Freedom and Tenure*, 53 LAW & CONTEMP. PROBS. 3, 14 (1990).

5. In most states, graduation from an ABA or AALS accredited law school is a prerequisite for bar admission. See, e.g., ALASKA STAT. § 08.08.207 (1994); ME. REV. STAT. ANN. tit. 4 § 803(2) (1994); MD. CODE ANN., [Bus. Occ. & Prof.] § 10-207(d) (1994); MISS. CODE ANN. § 73-3-2 (1994); NEV. SUP. CT. ADMIN. R. 51(3) (1994); N.H. SUP. CT. R. 42(4)(b) (1994); S.C. APP. R. § 402(c)(3) (1994). See generally Betsy Levin, *Accreditation And The AALS: The AALS Accreditation Process and Berkeley*, 41 J. LEGAL EDUC. 373 (1991). In Michigan, graduation from an ABA accredited law school is a prerequisite for appointment as a research law clerk for the court. MICH. COMP. L. § 600.318 (2) (1994). To the extent that accreditation is a criterion of a school's eligibility for certain forms of student financial aid, it can also have an effect on law school students.

6. ABA Standard 201(a) provides that: “Through development and periodic reevaluation of a written self-study, the law school shall articulate the objectives of the school's educational program consistent with the Standards.” STANDARDS FOR APPROVAL OF LAW SCHOOLS AND

A self-study framework has two advantages. First, it reduces the initial tension by focusing on the positive goals of both the accreditation process and the accreditation agencies, rather than on their perceived transgressions.⁷ Second, and more importantly, such a framework confines the scope of potential disagreements over either methodology or operating assumptions. What is needed, at a minimum, is some degree of mutual understanding or agreement about the nature and source or sources of the tensions that lead us to this discussion.

Part One will examine the mission and goals of the ABA and AALS and relate them to the goals of the law school accreditation process. Part Two will propose a self-study of the accreditation standards, both in general and as applied to religiously affiliated law schools. Part Three will examine the tensions that have arisen between the accrediting agencies and religiously affiliated law schools as a result of the ABA's and AALS's perceptions concerning the relationship of religious affiliation or commitment in relation to a law school's ability to provide a quality legal education program. Part Four will examine specific areas of concern, including intellectual diversity, preferential admissions, and hiring. Finally, the essay will conclude with a summary of issues that must be addressed before these tensions can be resolved or minimized.

I. RELATING THE MISSIONS OF THE ABA AND THE AALS TO THEIR ROLES AS ACCREDITING AGENCIES

A. *The ABA*

1. The "Mission" of the ABA

The intent of the ABA's *Standards for Approval of Law Schools* is to improve the legal profession by demanding that law school programs are

INTERPRETATIONS, OFFICE OF THE CONSULTANT ON LEGAL EDUCATION TO THE AMERICAN BAR ASSOCIATION (1993) [hereinafter ABA STANDARDS]. ABA Standard 103 provides that an approved school "must demonstrate that its program is consistent with sound educational policies. It shall do so by establishing that it is being operated in accordance with the Standards." *Id.* Standard 103. Interpretation 2 of Standards 102 and 103, and the interpretation of Standard 103, place the burden on the school desiring to obtain or retain accreditation to make such a showing. *Id.* Standard 102-03.

7. Compare Section of Legal Education and Admissions to the Bar, Task Force on Law Schools and the Profession: Narrowing the Gap, A.B.A., LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, pt. I, § 6.1 (Robert MacCrate ed. 1993) [hereinafter MACCRATE REPORT] with MACCRATE REPORT, *id.*, pt. II, § 4.1 (pt. I, § 6.1, *Understanding the Proper Nature and Bounds of the Lawyer's Role in a Counseling Relationship*; pt. II, § 4.1, *Seeking Out and Taking Advantage of Opportunities to Increase One's Own Knowledge and Improve One's Own Skills*).

not only "consistent with sound educational policies,"⁸ but also with their "own stated goals and objectives."⁹ The stated goals and objectives of the ABA provide the starting point for precisely defining what the Committee on Legal Education and Admission to the Bar means by their mission.

The purposes of the ABA are:

- [1.] to uphold and defend the Constitution of the United States and maintain representative government;
- [2.] to advance the science of jurisprudence;
- [3.] to promote throughout the nation the administration of justice and the uniformity of legislation and of judicial decisions;
- [4.] to uphold the honor of the profession of law;
- [5.] to apply the knowledge and experience of the profession to the promotion of the public good;
- [6.] to encourage cordial intercourse among the members of the American Bar; []
- [7.] to correlate and promote the activities of the bar organizations in the nation within these purposes and in the interests of the profession and of the public;¹⁰ and
- [8.] [to] effectuate measures for the improvement of the systems of pre-legal and legal education in the United States; methods for inculcating in law students the sincere regard for the ethics and morals of the profession necessary to its high calling; and means for the establishment and maintenance in the several states of adequate and proper standards of general education, legal training, and moral character of applicants for admission to the Bar, including the manner of testing their qualifications.¹¹

Article one, section three of the ABA by-laws of the Section of Legal Education and Admissions to the Bar echoes these sentiments:

PURPOSES. The purposes of the Section shall be to consider, discuss, recommend to the Association, and effectuate measures for the improvement of the systems of pre-legal and legal education in the United States; methods for inculcating in law students the sincere regard for the ethics and morals of the profession necessary to its high calling; and means for the establishment and maintenance in the several states of adequate and proper standards of general education, legal training, and moral character of appli-

8. See *infra* notes 17-35 and accompanying text.

9. ABA STANDARDS, *supra* note 6, Standard 201, Interpretation 1.

10. ABA CONST. § 1.2 Purposes.

11. ABA CONST. Foreword.

cants for admission to the Bar, including the manner of testing their qualifications.¹²

Although it would be formidable to have a program of legal education attentive to each of these lofty purposes, to stop at this point would leave the search for the substantive content of a "sound" legal education incomplete. The Preamble to the ABA's Model Rules of Professional Responsibility makes it clear that the Model Rules define, for lawyers, their relationship to our legal system.¹³ Therefore, any meaningful self-study of ABA accreditation standards and practices would include not only the Model Rules and other relevant ABA codes of conduct, but also the MacCrate Report, which is the most recent contribution to the ongoing debate over the role of law schools in shaping the legal profession's values.¹⁴ The MacCrate Report represents the most recent effort of the Section on Legal Education and Admissions to the Bar to self-study the needs and the values of the profession with a view toward cooperative planning for the future.¹⁵

If taken as a whole, the ABA definition of the components of a sound legal education is robust. It includes not only training in the basic technical and interpersonal skills that are essential to the competent practice of law, but also the development of justice, fairness, compassion, and mercy.¹⁶ Its goal is to produce lawyers who are far more than good

12. ABA STANDARDS, *supra* note 6, Forward.

13. ABA MODEL RULES OF PROFESSIONAL RESPONSIBILITY Preamble 12, *in* SELECTED STATUTES, RULES AND STANDARDS ON THE LEGAL PROFESSION 7 (John S. Dzienkowski ed., 1993).

14. MACCRATE REPORT, *supra* note 7.

15. The MacCrate Report emphasizes that "[a] Vision of the Skills and Values Which New Lawyers Should Seek to Acquire" is "*not* a mandatory code of rules; a reference point for malpractice litigation; a standard for law school accreditation; [or] a source for bar examinations." *Id.* at 116.

This, by the way, also appears to be the position of the AALS. At its 1994 mid-year meeting, the ABA House of Delegates adopted Report 8A, which urges law schools to undertake a number of steps designed to lay the groundwork for implementation of the MacCrate Report. The AALS opposed Report 8A because of its long-standing position that the MacCrate Report was not intended to be a set of guidelines for accreditation, but rather a basis for ongoing discussion within the profession. Talbot "Sandy" D'Alemburte, Keynote Address at the Conference Proceedings, *in* THE MACCRATE REPORT: BUILDING THE EDUCATIONAL CONTINUUM 5, 17 (1994) [hereinafter MACCRATE CONFERENCE PROCEEDINGS].

16. Noting that the "[m]odern law schools do not often describe their mission in that way," Talbot "Sandy" D'Alemburte, former President of the ABA, set the tone of the Conference on the MacCrate Report by reminding his listeners that the Report "asks us to remember why Thomas Jefferson sought to establish legal education in a university setting." AALS Memorandum 94-9 from Carl C. Monk to Deans of Member and Fee Board Schools (Feb. 14, 1994) (on file with author). The answer, he said, was that "Jefferson derived his legal education model from the way ministers were trained," and his purpose for legal education was "to

technicians. A good lawyer is, in the ABA's view, a good person, striving to pursue "the learned art in the spirit of a public service."¹⁷

2. The ABA Accreditation Standards

The ABA's vision of a good law school is inextricably linked with its vision of a good lawyer.¹⁸ ABA Standard 101 states that one of the ways and means of bringing about the improvement of the legal profession¹⁹ is for the ABA to promulgate a set of uniform standards designed to assure that law school programs are equipped to train good lawyers. In the ABA's view, law schools should be regularly required to demonstrate that their programs are consistent with sound educational policies, and the schools must do so by establishing that they are being operated in accordance with the Standards.²⁰ At a minimum, the Standards require:

1. a governing board whose members are dedicated to the maintenance of a sound educational institution, possess the capability of participating in the formulation and development of such an institution, and have no financial interest in the operation of the law school;²¹
2. control of all critical aspects of the academic program by a sufficient number of highly competent faculty and deans;²²

teach law as a means of moral education." *Id.* at 5 (quoting Professor Paul Carrington). Jefferson's aim was "to inculcate republican virtue, those traits needed by public men to evoke public trust in public institutions." *Id.*

17. ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 5 (1953), reprinted in *MACCRATE REPORT*, *supra* note 7, at 207. Professor Tom Shaffer's works on legal ethics point consistently to this goal. I use his book in my Professional Responsibility classes for precisely that reason. See THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., *LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY* (1994).

18. See *MACCRATE CONFERENCE PROCEEDINGS*, *supra* note 15, at 146. Robert MacCrate states:

We started by looking, not at law schools, but at lawyers: the total profession for which new lawyers must prepare. What one of our members, Jack Mudd, called "the world of lawyer performance in which law students will conduct their professional lives." He said that it was the essential starting point for a proper review of lawyer preparation for practice.

19. ABA STANDARDS, *supra* note 6, Standard 101.

20. *Id.* Standard 103. Once approved, a law school "shall seek to exceed the minimum requirements of the Standards." *Id.* Standard 105. Because consistency with the standards is considered to be the baseline against which the adequacy of an institution's program is measured, it follows logically that the ABA would also take the position that all bar admission candidates should graduate from an ABA approved law school, that mere graduation from a law school "should not confer the right of admission, and that all candidates for admission should be examined by public authority to determine fitness for admission." *Id.* Standard 102.

21. *Id.* Standard 203.

22. *Id.* Standards 204, 205, 208, 401-03.

3. a faculty of not less than six persons who possess a high degree of competence, as demonstrated by education, classroom teaching ability, experience in teaching or practice, and scholarly research and writing;²³
4. a clearly articulated set of educational objectives that are consistent with the Standards,²⁴ and the "maint[nance of] an educational program that is designed to qualify its graduates for admission to the bar and to prepare them to participate effectively in the legal profession," both now and in the future;²⁵
5. "sound standards of legal scholarship, including clearly defined standards of good standing, advancement, and graduation;"²⁶
6. access to "the resources necessary to provide a sound legal education and accomplish the objectives of its educational program,"²⁷ including "a library adequate for its program"²⁸ and a "physical plant that is adequate both for its current program and for such growth in enrollment or program as should be anticipated in the immediate future."²⁹
7. an administrative and organizational structure that enables the institution to utilize fully those resources for those purposes;³⁰
8. an admissions program that is consistent with the objective of its educational program and the resources available for implementing those objectives;³¹
9. a non-discrimination policy that governs admissions, or employment of faculty and staff "on ground of race, color, religion, national origin, or sex,"³² and that is implemented by concrete action demonstrating that it provid[es] full opportunities for the study of law and entry into the profession by qualified members of groups (notably racial and ethnic minorities) that have been victims of discrimination in various forms;³³
10. an established and announced policy with respect to academic freedom and tenure of which Annex I herein [the 1940 Statement of the American Association of University Professors] is an example but is not obligatory;³⁴ and

23. *Id.* Standards 401-02.

24. *Id.* Standard 201(a).

25. *Id.* Standard 301 (a), (c).

26. *Id.* Standard 304(a).

27. *Id.* Standard 201(b).

28. *Id.* Standard 601.

29. *Id.* Standard 701.

30. *Id.* Standard 201(b).

31. *Id.* Standard 501.

32. *Id.* Standard 211.

33. *Id.* Standard 212.

34. *Id.* Standard 405(d).

11. a placement program.³⁵

As defined by the Standards, a good law school will be a place that has adequate material and human resources to provide future lawyers with the background and training they need to be good technicians, *and* one that provides that background and training in a rigorous intellectual environment, supervised by qualified scholars, and open to diverse peoples and points of view.³⁶

B. The AALS

The purpose of the AALS is to improve the legal profession through legal education.³⁷ Its program objectives are recounted in Bylaw 6-1:

To foster high standards of legal education, a member school shall meet the obligations of membership imposed by this Article and the Executive Committee Regulations. These obligations are intended to reflect the Associations distinctive role as a membership association that emphasizes faculty scholarship, teaching quality, and institutional efforts to assure an intellectual community, while according appropriate respect for the autonomy of its member schools.³⁸

As befits its role as a membership association that emphasizes faculty scholarship, teaching quality, and institutional efforts to assure an intellectual community, while according appropriate respect for the autonomy of its member schools, the AALS accreditation standards are more detailed than their ABA counterparts.³⁹ However, their essential concerns are identical. Like the ABA, the AALS requires, among other things:

1. a sound academic program characterized by appropriate intellectual rigor, a comprehensive curriculum, and courses in various fields often enough to afford students and opportunity to participate in them;⁴⁰
2. a full-time dean who devotes substantially the entire time to the responsibilities of dean, a faculty of high competence and suitable

35. *Id.* Standard 214.

36. Notably absent from the framework implied by the Standards is any mention of the value orientation of the institution or the institution's role in shaping the values that are essential to the practice of law. *See supra* note 15 and accompanying text.

37. ASSOCIATION OF AMERICAN LAW SCHOOLS, 1993 ASSOCIATION HANDBOOK 71, ARTICLES OF INCORPORATION (1993).

38. ASSOCIATION OF AMERICAN LAW SCHOOLS, 1993 HANDBOOK 31, BYLAW § 6-1 (1993) [hereinafter AALS Bylaw].

39. *Id.*

40. *Id.* §§ 6-2, 6-3, 6-9.

size⁴¹ in which is vested primary responsibility for determining institutional policy;⁴²

3. a learning and working environment which is conducive to teaching, research, and instruction;⁴³

4. an academic freedom policy in accordance with the principles of the American Association of University Professors;⁴⁴ and

5. a clearly articulated program of diversity, non-discrimination, and affirmative action that protects faculty, students, and employees, and binds all employers whose recruiting programs seek the assistance of a member school or access to its facilities.⁴⁵

C. *Synthesizing the Requirements Into Neutral Principles of General Applicability*

Taken together and stated as generally as possible, the ABA and AALS concerns are virtually identical: the fostering of quality legal education programs, delivered in a variety of intellectual communities. Given the stated commitment of both accrediting agencies to academic freedom,⁴⁶ individual law schools retain the right to define themselves and their programs in a manner that is consistent with the more generalized community standards of the AALS and the ABA. These standards concern academic quality, diversity, non-discrimination, academic freedom, and affirmative action.⁴⁷

II. PROPOSING A SELF-STUDY OF THE ACCREDITATION STANDARDS

A. *Relating the Means and Ends of the Accreditation Process*

Since the Accreditation Standards of the ABA's Committee on Legal Education and Admissions to the Bar, the AALS By-laws, and Executive Committee Regulations (ECR's) are the means by which the respective organizations seek to accomplish their stated goals, the next step in the analysis is to determine the relationship of the accreditation standards to the stated goals of the two accrediting organizations.

The mechanism for exploring that relationship is set out by ABA Standard 201(a). It requires each institution under review to prepare "[a]

41. *Id.* § 6-5.

42. *Id.* § 6-6(a).

43. *Id.* §§ 6-8, 6-10.

44. *Id.* § 6-8(d); ASSOCIATION OF AMERICAN LAW SCHOOLS, 1993 HANDBOOK 53, EXECUTIVE COMMITTEE REGULATIONS 6.16 [hereinafter ECR].

45. AALS Bylaw, *supra* note 38, § 6.4; ECR, *supra* note 44, at 6.17-19.

46. *See supra* notes 34 & 44 and accompanying text.

47. *Cf.* ECR, *supra* note 44, at 6.11.

written self-study [which] articulate[s] the objectives of the . . . program consistent with the Standards."⁴⁸

The objectives of the ABA and the AALS are straightforward. The AALS describes itself as a membership association that emphasizes faculty scholarship, teaching quality, and institutional efforts to assure an intellectual community, while according appropriate respect for the autonomy of its member schools.⁴⁹ The ABA professes a commitment to improving the legal profession by encouraging law schools to provide new lawyers with the knowledge and skills they will need to make a contribution to the lofty goals set out in the ABAs mission statement.⁵⁰

It may seem difficult to "articulate the objectives of the . . . [accreditation] program consistent with the Standards," however,⁵¹ if it is the accreditation standards themselves that are the subject of the inquiry. Overcoming this obstacle can be achieved by differentiating between means and ends.

ABA Standard 103 states that in order for "a law school [to] demonstrate that its program is consistent with sound educational policies, [i]t shall . . . establish[] that it is being operated in accordance with the Standards."⁵² It thus assumes that the Standards are synonymous with sound educational policies.

That assumption is problematic for two reasons. First, it confuses means and ends. Assuring compliance with educational policies that are considered to be sound by either the AALS Executive Committee or the ABA Committee on Legal Education and Admissions to the Bar is the *means* by which these agencies seek to assure that programs of legal education will train lawyers who are good in every sense of the word—professionally, intellectually, technically, and morally. It is the connection between the means, the accreditation, and the end, the training of good lawyers, that should be explored "[t]hrough development and periodic reevaluation of a written self-study"⁵³ similar to that required of law schools by ABA Standard 201(a).

Second, ABA Standard 103 presumes that institutions which do not operate in accord with the totality of the ABA's vision of sound educational practices *cannot* produce good lawyers. This begs the question.

48. ABA STANDARDS, *supra* note 6, Standard 201(a).

49. AALS Articles of Incorporation, Art. 3.

50. ABA STANDARDS, *supra* note 6, Standard 103.

51. *Id.* Standard 201(a).

52. *Id.* Standard 103.

53. ABA STANDARDS, *supra* note 6, Standard 201(a).

The missing component is a set of baseline questions against which the periodic reevaluation of the accreditation standards applicable to *all* law schools can take place. Given that the goal is to train good lawyers, the self-study proposed here would necessarily include periodic reconsideration of the following related, but distinct, questions:

1. What are the goals of American legal education?
2. How are those goals furthered and fostered by the accreditation standards—considered both individually and collectively?
3. How do the characters and cultures of specific law schools relate to the goals of the Bar and the needs of our system of justice?
4. To what extent should the powers vested in accrediting agencies be utilized to set and enforce a fixed set of aspirational standards relating to:
 - i) the program content,
 - ii) the pedagogical style,
 - iii) the intellectual, cultural, and demographic character of specific law school communities, or
 - iv) the relationships law schools have with the larger communities they serve?

The debate over the MacCrate Report bears witness to the sensitivity of such inquiries. The MacCrate Task Force began its work by inquiring into the goals of the enterprise collectively known as “American legal education.”⁵⁴ The Report has provoked, and will continue to provoke, lively debate because its Statement on Skills and Values (SSV) draws an explicit connection between the values of the profession and the need for training programs that reflect those values.

Given the sensitivity of such inquiries, it is not surprising that the Task Force has felt compelled to “[e]xplicitly disclaim[] any intent to use the SSV to regulate accreditation, curriculum, bar examination, or mal-

54. Robert MacCrate, Chair of the MacCrate Task Force, credits Justice Rosalie Wahl of the Minnesota Supreme Court with providing “the predicate” of the MacCrate Report at the legal education conference at the University of New Mexico in October 1987 when she “asked rhetorically” whether legal educators “[h]ave . . . really tried to determine . . . what skills, what attitudes, what character traits, what qualities of mind are required of lawyers?” See MACCRATE CONFERENCE PROCEEDINGS, *supra* note 15, at 145. See also *supra* note 18 and accompanying text. “She suggested that, until the entire profession had a clearer vision of the answer to these questions, further progress in the professional education of lawyers would be thwarted.” MACCRATE CONFERENCE PROCEEDINGS, *supra* note 15, at 145. See also *supra* note 17.

practice.”⁵⁵ Unless there was a realistic fear that the ABA would attempt to utilize its accreditation authority to further increase the regulation of the substantive content of legal education, there would be no need to emphasize that the Report should not be “misread . . . as requiring law schools to deviate from their important functions or to relinquish their faculties’ autonomy.”⁵⁶

Disclaimers such as these reflect the very real tensions that arise any time regulators or their advisors appear poised to assert authority over questions that determine not only the physical and institutional framework of legal education, but also its *value orientation* and substantive content.⁵⁷ The tensions that have arisen between religiously affiliated law schools and their accreditors spring from precisely the same fears.⁵⁸

A self-study model has the advantage of placing the burden on the accreditors to demonstrate that each of the ABA Standards and Executive Committee Regulations is an appropriate response to one or more of the questions raised above.⁵⁹ In practice, this would mean that the

55. Remarks of Michael Traynor, in *MACCRATE CONFERENCE PROCEEDINGS*, *supra* note 15 at 125.

56. *Id.* at 126.

57. There is a common perception, both among lawyers and the general public, that the legal profession has lost its bearings. There is also no shortage of suggestions for a “fix.” See, e.g., *MACCRATE REPORT*, *supra* note 7, pt. II.; Nancy McCarthy, *Pessimism for the Future: Given a Second Chance, Half of the State’s Attorneys Would Not Become Lawyers*, CAL. ST. B.J. 1 (Nov. 1994); Nancy McCarthy, *Drunk, Drugged and Stressed: Problems Pervade Lawyers Lives*, CAL. ST. B.J. 1 (1994); Thomas L. Shaffer, *Legal Ethics & the Good Client*, 36 CATH. U. L. REV. 319 (1987).

58. See John J. Costonis, *The MacCrate Report: Of Loaves, Fishes, and the Future of American Legal Education*, 43 J. LEGAL EDUC. 157 (1993). The AALS noted its concern over the uses the ABA might put to the recommendations in the MacCrate Report by recommending, unsuccessfully, the adoption of an alternative resolution at the February 1994 mid-year meeting of the ABA. See *supra* note 14.

59. Were a religiously-affiliated institution to utilize the First Amendment as the basis for a challenge to a Standard or Executive Committee Regulation, its burden would be to demonstrate that the challenged regulation is either discriminatory on its face or that its application would excessively entangle a court in matters of religious doctrine. Should the institution make a *prima facie* case for discrimination or excessive entanglement, the burden would be on the accreditors to demonstrate that the failure to meet the standard or regulation in question would result in the operation of the law school in a manner that is *inconsistent* with sound educational policy. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S. Ct. 2217 (1993); *Employment Div. v. Smith*, 494 U.S. 872 (1991). Neither the ABA nor the AALS are subject to the reach of the First or Fourteenth Amendments. See *Lawline v. ABA*, 738 F. Supp. 288 (N.D. Ill. 1990), *cert. denied*, 114 S. Ct. 551 (1993); *Hickey v. D.C. Court of Appeals*, 457 F. Supp. 584 (D.C. Cir. 1978). However, state courts that utilize the standards for purposes of admission are subject to the First and Fourteenth Amendments. See *Consumer’s Union v. Virginia S. B.*, 688 F.2d 218 (4th Cir. 1982); *Consumer’s Union v. ABA*, 427 F. Supp. 506 (E.D. Va. 1976), *aff’d in part and rev’d in part sub nom.*, 688 F.2d 218 (4th Cir. 1982).

burden in the self-study suggested here would be on the ABA and the AALS to demonstrate how *each* of the standards furthers the very robust concepts of "good lawyer" and "good law school" implied in the organic documents of the ABA and the AALS.⁶⁰

B. General Versus Specific Tensions Created by the Accreditation Standards

Since the issue in this essay is the tension that exists between religiously affiliated institutions and their accrediting agencies, it is necessary to differentiate between and among the tensions that exist due to differences of opinion concerning the proper role of accrediting agencies generally and the specific questions that arise when accrediting agencies make rules aimed at religiously affiliated law schools.⁶¹ Standards governing physical plant, budget, class size, compensation, core subjects, and other relatively concrete topics that are common to all law schools are in the "general" category. Standards that seek to affect the nature, the value orientation, and the content of the educational experience, or that seek to impose a concept of "sound educational policy" on a religiously affiliated law school that may be at odds with its very mission are in the "specific" category.⁶²

III. DO THE ACTIVITIES OF RELIGIOUSLY AFFILIATED LAW SCHOOLS REQUIRE SPECIAL SCRUTINY?

ABA Standard 211 provides that a law school shall maintain equality of opportunity in legal education, including employment of faculty and staff, without discrimination or segregation on ground of race, color, religion, national origin, or sex.⁶³ However, it adds the following proviso:

60. See *supra* notes 8-48 and accompanying text.

61. This inquiry would include situations in which rules of general applicability create problems that are specific to religiously affiliated institutions.

62. Excerpts from the mission statements of several universities appear in the Appendix to this essay.

63. Compare Cal. St. Admiss. Rule XVIII § 2(1), Standards L and M (1994). Standard L provides:

Consistent with sound educational policy and the Standards, the school shall demonstrate, or have carried out and maintained, by concrete action, a commitment to providing full opportunities for the study of law and entry into the profession by qualified members of groups (notably racial and ethnic minorities) which have been victims of discrimination in various forms. This commitment would typically include a special concern for determining the potential of such applicants through the admission process, special recruitment efforts, and a program which assists in meeting the unusual financial needs of many such students, provided that no school is obligated to apply stan-

This Standard does not prevent a law school from having a religious affiliation and purpose and adopting and applying policies of admission of students and employment of faculty and staff that directly relate to this affiliation and purpose so long as (1) notice of these policies has been given to applicants, students, faculty and staff before their affiliation with the law school, and (2) the religious affiliation, purpose and policies do not contravene any other Standard, including Standard 405(d) concerning academic freedom. The policies may provide a preference for persons adhering to the religious affiliation and purpose of the law school, but shall not be applied to preclude a diverse student body in terms of race, color, religion, national origin, or sex. This Standard permits religious policies as to admission and employment only to the extent that they are protected by the United States Constitution. It shall be administered as if the First Amendment of the United States Constitution governs its application.⁶⁴

The AALS has a virtually identical requirement. Executive Commission Regulation section 6.17, which implements section 6-4(a) of the by-laws, provides:

LAW SCHOOLS WITH A RELIGIOUS AFFILIATION OR PURPOSE. It is not inconsistent with Bylaw Section 6-4(a) for a law school with a religious affiliation or purpose to adopt preferential admissions and employment practices that directly relate to the schools religious affiliation or purpose so long as (1) notice of the practices is provided to members of the law school community (students, faculty and staff) before their affiliation with the school; (2) the practices do not interfere with the schools provision of satisfactory legal education as provided for in these bylaws and regulations, whether because of lack of a sufficient intellectual diversity or for any other reason; (3) the practices are in compliance with Executive Committee Regulation Chapter 6.16, as well as all

dards for the award of financial assistance different from those applied to other students.

Cal. St. Admiss. Rule XVIII § 2(1), Standard L (1994). Standard M provides:

The school shall maintain equality of opportunity in legal education in admission and retention of students and hiring, retention and promotion of faculty without discrimination or segregation on the grounds of race, color, religion, national origin, sex, age, marital status or sex orientation, except insofar as such action is protected by the Constitution of the United States or the Constitution of the state of California, provided that nothing in this Section is intended to prohibit such admission, retention, hiring and promotion policies maintained for the purpose of remedying present effects of past discrimination

Id. Standard M.

64. ABA STANDARDS, *supra* note 6, Standard 211(d).

other Bylaws and Executive Committee Regulations; (4) the practices do not discriminate on the ground of race, color, national origin, sex, age, handicap or disability, or sexual orientation; and (5) the practices contain neither a blanket exclusion nor a limitation on the number of persons admitted or employed on religious grounds.⁶⁵

Given that these "exemptions" apply *only* to religiously affiliated law schools, it will be useful to try not only to understand what they do, but also why they do it that way.

Before doing so, however, two preliminary matters must be addressed. The first is what might be termed the "characterization" problem; that is, whether rules which single out religiously affiliated schools for special treatment should be treated as "accommodations," "exemptions," or as regulations "discriminatory on their face." The second is the selection of an appropriate "standard of review."

The characterization problem is critical because it depends, in part, on both the perspective of the observer and the purpose of the characterization.⁶⁶ If the standards for religiously affiliated schools are characterized at the outset as "accommodations," the questions discussed in a self-study would be very different from those relevant if they were branded as "exemptions" or evidence of "discrimination."⁶⁷ Since the

65. ECR, *supra* note 44, at 6.17.

66. This is true in every characterization problem. See, e.g., *Sun Oil Co. v. Wortman*, 486 U.S. 717, 726 (1988) (noting that characterizations, such as "substance" and "procedure" that express dichotomies "precisely describe very little except a dichotomy, and what they mean in a particular context is largely determined by the purposes for which the dichotomy is drawn"); *Id.* at 756 (Brennan, J., concurring) (noting that some characterizations reflect a balance among a number of competing interests, and thus should be analyzed to ascertain their substantive content); *Haumschild v. Continental Casualty Co.*, 7 Wis. 2d 130, 95 N.W.2d 814 (1959) (finding that family law, rather than tort law, was the proper doctrinal heading for an interspousal immunity issue). See generally RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 47-49 (3d ed. 1986).

67. In a First Amendment or Equal Protection context, it is important to distinguish characterization from fact-finding. Although fact-finding is the critical last step in determining whether a constitutional norm has been *violated*, characterization is often a critical *first* step in determining whether a cause of action exists. Compare *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (presenting the standards for fact-finding in mixed motive cases under Title VII) with *St. Francis College v. Al-Khazraji*, 481 U.S. 604 (1987) (stating the definition of "race" for purposes of 42 U.S.C. § 1981); see also *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987); *Lynch v. Donnelly*, 465 U.S. 668 (1984).

[W]hether a government activity communicates endorsement of religion is not a question of simple historical fact. Although evidentiary submissions may help answer it, the question is, like the question whether racial or sex-based classifications communicate an invidious message, in large part a legal question to be answered on the basis of judicial interpretation of social facts.

purpose of this paper is to suggest the need for a self-study, my task is to suggest a series of questions that will enable those engaged in the self-study process to discern the intent of the disputed standards.

The standard of review question is, thankfully, answered by the Standards themselves. Under ABA Standard 103, the burden of going forward with evidence that justifies a program is placed squarely in the lap of its proponent. In the words of Interpretation Two of Standards 102 and 103, it will be impossible to evaluate a program if its proponent refuses to submit information requested by the evaluators. In fact, such refusal "could be determined a violation of the Standards."⁶⁸

A. *What Do ABA Standard 211(d) and AALS ECR 6.17 Require on Their Face?*

Standard 211(d) and ECR 6.17 are virtually identical. Both permit a law school to have a religious affiliation and purpose as long as either the affiliation or purpose do not result in violation of any other applicable standard; and permit a religiously affiliated law school to adopt and apply policies of admission of students and employment of faculty and staff that directly relate to this affiliation and purpose.⁶⁹

The initial question, both legally and historically, is why religiously affiliated law schools *need* permission from accrediting agencies to have a religious affiliation and purpose and to further that purpose through the adoption and implementation of affirmative policies designed to control the religious demographics⁷⁰ of their students, faculty, and staff. After all, as Judge John T. Noonan, Jr. observes, "[t]he mother of all law schools is Bologna, the splendid creation of the religious and cultural revival of the twelfth century."⁷¹ To answer this question, it is necessary to examine some of the assumptions that undergird the regulations.

Lynch, 465 U.S. at 693-94 (O'Connor, J., concurring).

68. See ABA STANDARDS, *supra* note 6, Standard 103, Interpretation 2.

69. ABA STANDARDS, *supra* note 6, Standard 211(d); ECR, *supra* note 44, at 6.17.

70. As used here, the concept of "religion," defined as a system of beliefs about human relationships with God and other matters of ultimate concern, should be distinguished from the concept of "confession," or devotion to a particular denomination or system of beliefs (including atheism). The concept of "religiousness," or the measure of an individual's attachment to a given set of religious beliefs, is perhaps the most accurate way to describe the manner in which religious belief may contribute to the intellectual and cultural "diversity" of a group. Not only is the term sufficiently broad to cover a wide range of beliefs within particular confessions, but it also includes the degree of commitment to their beliefs of those who confess to having no religion at all.

71. John T. Noonan, Jr., *A Catholic Law School*, 67 NOTRE DAME L. REV. 1037, 1037-38 (1992). Judge Noonan goes on to observe:

Assuming that both the ABA and the AALS have the authority to make generally applicable rules forbidding discrimination on the basis of, among other things, religion,⁷² the question becomes how the ABA and the AALS should deal with institutions that are *defined* by reference to either a particular religion or to religion in general.

This is not an easy question to answer in the abstract. It must be viewed in light of one of our baseline inquiries: How do the characters and cultures of specific law schools relate to the goals of the Bar and the needs of our system of justice?

Without an exception for religiously affiliated institutions, the ban on religious discrimination would make it impossible for such institutions to maintain or create a "critical mass" among faculty and staff sufficient to sustain their distinctively religious character.⁷³ The question, then, is not so much their right to *exist*, since that right is guaranteed by the First Amendment,⁷⁴ but their right to utilize admissions or hiring criteria as a

The Bolognese method of collecting authorities, critically comparing them, and challenging their conclusions was the preferred approach of that nascent and vigorous Catholic culture. The first great legal casebook is Master Gratian's *Harmony of Unharmonious Canons*, a work that proceeds by hypotheticals as boldly outrageous as any of Professor Rodes' and then arranges the authorities pro and con on each question, creating space for Gratian to provide his own resolution of the matter. Every law teacher learns this secret: respect the authorities but leave room to give your own view of what the result should be.

Id. (footnote omitted).

72. Since discrimination on these grounds is prohibited under both federal and state law, the degree to which accrediting organizations may enforce standards that are inconsistent with governing law is an interesting question in its own right. It is, however, beyond the scope of this paper.

73. The term "critical mass" is used extensively in literature on diversity in the academic setting, but there is little, if any, guidance on what it means. See, e.g., Richard Delgado, *The Inward Turn In Outsider Jurisprudence*, 34 WM. & MARY L. REV. 741, 767 n.183 (1993) (stating that "the term 'critical mass' means a number sufficient to enable the newcomers to offer each other psychological support and avoid being engulfed by demands such as tutoring and counseling."); Report of the Secretary-General, *Equality: Equality in Political Participation and Decision-Making*, U.N. Escor, 34th Sess., Par. 53, U.N. Doc. E/CN.6/1990/2 (1989), supp. U.N. Doc. E/CN.6/1990/2/Corr.1 (1989) (arguing that 30% of representation of women in the foreign policy establishment is "critical mass" for women's views to be heard), discussed in Susan Moloney Smith, Comment, *Diversifying The Judiciary: The Influence of Gender and Race on Judging*, 28 U. RICH. L. REV. 179 (1994); EVA SPANGLER, ET. AL., LAW STUDENT ACTIVITY PATTERNS PROJECT OF THE AMERICAN BAR FOUNDATION, *TOKEN WOMEN: AN EMPIRICAL TEST OF KANTER'S HYPOTHESIS* (1978), reprinted in 84 AMER. J. SOC. 160-70 (1978).

74. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

device to maintain a character that is consistent with their respective educational and religious missions.⁷⁵

The problem is even more difficult when evaluation centers on the program's substantive content. The goal of any accreditation program is, at least in part, to enforce a consistent set of quality standards that the accrediting agency thinks is critical to the maintenance of a sound educational program.⁷⁶ Of necessity, this will include preparing future lawyers for service in a community that includes both a wide range of cultural, ethnic, racial, and religious groups, as well as a wide variety of legal problems.

Because those charged with evaluating the adequacy of an academic program must clearly elucidate the moral and academic principles that undergird the accreditation process, they are not in a position to design exemptions from the community standards they enforce. If religious orientation is either a "plus" or a "null" in terms of these goals, one might expect the response of accreditors to be supportive at best, and accommodating at worst. If that orientation is viewed as a source of potential harm, the attitude would be one of skepticism or outright discouragement.

There is little dispute over the substantive content of the moral and academic principles that undergird the accreditation standards. These principles include: equality of educational opportunity and demographic diversity, measured in terms of race, color, religion, national origin, and sex, among student body, faculty, and staff; any standard other than norm-prohibiting discrimination on the basis of religion; and academic freedom and institutional autonomy.

Religious communities form law schools with a view toward serving the community by establishing or maintaining a law school program that is consistent with their values and teachings. The problem, then, is to determine how maintaining a distinctively religious character of law school compromises any of these principles.⁷⁷

75. *Compare Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987) with *EEOC v. Kamehameha Sch.*, 990 F.2d. 458 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 439 (1993).

76. See ABA STANDARDS, *supra* note 6, Standard 211(a).

77. It should be noted that the second of these principles—demographic diversity—suffers from the same defect as ABA Standard 103. It assumes that compliance with the "diversity" policies considered to be "sound" by either the AALS Executive Committee or the ABA Committee on Legal Education and Admissions to the Bar will result in the training of good lawyers and presumes that institutions *cannot* produce them if they do not comply. This problem is discussed at greater length in Parts III (A) & IV (C) and will not be revisited here.

B. *Discerning the Sources of Tension: The Standards "As Applied" to Religiously Affiliated Law Schools*

1. The Oral Roberts/Regent University Law School Controversy: Managing Religious Diversity, Affirmative Action, or Invidious Discrimination?

The interplay of these principles, and the tensions they cause in the accreditation process, is illustrated by the case of the law school formerly located at Oral Roberts University [ORU]. ORU Law School required its students to "go to the school chapel to sign a 'code-of-honor pledge' acknowledging Jesus Christ as Lord and Savior and vowing to follow in his footsteps."⁷⁸ After a stormy debate that pitted arguments decrying any exclusionary discrimination against arguments that emphasized that religious liberty and choice in education are protected by the First Amendment,⁷⁹ the ABA decided that Standard 211 should be modified to reflect the special concerns of religiously affiliated institutions. However, that modification was limited. Religious discrimination could be permitted in only three instances:

1. When the religious discrimination directly relate[s] to the law schools religious affiliation;
2. when adequate public notice of the policy has been given to applicants, faculty, and staff; and
3. when the school's religious affiliation, purpose, and policies do not otherwise contravene standards of academic freedom and diversity that apply to institutions without such affiliations.⁸⁰

78. *Oral Roberts Wins A Legal Battle*, NEWSWEEK, Aug. 24, 1981, at 73-74.

79. Oral Roberts University [hereinafter ORU] sued the ABA, Oral Roberts Univ. v. ABA, No. 81-C3171 (N.D. Ill. July 22, 1981), and obtained an order enjoining the ABA "from denying provisional accreditation to ORU's Law School in whole or in part on the basis of . . . prohibitions against religious restrictions." Thomas L. Shaffer, *Erastian and Sectarian Arguments in Religiously Affiliated American Law Schools*, 45 STAN. L. REV. 1859, 1861 n.5 (1993). The complaint was later dismissed by ORU. *Id.*

80. Standard 211 (d) provides:

This Standard does not prevent a law school from having a religious affiliation and purpose and adopting and applying policies of admission of students and employment of faculty and staff that directly relate to this affiliation and purpose so long as (1) notice of these policies has been given to applicants, students, faculty and staff before their affiliation with the law school, and (2) the religious affiliation, purpose and policies do not contravene any other Standard, including Standard 405(d) concerning academic freedom. These policies may provide a preference for persons adhering to the religious affiliation and purpose of the law school, but shall not be applied to preclude a diverse student body in terms of race, color, religion, national origin, or sex. This Standard permits religious policies as to admission and employment only to the extent that they are protected by the United States Constitution. It shall be administered as if the First Amendment of the United States Constitution governs its application.

Though that formulation, coupled with a grant of provisional accreditation, allowed both sides in the ORU case to claim that they had served their essential purposes,⁸¹ it actually highlighted the primary source of the tension between religiously affiliated law schools and their accrediting agencies. Religiously affiliated institutions view their "religiosity" or "religiousness" as central components of their identity as higher learning institutions. As a result, their very understanding of "diversity," "community," "quality education," and "good lawyering" must be viewed in the context of the specific religious traditions that give them life and substance.⁸²

The ABA's position is very different from ORU's, and it provides a useful contrast. Talbot D'Alemberte, the former President of the ABA and a member of the ABA's legal-education section during the controversy at ORU, summarized the organization's position on the relationship of religion to diversity, community, and quality education: "We felt that while the ABA should encourage diversity, we should hold open the possibility that a nondiverse institution may develop a competent law school. It's a recognition of the right to freely exercise religious principles."⁸³

This statement is telling both for what it says and for what it assumes. The first assertion is that the ABAs goal of encouraging diversity and a recognition of the "right [of religiously affiliated institutions] to freely exercise religious principles" may sometimes be at odds.⁸⁴ This is an interesting proposition for several reasons, not the least of which is the

ABA STANDARDS, *supra* note 6, Standard 211(d).

81. There were other significant issues involved in the ORU case, such as financial stability, that are by no means unique to religiously affiliated universities. This writer is not privy to the information considered by the visitation team, and therefore expresses no opinion with respect to those issues.

82. Pope John Paul II has described the task as follows:

In the world today, characterized by such rapid developments in science and technology, the tasks of a Catholic university assume an ever greater importance and urgency. Scientific and technological discoveries create an enormous economic and industrial growth, but they also inescapably require the correspondingly necessary *search for meaning* in order to guarantee that the new discoveries be used for the authentic good of individuals and of human society as a whole. If it is the responsibility of every university to search for such meaning, a Catholic university is called in a particular way to respond to this need: Its Christian inspiration enables it to include the moral, spiritual, and religious dimension in its research, and to evaluate the attainments of science and technology in the perspective of the totality of the human person.

POPE JOHN PAUL II, CONSTITUTION OF THE SUPREME PONTIFF, ON CATHOLIC UNIVERSITIES (*Ex Corde Ecclesiae*) (United States Catholic Conference No. 399-X 1990).

83. *Oral Roberts Wins A Legal Battle*, *supra* note 78, at 73.

84. *Id.*

utter *lack* of attention given to it by either the ABA or the AALS.⁸⁵ The important question is not *whether* the ABA or the AALS view diversity and the free exercise of religion to be somewhat at odds. They do. The critical question is *why*?

The answer to this question can only be found through a careful self-study of the ABA and AALS definitions of diversity. What we need to uncover is not a definition of diversity in general, but rather the specific *kinds* of diversity accrediting agencies feel should be encouraged *and* the reasons for the selections made.

Mr. D'Alemberte's comment concerning ORU is revealing in this regard. It assumes that an institution that requires all of its faculty, students, and staff to "acknowledg[e] Jesus Christ as Lord and Savior and vow[] to follow in His footsteps"⁸⁶ is nondiverse, without any apparent regard for any of the traditional indicia of diversity that the ABA *does* encourage, such as race, sex, and national origin. If taken at face value, the assertion is that an *ethnically or racially* diverse, but religiously homogeneous, institution is *not* diverse unless it maintains a certain modicum of religious diversity as well.⁸⁷

85. The MACCRATE REPORT, for example, spends two-thirds of Chapter One, "*Lawyers and Legal Services: Growth, Change and Multicultural Diversity*," discussing the change in the gender make-up of the profession and the Bar's "Belated Opening to Minorities and Diversity." MACCRATE REPORT, *supra* note 7, at 13. As useful as that discussion is, it is also incomplete. The record of the organized Bar respecting equal opportunity and treatment for persons and institutions not favored by the governing elites in the profession and legal academy has not been good. For the record on religious and national origin discrimination, see *infra* notes 147-150 and accompanying text.

86. ABA STANDARDS, *supra* note 6, Standard 212.

87. The key question, of course, is how such religious diversity is to be defined, established, or maintained without also engaging in prohibited "religious discrimination." The dilemma is indeed difficult, but it is no different than attempts to manage racial, ethnic, or gender diversity without running afoul of laws prohibiting discrimination on the basis of race, national origin, or sex.

When attempts to manage diversity take place against a non-remedial background, there is no colorable claim that the program in question is designed to do anything *other than* to seek racial, ethnic, sexual or religious diversity as such. The reasons why such a program might be established are varied, but they largely fit into two categories: 1) to provide tangible evidence that an institution is serving a specific community, and 2) to assume that these characteristics are predictive of one's perspectives or opinions and are valued for that reason. The former reason animates California's requirement that there be coordination of effort among its universities and colleges to assure that students from ethnic minority communities may transfer to the University of California. See CAL. EDUC. CODE § 66740 (West 1993). See also CAL. EDUC. CODE § 87100 (b) (mandating affirmative action in community college hiring); Paul D. Carrington, *Diversity*, 1992 UTAH L. REV. 1105, 1130-31 & nn.85-87 (citing UNIVERSITY OF CAL., REPORT OF THE 1990 ALL-UNIVERSITY FACULTY CONFERENCE ON GRADUATE STUDENT AND FACULTY AFFIRMATIVE ACTION 7 (1990)) (aiming at a student and faculty popula-

The second component of Mr. D'Alemberte's statement raises equally serious issues. In this view, the ABA should hold open the possibility that a nondiverse institution may develop a competent law school.⁸⁸ Once again, the question is *why*? There are only two conceivable reasons. The first is the unexceptionable proposition that the First Amendment and the ABA's self-professed commitment to the cause of justice and improvement of the law⁸⁹ requires that it keep an open mind on such matters. The second is that the ABA's understanding of the concept of "diversity" may not be as closely related to issues of institutional competence and quality education as it seems to think.⁹⁰

Either way, the question is not so much about diversity, as such, but the specific contributions that the value orientation of a given institution, combined with a particular mix of students and faculty, makes both to the quality of the educational experience and to the diversity, however the term is defined, of the profession.

The ABA concession that a law school's religious demographics are not *necessarily* inconsistent with competence in legal education is an important one. If, as the ABA and AALS standards assume, it is possible to differentiate between competent and inadequate legal education programs, we need to know when "diversity" affects competence in legal education and when it does not.

We must, therefore, place two further topics on the agenda of our planned self-study of the accreditation rules:

- the "as applied" definition of competence in legal education under ABA Standard 103, and
- the relationship of competence in legal education to the ABA and AALS understanding of the concept of diversity.⁹¹

tion that mirrors the demographics of the state of California). The second is the rationale for Justice Powell's opinion in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 269-324 (1978).

The relationship of race, ethnic, sex or religion to the "intellectual diversity" requirements of the ABA and AALS accreditation standards is discussed at *infra* note 151-63 and accompanying text.

88. See Statement of Gordon D. Schaber, Chairman, Section of Legal Education and Admissions to the Bar, A.B.A., July 24, 1982, at 2.

89. See *supra* notes 10-11 and accompanying text.

90. Though Betsy Levin has noted the importance of separating issues of accreditation generally from those that raise questions about the use of diversity factors in the accreditation process, see Levin, *supra* note 5, the use of such factors remains extremely controversial. See generally *id.*

91. See *infra* notes 133-39 and accompanying text.

2. The Controversy Continues: Regent University and the Case for "Intellectual Diversity"

The tensions that will be uncovered in any self-study cannot be resolved without careful and sensitive consideration of all perspectives. One rather important issue for present purposes is secular liberalism's perspective⁹² that matters of faith and matters of reason are distinct orders of reality.⁹³ Christopher Columbus Langdell's notion that law could be studied scientifically⁹⁴ adds another gloss to the philosophical and moral question of whether they can (or should) be separated at all.⁹⁵ The ongoing controversy over the accreditation of the Regent University

92. See, e.g., Kathleen Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 199-201 (1992). Professor Sullivan argues that "the affirmative implications of the Establishment Clause . . . entail[] the establishment of a civil order — the culture of liberal democracy." *Id.* at 199-201. In her view, "[t]he correct baseline [of the Religion Clause] . . . is not unfettered religious liberty, but rather religious liberty insofar as it is consistent with the establishment of the secular public moral order." *Id.* at 198. Acceptance of secular liberalism is, in this view, the "religious truce" that inheres in the Establishment Clause.

It is freely admitted that such a religious truce "may well function as a belief system with a substantive content, rather than a neutral and transcendent arbiter among other belief systems." *Id.* at 199; Accord Naomi M. Stolzenberg, *"He Drew A Circle That Shut Me Out": Assimilation, Indoctrination, and the Paradox of a Liberal Education*, 106 HARV. L. REV. 581 (1993); Larry Alexander, *Liberalism, Religion, and the Unity of Epistemology*, 30 SAN DIEGO L. REV. 763 (1993). What is surprising (and refreshing) about the argument is both its candor and its apparent determination to ignore the history, language, and structure of the Constitution in an attempt to demonstrate that "the culture of liberal democracy" is ordained, albeit "implicitly," by the *First Amendment itself* as "the overarching belief system for politics, if not for knowledge." Sullivan, *infra*, at 200-03.

It has been duly noted that such views may be derived from more traditional religious roots. See, e.g., Stolzenberg, *supra*. In the course of an attack on the AALS Executive Committee's inquiry into diversity issues at the University of California, Berkeley's Boalt Hall School of Law, Professor Paul Carrington writes disparagingly of the "secular Calvinism now apparently infecting much academic discourse." See Paul D. Carrington, *Accreditation And The AALS: The Boalt Affair*, 41 J. LEGAL EDUC. 363, 371 (1991).

93. Accord Roger C. Crampton, *The Ordinary Religion of the Law School Classroom*, 29 J. LEGAL EDUC. 247, 250 (1978) ("The law teacher must stress cognitive rationality along with 'hard' facts and 'cold' logic and 'concrete' realities. Emotion, imagination, sentiments of affection and trust, a sense of wonder or awe at the inexplicable, these soft and mushy domains of the 'tender minded' are off limits for law students and lawyers.").

94. See Russell L. Weaver, *Langdell's Legacy: Living With the Case Method*, 36 VILL. L. REV. 517, 527 n.24 (1991); see also Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983). Grey quotes Langdell as saying that "[i]f law be not a science, a university will consult its own dignity in declining to teach it." Grey, *supra*, at 38. See also J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 YALE L.J. 251, 272 n.80 (1989).

95. Langdell's argument that law is a science was based on his conception of law itself, and on his belief that students should study it by consulting original sources. His preference for the scientific method fit well into the prevailing wisdom of his time. J. Peter Byrne, for example, notes:

Law School, which is a part of the ministry of the Reverend Pat Robertson, is a case in point.

When CBN University, now Regent University, took over Oral Roberts Law School in 1986, the ABA properly refused⁹⁶ simply to transfer the accreditation to the new entity. It denied Regent's accreditation in 1987, and again in 1989. This time, the controversy was joined on the point that Mr. D'Alemberte's statement emphasized in the aftermath of the ORU case: the infinitely more subjective question of whether a law school controlled by an unabashedly Evangelical Christian management and faculty could provide the quality of legal education demanded by the ABA's accreditation standards.

In the course of defending itself against a lawsuit brought by students enrolled at CBN, "[t]he ABA's lawyer, David Pritikin, . . . asked [in court] whether faculty members in class [could] fully explore *Roe v. Wade* [given that] many fundamentalists believe abortion is tantamount to murder."⁹⁷ Coming, as it does, from an experienced attorney well aware of the potential stakes with substantial First Amendment implications, this is quite a revealing question.

If we assume, as we must, that students need a full exploration of *Roe v. Wade* in order to appreciate why it is of one of the most controversial

The[] structural changes [in governing boards and the orientation of their members] reflected a fundamental change in the intellectual orientation of American universities. The change is usefully, if simple-mindedly, expressed as a movement from a paradigm of fixed values vouchsafed by religious faith to one of relative truths continuously revised by scientific endeavor. This shift did not merely elevate the relative status of the natural sciences; scholars in nearly all disciplines adopted scientific methods and goals whether they were addressing social, moral, or aesthetic issues. Religion lost prestige as the primary basis for interpreting human goals. Universities became secular; religion was usually retained only as a polite ornament.

Byrne, *supra* note 94, at 271 (footnotes omitted). Langdell's argument also had another effect: it provided a powerful justification for the existence of law schools at universities. See Weaver, *supra* note 94, at 529-31 nn.29-33. There is extensive literature on the need for law schools to teach more than simply "black letter" law. See, e.g., Angela P. Harris & Marjorie M. Shultz, "A(nother) Critique of Pure Reason": Toward Civic Virtue in Legal Education, 45 STAN. L. REV. 1773 (1993); Phoebe Haddon, *Academic Freedom And Governance: A Call For Increased Dialogue And Diversity*, 66 TEX. L. REV. 1561 (1988); Terrence Sandalow, *The Moral Responsibility of Law Schools*, 34 J. LEGAL EDUC. 163, 166-67 (1984) (stating that legal education should go beyond equipping students to perform professional roles); David Luban, *Against Autarky*, 34 J. LEGAL EDUC. 176, 188 (1984) (arguing that law schools should "inculcate a sense of justice" in their students).

96. Compare ECR, *supra* note 44, at 11.5 (change of Operation of a School) with ABA STANDARDS, *supra* note 6, Rules of Procedure for Approval of Law Schools by the American Bar Association, Rule 33A and 33B (changes in program).

97. Felicity Barringer, *Evangelicals and the Bar Spar Over Law School*, N.Y. TIMES, May 19, 1989, at B6.

cases in all of constitutional law,⁹⁸ the question invites us to speculate on the capacity, or inclination, of "fundamentalists" who believe that abortion is tantamount to murder to engage in such an exploration without prodding by others who do not share such views. It also invites us to speculate on the substantive content Mr. Pritikin might require before he would deem an exploration of the matter to be "full."

The ABA's apparent concern was that, because Regent's enrollment was limited to committed Christians, it lacked sufficient intellectual diversity to permit it to function as an institution of higher learning. For the former Dean of Regents Law School, Herbert W. Titus, however, the question was not one of either diversity or educational quality, but one of "perspective"—itself an important component of intellectual diversity.

Noting that after many years of teaching he "began to realize [he] couldn't teach the way [he]'d taught before," Dean Titus raised a legitimate question: "If you can teach law from a Marxist perspective or a feminist perspective or the perspective of a critical legal scholar, why can't you teach it from a biblical perspective?"⁹⁹

The point is twofold. If the ABA and AALS are concerned that the beliefs or cultural backgrounds of the professors and students might affect either the substantive content of teaching or the tenor of the classroom environment, their concerns are not misplaced. They can and do.

98. See DAVID GARROW, *LIBERTY & SEXUALITY: THE RIGHTS OF PRIVACY AND THE MAKING OF ROE V. WADE* (Macmillan ed. 1994); RONALD DWORKIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA AND INDIVIDUAL FREEDOM* (1993); Robert A. Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 CAL. L. REV. 1250 (1975); John H. Ely, *The Wages of Crying Wolf: A Commentary on Roe v. Wade*, 82 YALE L.J. 920 (1973); Richard Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159.

99. Barringer, *supra* note 97. The controversy at Regent continues as these words are written. See Mark O'Keefe & Mac Daniel, *Majority of Regent Law Professors File Complaint to ABA Robertson said the Action, Spurred by Concern Over Job Security, was "Counter-productive," NORFOLK VIRGINIAN-PILOT*, Sept. 24, 1993, at A1.

I do not believe it is possible to "resolve" controversies over matters of perspective without destroying the very intellectual diversity accrediting agencies such as the ABA seek to foster. I do believe, however, that it is possible to ascertain whether or not the "essentials" of specific subject matter (however they may be defined) are "covered," and that such an inquiry is perfectly consistent with both academic freedom (however defined) and the First Amendment. See *infra* notes 123-26 and accompanying text. Differences in perspective are simply a fact of life. They occur among the wide variety of public, private, and religiously affiliated institutions in this country, and within their respective faculties. If "perspective" is to be an issue for the accreditation team at all, it is incumbent on both the accreditors and the institution seeking (or seeking to retain) accreditation to lay it "flat" on the table, so that both parties can to discuss the relationship of the perspective in question to the more generalized issues of educational quality which are the legitimate concern of a visitation committee.

In fact, it is precisely this insight which undergirds the ABA and AALS concerns that accredited institutions have affirmative action policies.¹⁰⁰ The issue, therefore, is not the beliefs (as such) of either the professor or the students,¹⁰¹ but whether or not a professor or a significant number of students in a given class might act in a way that will make it possible (or likely) that the students will be "indoctrinated" rather than "educated."¹⁰²

This, of course, is a legitimate concern. Teaching is a position of fiduciary responsibility, and manipulation of the classroom environment in a manner inconsistent with that responsibility is unethical.¹⁰³ It is equally unethical, however, for accreditors to try to divine, based on a person's religious beliefs, whether they can be trusted with the education of lawyers.¹⁰⁴ If there is a concern about the ethics of the classroom, it should

100. The need for academic institutions to take active steps to shape their internal intellectual climate was the justification for Justice Powell's finding that the First Amendment provided an intellectual diversity rationale for the University of California's race-conscious admissions policies. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 269-324 (1978).

101. In fact, there is a good deal of literature that values the contributions of women and minorities because their perspectives are drawn from their ethno-cultural background. See, e.g., Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 VA. L. REV. 461 (1993); John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129 (1992); Alex M. Johnson, Jr., *The New Voice of Color*, 100 YALE L.J. 2007 (1991); Robin D. Barnes, *Race Consciousness: The Thematic Content of Racial Distinctiveness in Critical Race Scholarship*, 103 HARV. L. REV. 1864 (1990). See also Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413 (1991); Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077 (1991).

102. The extent to which concerns about the substantive content of teaching in religiously affiliated schools affect the judgments of funding and regulatory bodies is a topic given far too little attention in the First Amendment literature. Though a detailed exploration of the topic is far beyond the scope of this paper, congressional attempts to control the content of editorials by public broadcasting affiliates, of "counseling" sessions at Title X birth control clinics, and of publicly-funded "art" have raised similar questions. See, e.g., *F.C.C. v. League of Women Voters*, 468 U.S. 364 (1984) (invalidating restrictions on public funding of editorials); *Rust v. Sullivan*, 500 U.S. 173 (1991) (upholding Title X Regulations). *Bella Lewitzky Dance Found. v. Frohnmayer*, 754 F. Supp. 774 (C.D. Cal. 1991) (invalidating restrictions on government funding of obscene art).

103. See ASSOCIATION OF AM. LAW SCH., STATEMENT OF GOOD PRACTICES BY LAW PROFESSORS IN THE DISCHARGE OF THE ETHICAL AND PROFESSIONAL RESPONSIBILITIES ¶ 1 (1989), reprinted in STEVEN GILLERS & ROY D. SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS 565, 566-67 (West 1993) (stating that "Law professors have an obligation to treat students with civility and respect and to foster a stimulating and productive learning environment in which the pros and cons of debatable issues are fairly acknowledged. Teachers should nurture and protect intellectual freedom for their students and colleagues.").

104. Cf. U.S. CONST. Art. VI, cl. 3 (Religious Test Clause); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(j) (1988) (prohibiting, among other things, discrimination on the basis of religion).

be addressed as such: either by questioning the ethics and intellectual honesty of a specific professor (or student) or, if the situation warrants it, by raising the sensitive question of intellectual diversity during an accreditation visit.

One thing, however, is clear. Concerns about the intellectual diversity of law schools and their faculties should not be limited to institutions in which the students and faculty are of a predominantly orthodox¹⁰⁵ religious stripe. Law schools with impeccable progressive credentials are equally capable of manipulating the learning environment "and have done so with great fanfare, and largely without apology."¹⁰⁶

105. The terms "orthodox" and "progressive" are borrowed from James Davison Hunter's *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* (Basic Books 1990). They are described as follows:

The terms are imperfect, but each aspires to describe in shorthand a particular locus and source of moral truth, the fundamental (though perhaps subconscious moral allegiances) of the actors involved in the culture war as well as their cultural and political dispositions. Though the term "orthodox" and "progressive" may be familiar to many, they have a particular meaning here that requires some elaboration. What is common to all three approaches to *orthodoxy*, for example (and what makes orthodoxy more of a formal property) is *the commitment on the part of adherents to an external definable, and transcendent authority*. Such objective and transcendent authority defines, at least in the abstract, a consistent, unchangeable measure of value, purpose, goodness, and identity, both personal and collective. It tells us what is good, what is true, how we should live, and who we are.

Within cultural progressivism, by contrast, moral authority tends to be defined by the spirit of the modern age, a spirit of rationalism and subjectivism. Progressivist moral ideals tend, that is, to derive from and embody (though rarely exhaust) that spirit. From this standpoint, truth tends to be viewed as a process, as a reality that is ever unfolding. In other words, what all *progressivist* world views share in common is *the tendency to resymbolize historic faiths according to the prevailing assumptions of contemporary life*.

But what about the growing number of "secularists?" These people range from the vaguely religious to the openly agnostic or atheistic. While they would probably claim no affiliation with a church or religious denomination, they nevertheless hold deep humanistic concerns about the welfare of the community and nation. Like the representatives of religious communities, they too are divided. Yet public opinion surveys show that a decided majority of secularists are drawn toward the progressivist impulse in American culture. For these people religious tradition has no binding address, no opinion-shaping influence. Some secularists, however, (particularly secular conservative and neo-conservative intellectuals) are drawn toward the orthodox impulse. For them, a commitment to natural law or to a high view of nature serves as the functional equivalent of the eternal and transcendent moral authority revered by their religiously orthodox counterparts.

Id. at 44-46.

106. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (race-based admissions criteria at the University of California, Davis); *Hopwood v. State of Texas*, 861 F. Supp. 551 (W.D. Texas 1994) (University of Texas Law School); DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 5 (1992). See also Derrick A. Bell, *Academic*

C. *Drawing Conclusions: Is There a Rationale That Supports the Special Treatment of Religiously Affiliated Institutions?*

If there is any rationale for the special treatment of religiously affiliated institutions, it appears to be the belief that too much religion can tip the scale from education, which is acceptable, to indoctrination, which, apparently, is not. Given the ABA's expressed commitment to academic freedom and nondiscrimination on the basis of religion, this is an interesting position indeed.

The formal meaning of indoctrination is simply instruction "in doctrines, principles, theories or beliefs."¹⁰⁷ If understood in this fashion, the primary business of law schools is indoctrination. As used in case law¹⁰⁸ and common parlance, however, the concept denotes an attempt by an instructor "to cause to be impressed and . . . ultimately imbued (as with . . . partisan or sectarian opinion, point of view, or principle)" or to "cause to be drilled or otherwise trained (as in a sectarian doctrine) and . . . persuaded"¹⁰⁹ It can occur whenever a committed adherent utilizes the educational process to proselytize a particular world view.¹¹⁰

Mr. Pritikin's statement on behalf of the ABA in the Regent litigation implies that anyone who believes that abortion is tantamount to murder is unqualified to teach *Roe v. Wade*¹¹¹ without close supervision by accrediting agencies, deans, faculty committees, and perhaps the ABA itself. By doing so, he unwittingly underscores the main point of this paper: that there is, in fact, a tension between the accreditation agencies and the religiously affiliated schools they supervise. Furthermore, this tension arises from a stereotype that is all too common in the law: that religiously-based education rests upon indoctrination rather

Freedom and Legal Education: Diversity and Academic Freedom, 43 J. LEGAL EDUC. 371 (1993) (describing his experiences at Stanford); Carrington, *supra* note 92; Normal Redlich, *Law School Faculty Hiring Under Title VII: How a Judge Might Decide a Disparate Impact Case*, 41 J. LEGAL EDUC. 135 (1991).

107. WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 933 (2d ed. 1983). The secondary definition is "to instruct; teach." *Id.*

108. *See, e.g.,* Lemon v. Kurtzman, 403 U.S. 602 (1971); Board of Educ. v. Allen, 392 U.S. 236 (1968).

109. Webster's Third New International Dictionary defines "indoctrinate" as "to cause to be impressed and ultimately imbued (as with . . . partisan or sectarian opinion, point of view, or principle) . . . : cause to be drilled or otherwise trained (as in a sectarian doctrine) and persuaded" WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1153 (3d ed. 1971).

110. *Cf.* R. Crampton, *The Ordinary Religion of the Law School Classroom*, 29 J. LEGAL EDUC. 247 (1977).

111. 410 U.S. 113 (1973). *See also* Doe v. Bolton, 410 U.S. 179 (1973).

than the modes of inquiry that characterize other fields of scholarly endeavor.¹¹²

Abortion is unquestionably a subject of great moral and legal controversy.¹¹³ Reasonable minds can differ not only on the details of the substantive policy itself, but also on the proper way in which to present the material to a class. Whatever one's views on the merits of *Roe v. Wade*, law and economics, feminism, critical legal studies, legal realism, or the need for additional skills training before graduation from law schools, it goes without saying that beliefs on such matters are not neutral, nor can they be given the nature of human perception. Academic politics, personal preference or philosophy, and, sometimes, actual prejudice, are very real factors in the presentation of class materials, the selection of research topics, the admission of students, and the hiring, promotion, and retention of faculty members.¹¹⁴ Add to this already-volatile mix differing views on the nature and sources of public and private morality, and the fundamentally viewpoint-based nature of the main tensions affecting the accreditation process becomes painfully obvious.

In sum: Why do the ABA and AALS accreditation standards presume that the *primary* risk of indoctrination occurs in religiously affiliated law schools, when the reality is that indoctrination can occur in *any* law school? The answer to this question is to be found in an examination of the *1940 Statement of Principles on Academic Freedom and Tenure* of the American Association of University Professors.¹¹⁵

112. See, e.g., April K. Cassou & Robert F. Curran, *Secular Orthodoxy and Sacred Freedoms: Accreditation of Church Related Law Schools*, 11 J. C. & U. L. 293 (1984); Charles E. Curran, *Academic Freedom at Catholic Universities*, 66 TEX. L. REV. 1441 (1988); Lonnie D. Kliever, *Religion and Academic Freedom: Issues of Faith and Reason*, 74 ACADEME: Bulletin of AAUP 8-11 (Jan.-Feb. 1988). See generally Stolzenberg, *supra* note 92; RUSSELL KIRK, *ACADEMIC FREEDOM: AN ESSAY IN DEFINITION* (Greenwood Press 1955).

113. See, e.g., DWORKIN, *supra* note 98.

114. See, e.g., Haddon, *supra* note 95; Paul Carrington, *Freedom And Community In The Academy*, 66 TEX. L. REV. 1577 (1988).

115. AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, *1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE, POLICY DOCUMENTS & REPORTS* 3 (1984); see 53-3 LAW & CONTEMP. PROBS. 407 App. B (1990). See generally Symposium, *Freedom and Tenure in the Academy: The Fiftieth Anniversary of the 1940 Statement of Principles*, 53 L. & CONTEMP. PROBS. 1 (William W. Van Alstyne et. al. eds., 1990).

IV. "MANAGING" THE CONTENT OF THE EDUCATIONAL EXPERIENCE

A. *The Meaning of "Academic Freedom"*

The basis for the ABA and AALS definitions of academic freedom is the *1940 Statement*.¹¹⁶ The ABA's commitment to the AAUP framework is reflected in Standards 103, 211, and 405(d). Those provisions state explicitly that "sound educational policies" require, among other things, that institutions adhere to standards of academic freedom which are consistent with those of the AAUP.¹¹⁷ The AALS is even more explicit:

ACADEMIC FREEDOM DEFINED. Bylaw Section 6-8(d) provides: "A faculty member shall have academic freedom and tenure in accordance with the principles of the American Association of University Professors." Those principles are defined by the American Association of University Professors' 1940 Statement on Academic Freedom and Tenure and the Interpretive Comments adopted in 1970. Specifically, the Association of American Law Schools adopts the position of the 1970 Interpretive Comments that "most church-related institutions no longer need or desire the departure from the principles of academic freedom implied in the 1940 Statement, and we do not now endorse such a departure."¹¹⁸

Though I seriously doubt that either organization intended to take an official position on the relationship of religion to education and the search for truth when they adopted the AAUP position as normative for legal education, that is precisely what they did.¹¹⁹

The provisions of *The 1940 Statement* most directly relevant to the ABA and AALS accreditation standards are the three "Principles on Academic Freedom and Tenure." I will quote them in full:

ACADEMIC FREEDOM (a) The teacher is entitled to full freedom in research and in the publication of the results, subject to the adequate performance of his other academic duties; but research for pecuniary return should be based upon an understanding with the authorities of the institution.

(b) The teacher is entitled to freedom in the classroom in the discussing his subject, but he should be careful not to introduce into

116. Symposium, *supra* note 115.

117. ABA STANDARDS, *supra* note 6, Standards 103, 211 & 405(d).

118. AALS Bylaw, *supra* note 38, § 6-8(d).

119. *Id.* Metzger, *supra* note 4, at 5 (stating "Like Elsa plighting her troth to the cryptic Lohengrin, American academics and others have embraced the 1940 Statement without knowing its family name.").

his teaching controversial matter which has no relation to his subject. Limitation of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment.

(c) The college or university teacher is a citizen, a member of a learned profession, and an officer of an educational institution. When he speaks or writes as a citizen, he should be free from institutional censorship or discipline, but his special position in the community imposes special obligations. As a man of learning and educational officer, he should remember that the public may judge his profession and his institution by his utterances. Hence he should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that he is not an institutional spokesman.¹²⁰

The 1940 Statement has a long and interesting history. Thankfully, however, it is recounted elsewhere and need not be repeated here.¹²¹ The 1940 Statement is relevant to the present discussion in two ways. First, it is the standard by which law schools must judge themselves under ABA Standards 103 and 405(d). As such, it contains important statements that should guide the ABA and AALS in the self-study suggested here. Second, its history casts light upon the way in which religious institutions are singled out for special treatment under ABA Standard 211 and AALS ECR's 6.16 and 6.17. I will address these points in reverse order.

It is clear that Standard 211 and ECR 6.17 borrow their disclosure requirements from the "Limitations Clause" of Paragraph (b): "Limitation of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment."¹²² The appropriation was not exact, however. The AAUP's phrase "or other aims of the institution" presupposes that there can be, at both religious and nonreligious institutions, *non-religious* aims that could be inconsistent with academic freedom.¹²³

120. AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, *supra* note 115, at 3. See 53-3 LAW & CONTEMP. PROBS. 407 app. B (1990). The 1940 Statement was amended in 1989 and 1990 to remove gender specific references in the text. *Id.*

121. Metzger, *supra* note 4, at 3.

122. ABA STANDARDS, *supra* note 6, Standard 211; ECR, *supra* note 44, at 6.17.

123. See, e.g., Bishop v. Aronov, 926 F.2d 1066 (11th Cir. 1991), *cert. denied*, Bishop v. Delchamps, 112 S. Ct. 3026 (1992) (upholding state university professor's discipline because he discussed, in class, religious questions he believed were relevant to his courses in human physiology; the goal was to maintain the university's standards for secular speech in the classroom).

This is a telling omission. By its terms, the *1940 Statement* applies to any "aims of [any] institution" that can be inconsistent with academic freedom, but the ABA and AALS single out *only* institutions with a religious commitment or mission for special treatment. The reason, I submit, is to be found in the official attitude of the AAUP and much of the academy concerning religion.¹²⁴ Unfortunately, that attitude is neither flattering nor religiously neutral.

The *1940 Statement* and its subsequent interpretations are based on a secular view of the nature of both freedom and the search for truth in an academic setting. Professor Walter Metzger of Columbia University notes that those who laid the groundwork for the *1940 Statement* were [u]tilitarian in temper and conviction, . . . [and] did not view the expressional freedoms of academics as a bundle of abstract rights. They regarded them as corollaries of the contemporary public need for universities that would increase the sum of human knowledge and furnish experts for public service—new functions that had been added to the time-honored one of qualifying students for degrees.¹²⁵

That utilitarianism was clearly reflected in the AAUP's 1915 Declaration of Principles,¹²⁶ but it is not apparent on the face of the *1940 Statement*. The only vestige of a clear statement by the AAUP concerning "the compatibility of individual academic freedom with institutional religious or other doctrinal tests" is the Limitations Clause itself. As Metzger observes, "The words of this provision come from an every-day vocabulary . . . but they vibrate with mystery and ambiguity when read without the 1915 master key."¹²⁷ We must, therefore, take a brief look at that 1915 master key to the meaning of the Limitations Clause to see what view of religion, or, more accurately, institutional commitment to religiously-based truth claims, is adopted by the ABA and AALS. Once again, Professor Metzger provides the answer:

The idea of institutional neutrality—the view that a university cannot put the stamp of its approval or disapproval on a disputed truth-claim and still be faithful to its social trust—was of such critical importance to these authors that they highlighted it in almost every paragraph, though they did not refer to it by that name. . . . Any university, they wrote, "which lays restrictions upon the in-

124. See generally STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF* (1993).

125. Metzger, *supra* note 4, at 13.

126. General Report of the Committee on Academic Freedom and Academic Tenure, 1 AAUP BULL. 17, Dec. 1915 in Appendix A, 53 LAW & CONTEMP. PROBS. 393 (1990).

127. Metzger, *supra* note 4, at 31.

tellectual freedom of its professors proclaims itself a proprietary institution, and should be so described whenever it makes a general appeal for funds; and the public should be advised that the institution has no claim whatever to general support or regard."¹²⁸

B. *Academic Freedom and Institutional Diversity*

It is obvious that such a construct poses problems for religiously affiliated institutions that take their religious commitments seriously. Law schools that consciously identify themselves with specific communities of faith view their religious commitments as more than an identification; it is part and parcel of their respective identities and missions as institutions of higher learning.¹²⁹ In the words of Pope John Paul II, "A Catholic University's privileged task is 'to unite existentially by intellectual effort two orders of reality that too frequently tend to be placed in opposition as though they were antithetical: the search for truth, and the certainty of already knowing the fount of truth.'"¹³⁰

Given their commitment to the *1940 Statement*, it is not surprising that both the ABA and the AALS appear to question, if not reject outright, the idea that institutions of higher learning have any business being officially involved in either the search for religious truth or uniting that search with what often appears to be—to lawyers at least—two equally distinct "orders of reality:" the teaching and the practice of law.¹³¹ In fact, both organizations have taken actions respecting religiously affiliated law schools that indicate their profound discomfort when religious commitment requires that an institution respectfully demur from decisions thought, in good faith by either the ABA or AALS, to be in the best interests of quality legal education.¹³²

Given that the ABA proclaims itself to be bound by the First Amendment, and the AALS by the *1940 Statement* and its commitment

128. *Id.* at 14.

129. See discussion *infra* part III.

130. APOSTOLIC CONSTITUTION OF THE SUPREME PONTIFF, *supra* note 82, ¶ 1. See Noonan, *supra* note 69; Thomas L. Shaffer, *Mission of a Church-Related Law School, The Catholic Tradition*, 22 VAL. U. L. REV. 669 (1988); Thomas L. Shaffer & Robert E. Rodes, Jr., *A Catholic Theology for Roman Catholic Law Schools*, 14 U. DAYTON L. REV. 5 (1988). See also Shaffer, *supra* note 79.

131. Cf. MACCRATE REPORT, *supra* note 7, § 2. See also *supra* note 15 and accompanying text.

132. The AALS adoption of the 1970 Interpretive Comments to the 1940 AAUP Statement provides a textbook case. See ECR, *supra* note 44, at 6.16. For a further discussion, see *supra* notes 106-31 and accompanying text.

to institutional autonomy, there is a problem here. While both the ABA and AALS are certainly free to adopt a secular¹³³ position on any topic they choose, the First Amendment and principles of institutional autonomy do not permit either organization to impose its understanding of the nature of truth and its relation to religious faith upon an unwilling institution, religious or otherwise. Yet, this is the very threat that lurks at the heart of the Limitations Clause.

The situation became even more complex when the AALS added the following language to ECR 6.16: "Specifically, the Association of American Law Schools adopts the position of the 1970 Interpretive Comments that 'most church-related institutions no longer need or desire the departure from the principles of academic freedom implied in the 1940 Statement, and we do not now endorse such a departure.'" ¹³⁴ If viewed through the lens of the First Amendment, this is an extraordinary statement.

In a perceptive and well-written article entitled *Academic Freedom in Religious Institutions*,¹³⁵ Professor Michael McConnell argues that the 1970 Interpretive Comment was "of uncertain authority" because it purports to modify, by mere committee action, "the terms of a fundamental charter that had been unanimously endorsed by 120 educational and disciplinary organizations."¹³⁶ Even more important, he says, is its temporal quality and quantitative focus on "most" such institutions, "rather than [on] a principled determination of whether any such institution *should* have the option to depart from the prevailing understandings of academic freedom."¹³⁷

But this is not all. Not only does the 1970 Interpretive Comment have a pedigree that is legally dubious, its language is unconstitutionally vague. McConnell observes that church-related institutions "will continue to operate in the dark about what obligations the AAUP considers them to bear and when to expect a judgment of censure for their practices" because the organization's official position since the late 1980s "begs the question of what obligation a church-related institution has to afford academic freedom."¹³⁸

133. Much like the term "religion," the term "secular" has no clear definition in case law. In practice, it appears to mean little more than "not 'religious.'" See *supra* note 105 and accompanying text.

134. ECR, *supra* note 44, at 6.16.

135. 53-3 LAW & CONTEMP. PROBS. 303 (1990).

136. *Id.* at 308 & n.14.

137. *Id.* at 308-09 & nn.15-16.

138. *Id.* at 311.

My view is a bit harsher: the 1970 Interpretive Comment begs the question of obligation *in toto*; that is, for any law school, religious or not.

Read together, the three "Principles on Academic Freedom and Tenure" are an interesting amalgam of freedom and obligation. From that reading we learn that "[t]he teacher is entitled to full freedom in research and in the publication of the results," but we also know from common experience that intense peer pressures affect topic selection, arguments, conclusions, and selection of publication forum. Promotion, tenure, and "merit" salary increases often turn on such details. Do pressures of this type limit academic freedom? It is impossible to know by looking at the 1940 *Statement*, for there is no definition either the term "limit" or the critical concept of "academic freedom."¹³⁹

The second of the AAUP principles is, by its own terms, self-limiting. "[C]ontroversial matter which has no relation to this subject" should not be introduced into the classroom setting.¹⁴⁰ This statement implies that introducing controversial matter that *does* relate to the subject at hand is left to the discretion of the teacher who is called upon to remember that his or her status implies the existence of certain obligations. In the AAUP view, a teacher is, simultaneously, "a citizen, a member of a learned profession, and an officer of an educational institution," and each status implies a duty to "[at] all times be accurate, [to] exercise appropriate restraint, [to] show respect for the opinions of others, and [to] make every effort to indicate that he is not an institutional spokesman."¹⁴¹ The ABA's *Model Rules of Professional Responsibility* impose precisely the same constraints on lawyers.

Thus, while the 1940 *Statement* is as good a place as any to start the discussion of the importance of academic freedom in a law school setting, the discussion must end with a robust understanding of the way in which academic diversity and freedom further the goals of the ABA and AALS, the mission statements of the member schools, and the professional obligations imposed by the rules, codes, and canons of legal and judicial ethics.

139. Though lawyers should know better, AALS ECR 6.16 simply incorporates these undefined terms by reference. ABA Standard 405(e) adopts the AAUP Statement as one example of an acceptable statement of academic freedom, but gives no clear guidance as to what others might look like. While it is unconstitutionally vague for that reason, *see, e.g.,* *Cable Alabama v. City of Huntsville*, 768 F. Supp. 1484 (N.D. Ala. 1991); *Bella Lewitzky Dance Found. v. Frohnmayer*, 754 F. Supp. 774 (C.D. Cal. 1991), it does at least recognize that there is a role for institutional autonomy and diversity on this important topic.

140. AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, *supra* note 115, at 3.

141. *Id.* The courts have viewed the content of the First Amendment's free speech norms in a very similar fashion. *See, e.g.,* *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

The issue that lies at the heart of the accreditation process, therefore, is whether a law school's program is capable of preparing good lawyers for their lives as public and private citizens, as advocates, and as counselors. Academic freedom is simply a means to that end.

Once again, we turn to the special case of the religiously affiliated law school. "The mission of Brigham Young University—founded, supported, and guided by The Church of Jesus Christ of Latter-Day Saints—is to assist individuals in their quest for perfection and eternal life."¹⁴² The mission of my own institution, The Catholic University of America, is "to cultivate and impart an understanding of the Christian faith within the context of all forms of human inquiry [, and] . . . to assure, in an institutional manner, the proper intellectual and academic witness to Christian inspiration in individuals and in the community."¹⁴³

Are these statements controversial? To some, perhaps they are. To the institutions making these claims, they are not. But the important question under the AAUP Statement is not whether they are controversial, but whether they are unrelated to the subject of training a good lawyer?

All law schools have a mission and a vision (however vague) of who they are and where they are going. The accrediting agencies also have missions and visions. Since the mission inquiry is, at bottom, a moral one, the risk is that the accrediting agencies, in their zeal to further quality education by encouraging demographic and intellectual diversity, will forget that their own views, while nominally secular, are not religiously neutral.¹⁴⁴ Metzger explains:

In a Protestant milieu, where theology tended to dissolve into piety, a dogmatic core was hard to isolate; in a Catholic milieu, where matters of faith were authoritatively decided, so too were matters of morals, and the two were authoritatively intertwined.

142. BRIGHAM YOUNG UNIV., 1992-93 GENERAL CATALOGUE 1 (1993) (The Mission of Brigham Young University).

143. THE CATHOLIC UNIV. OF AMER., COLUMBUS SCH. OF LAW, ANNOUNCEMENTS 1993-94 15 (1993).

144. This, of course, is the problem with the Supreme Court's jurisprudence of the First Amendment. The Court has equated the concept of secularism with the very different concept of neutrality. Cases such as *Bishop v. Aranov*, 926 F.2d 1066 (11th Cir. 1991) illustrate the "Catch-22" in which those who search for truth from a religious perspective find themselves. If the AAUP Statement is taken seriously, the imposition of a limitation on the professor's ability to raise whatever questions he deems relevant to the subject matter would be considered a violation of academic freedom. It is doubtful, however, that the University of Alabama's promotion and employment materials disclose its now-official position that the in-class disclosure of a professor's religious perspective on the topic being discussed is inappropriate.

The AAUP saw great dangers to personal freedom in this inter-linking of creed with conduct. Religious communities often failed to distinguish the spiritually essential from the culturally familiar; behaviors deemed innocuous in some religious settings, such as dancing, drinking, or marrying someone who had been divorced, could be seen in another as steeped in sin. When the AAUP tried to draw a line between valid doctrinal demands and invalid behavioral coercions, it appeared to set itself up as the arbiter of true religion, which was an awkward presumption, to say the least.¹⁴⁵

One need only replace the acronym AAUP in the foregoing quote with the letters AALS or ABA, and the point is made.¹⁴⁶ Religiously affiliated law schools do not draw their philosophical inspiration from utilitarianism, post-Enlightenment liberalism, or the warmed-over, Donahue-style secularism so aptly described in Stephen Carter's book *The Culture of Disbelief*¹⁴⁷ (i.e., "religion as hobby").¹⁴⁸ Such schools are founded and maintained to teach law just as they think it should be taught: that is, to the whole person, viewed as a child of God, whose duty is to serve and to seek Salvation.¹⁴⁹ (Whether they do so, and how, are topics for other speakers.)

145. Metzger, *supra* note 4, at 33-34 & n.46 (footnote omitted).

146. In fact, it has been noted that the AAUP's 1970 Interpretative Comments were motivated, in part, by "the turn in Catholic higher education toward research and academic freedom" as understood by the AAUP. Byrne, *supra* note 94, at 275 n.91. In one significant passage, Professor Byrne notes:

The current general acceptance of academic freedom at Catholic universities has been the result of a historic process of secularization at those schools, similar to the secularization of Protestant universities in the nineteenth century. (The differences are important and provocative but outside the scope of this article.) By way of contrast, new Protestant Fundamentalist colleges that insist on biblical literalism and inerrancy frequently reject the notion of academic freedom.

Id.; see JOEL A. CARPENTER & KENNETH W. SHIPPS, MAKING HIGHER EDUCATION CHRISTIAN: THE HISTORY AND MISSION OF EVANGELICAL COLLEGES IN AMERICA (1987); Scott Heller, *Southern Baptist Leaders Vow to Fight "Takeover" as Fundamentalists Seek Control of Governing Boards*, CHRON. HIGHER EDUC., Oct. 21, 1987, at A15.

147. CARTER, *supra* note 124.

148. See Stephen L. Carter, *The Separation of Church and Self*, 46 S.M.U L. REV. 585 (1992).

149. See *supra* note 115 and accompanying text. Professor J. Peter Byrne has observed that:

The crucial role in the development of academic freedom played by the replacement of a predominantly religious paradigm by a scientific one may be contrasted to the divergent development of Roman Catholic universities until the 1960's. Catholic educators of the latter part of the nineteenth century rejected many of the values of the new university as excessively secular and relativistic. Philip Gleason characterizes this opposition:

In sum, the ABA and AALS have unwittingly adopted a secular vision of the relative "quality" of the intellectual experience at religiously affiliated law schools. It is a vision that is at odds with the intellectual diversity both organizations claim to value so highly. Academic freedom, however defined, is (or should be) a concern at all law schools. I would like to suggest, therefore, that a prime topic of the proposed self-study be a rethinking of the reasons why both the ABA and the AALS believe that academic freedom at religious institutions requires special scrutiny.

C. "Managing" Intellectual Diversity Through Preferential Admissions and Hiring

1. Non-Discrimination and the Quest for Demographic and Intellectual "Diversity"

Setting the principle of academic freedom and its relation to academic quality aside for the present, we are left to grapple with the questions that arise under Standard 211(d) and ECR 6.17. To what extent does diversity, whether defined in terms of equal opportunity or affirmative action taken to shape the demographic and cultural mix of faculty, students, or staff, contribute to the training of good lawyers?

In order to address this question, a number of preliminary issues must be put on the table for consideration. Among these are:

1. What makes a student body or faculty "diverse," whether the diversity sought is based on physical characteristics, potential for intellectual contribution, or any other factor relevant to the educational process?¹⁵⁰
2. What "critical mass" is needed among students and faculty to attain the requisite level of "diversity" in terms of race, color, religion, national origin, or sex?¹⁵¹

To an age whose education was secular, scientific, and technical in spirit, particularized in vision, flexible in approach, vocational in aim, and democratic in social orientation, the Jesuits [the religious order that dominated Catholic higher education at the time] thus opposed a system that was religious, literary, and humanistic in spirit, synthetic in vision, rigid in approach, liberal in aim, and elitist in social orientation.

J. Peter Byrne, *supra* note 94, at 340 n.91 (quoting Gleason, *American Catholic Higher Education: A Historical Perspective, in the Shape of Catholic Higher Education* 15, 46 (R. Hassenger ed. 1967)).

150. A similar question arises in the context of single sex and historically black colleges and universities. See, e.g., Wendy Brown-Scott, *Race Consciousness In Higher Education: Does "Sound Educational Policy" Support The Continued Existence Of Historically Black Colleges?*, 43 EMORY L.J. 1 (1994) (answering in the affirmative).

151. For a rough definition of the term "critical mass," see *supra* note 73.

3. Are there factors, beyond numeric representation of racial, religious, ethnic, or gender groups, that might convert an otherwise diverse law school into one that is *not* diverse in some sense that is relevant to the purpose of legal education?¹⁵²
4. How are relevant diversity factors to be valued?
 - a) by reference to patterns of discrimination and exclusion, both past and present?¹⁵³
 - b) by reference to the needs of the community served by the institution?¹⁵⁴
 - c) by reference to the nature of the community as defined by its mission statement?
 - d) by reference to the purpose of the institution?¹⁵⁵
 - e) by reference to the contribution that persons possessing these, and perhaps other characteristics, such as economic status or geographic distribution, can make to the intellectual climate of the institution? or
 - f) by reference to what may be needed to leaven the existing cultural community and to diversify the demographics of the profession?¹⁵⁶

Though each of these is an immensely important and interesting question for both law schools and their accrediting agencies, none are particularly unique to religiously affiliated institutions. All institutions are enjoined by ABA Standard 212 to "demonstrate, or have carried out and maintained, by concrete action, a commitment to providing full opportunities for the study of law and entry into the profession by qualified members of groups (notably racial and ethnic minorities) which have been victims of discrimination in various forms."¹⁵⁷ AALS Bylaw 6-4(c) is virtually identical: "A member school shall seek to have a faculty, staff, and student body which are diverse with respect to race, color, and

152. The former ABA President Talbot "Sandy" D'Alemberte's comments concerning diversity at the Oral Roberts University Law School (now Regent University) are illustrative of this question. See *supra* notes 83-92 and accompanying text.

153. See, e.g., Cal. St. Admiss. Rule XVIII § 2(1), Standard M, *supra* note 63 and accompanying text.

154. See *supra* note 87 and accompanying text.

155. See, e.g., *United States v. Commonwealth of Va.*, 766 F. Supp. 1407 (W.D.Va. 1991) *cert. denied* 113 S.Ct. 2431 (1993) (discussing the unique mission of the Virginia Military Institute [VMI]).

156. See *supra* note 87 (discussing how the nature of the academic setting influenced Justice Powell's rationale defending affirmative action which is not exclusively based on racial factors).

157. ABA STANDARDS, *supra* note 6, Standard 212.

sex. A member school may pursue additional affirmative action objectives."¹⁵⁸

Religion, national origin, and culture, however, are notably absent from this list, even though all three have long been the basis for discrimination and exclusion from many walks of American life, including law school and admission to the bar.¹⁵⁹ Religious discrimination was so widespread at the time of the Founding that an explicit ban "the Religious Test Clause of Article VI" is the only mention of the word "religion" in the text of the Constitution.¹⁶⁰ Though examples abound of *de jure* and *de facto* discrimination on the basis of both religion and national origin up to and including the present day, they warrant implicit mention in the accreditation standards only as "additional affirmative action objectives."

Thus, to the extent that a long history of *de facto* and *de jure* discrimination is relevant to an institution's obligation to foster diversity, there can be no question that *both* religion and national origin are legitimate diversity factors for the consideration of all law schools. Given its immense importance in the everyday lives of most Americans¹⁶¹ and in the development of some of our most basic concepts of human rights,¹⁶² religion should be viewed by the AALS and ABA as a valid—and positive—diversity factor in its own right.

This, however, is not the dominant view. Religion, or more accurately, *serious* commitment to a religious tradition, belief, or practice, is often viewed as the uninvited, embarrassing guest at academe's celebra-

158. AALS Bylaw, *supra* note 38, § 6-4(c).

159. See ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850s TO THE 1980s* 92-109, 176 (1983); J. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 99 (1976).

160. Gerard Bradley, *The No Religious Test Clause and the Constitution of Religious Liberty: A Machine that Has Gone of Itself*, 37 CASE W. RES. L. REV. 674 (1987).

161. Americans have been described by Reverend Richard John Neuhaus as "incorrigibly religious." RICHARD J. NEUHAUS, *THE NAKED PUBLIC SQUARE* 113 (1984). This description is borne out in all of the survey data on religiousness. The fact that Americans are, at heart and in practice, a religious people—far more, in fact, than their Western European counterparts—is (or should be) a matter of critical importance to future lawyers as well. To the extent that the Rules of Professional Responsibility require an attorney/advisor to counsel the client concerning his or her intended behavior, they also make it clear that "[i]n rendering such advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.2, 2.1 (1992).

162. See generally Symposium, *The Religious Foundations of Civil Rights Law*, 5 J. L. & RELIGION 1-240 (1987).

tion of "cultural diversity."¹⁶³ It alone is viewed as a conversation stopper; that is, the *one factor* that has the potential to *inhibit* intellectual diversity.

How do we know this? The literature is immense, but for present purposes it is only necessary to look at the accreditation standards. The clear implication of Standard 211(d) and ECR 6.17 is that at least a *certain* quantum of religious diversity is required in order to maintain a competent program of legal instruction in a religiously affiliated law school. Otherwise, there would be no need for the AALS to limit the exemption only to those "preferential admissions and employment practices that *directly relate to* the school's religious affiliation."¹⁶⁴

As if to underscore the point, Standard 211 puts religiously affiliated institutions on notice that their preferential admissions and employment practices can be tolerated only "to the extent that they are protected by the United States Constitution."¹⁶⁵ This is an interesting formulation indeed, since it comes from an organization that, in the very next sentence, purports to adopt the First Amendment as its interpretive lodestar. It is also interesting because this same organization regularly defends the widest berth for freedom of speech and a wide range of unenumerated rights relating to privacy under the rubric that attorneys have an obligation to "improve" the law.¹⁶⁶

What these provisions tell us is that the ABA and AALS do not feel that the maintenance of religiously identifiable communities within law school settings is something to be encouraged, even if the law school was created to serve a community that is *defined* by its commitment to a religious faith. The ABA and AALS are willing to tolerate the maintenance of such communities within the legal educational establishment, but only to the extent that the Supreme Court forces them to do so.

Given the views of the current Supreme Court Justices in Free Exercise cases,¹⁶⁷ the grudging commitment of both the ABA and the AALS

163. Cf. Frederick M. Gedicks, *Public Life And Hostility To Religion*, 78 VA. L. REV. 671 (1992); Michael W. McConnell, "God is Dead and We Have Killed Him!": *Freedom of Religion in the Post-Modern Age*, 1993 B.Y.U.L. REV. 163.

164. ECR, *supra* note 44, at 6.17 (emphasis added). Put another way, the standards could be read as mandating that the institution demonstrate a clear nexus between its preferential admissions program and its institutional mission.

165. ABA STANDARDS, *supra* note 6, Standard 211.

166. See, e.g., Brief *Amicus Curiae* of the Association of American Law Schools, Lloyd v. Grella, 83 N.Y.2d 537 (1994) (No. 65).

167. It is, perhaps, possible to argue under *Employment Division v. Smith* that religiously affiliated law schools are engaged in a hybrid activity that involved both free exercise and freedom of speech and association. See *Employment Div. v. Smith*, 494 U.S. 872, 882 & n.1

to tolerate religious diversity at the *institutional* level is a slender reed on which to base a claim that either organization is motivated by concerns for the entire spectrum of First Amendment rights. Viewed broadly, it is doubtful that it is a commitment to tolerance, or to intellectual or demographic diversity, at all.

This is not surprising. The organized bar has a bad record respecting equal opportunity and treatment for persons and institutions not favored by the governing elites in the profession and legal academy. There has long been manipulation of accreditation and admission rules so as to limit opportunities for those deemed (for whatever reason) unworthy of admission to either the bar or the academy. In practice, such attitudes have translated into discrimination against African-Americans, women, and non-Protestant immigrants, including Southern and Eastern Europeans of Catholic and Jewish descent, Latinos, and non-whites arriving from Asia and the Pacific islands. There have also been attempts to regulate the institutions that served those populations out of existence.¹⁶⁸

For present purposes, however, the important point is that religiously affiliated law schools have played an important role in increasing the ethnic and religious diversity of the profession in the face of concerted opposition by powerful forces within the organized bar. Given that history, it seems legitimate to inquire as to both the current relevance of that history¹⁶⁹ and its relationship to the apparent position of the ABA and AALS accreditation standards that religious orientation is at least somewhat inconsistent with a properly conceived vision of diversity and quality education.

One need not (and should not) dwell on the historical record, however, to make the case that religiously affiliated law schools contribute to the diversity of the profession. Taken at face value, the language and rationale of ABA Standard 212 and AALS Bylaw 6-4(c) would support

(1991). My own view, however, is that Justice Scalia's hybrid concept does not constitute a separate category of protected conduct. It is, rather, a descriptive term that rationalizes a series of cases currently understood as Free Exercise cases. However, they do not fit neatly into either the line of cases characterized by religious claims against public authority, where the Court has held the imposition to be justified because its understanding of the Free Exercise Clause did not comprehend the protection of the religious interests alleged, *see, e.g., Reynolds v. United States*, 98 U.S. 145 (1878) (polygamy), or the line of cases in which the lines drawn by the state were discriminatory. *See, e.g., Sherbert v. Verner*, 374 U.S. 398 (1963) (preference for Sunday observers).

168. *See generally* STEVENS, *supra* note 159, at 92-109, 176. *See also* AUERBACH, *supra* note 159, at 99 (noting that "[a]lthough lawyers spoke the language of professionalism, their vocabulary often masked hostility toward those who threatened the hegemony of Anglo-Saxon Protestant culture").

169. *Cf. Washington v. Davis*, 426 U.S. 229 (1976).

the assertion that the religious demographics of a law school, a specific class, or faculty may indeed be a determinant of both intellectual and cultural diversity. If Standard 211 mandates "a diverse student body in terms of race, color, religion, national origin, or sex"¹⁷⁰ at *all* law schools, then the religious diversity of *all* law schools is a legitimate point of inquiry. In fact, if Standard 212 is taken at face value, *any* law school might validly consider embarking on a program of religion-based affirmative action to the extent it could make the case that either its student body, faculty, or staff is religiously nondiverse.¹⁷¹

It is safe to predict, however, that fostering affirmative action of this type would not be a high priority for either the ABA or the AALS. Neither appears to be particularly comfortable with the role and mission of religiously affiliated law schools nor with the concept of encouraging religious diversity in law schools that are not religiously affiliated. There are, as a result, four additional topics for consideration in our self-study of the accrediting agencies:

1. the ABA/AALS understanding of what the First Amendment either permits or requires in the context of educational accreditation generally;
2. the specific differences, if any, in the ABA/AALS understanding of what the First Amendment either permits or requires when the educational institution is either religiously affiliated or seeks to permit religious content to infuse all or part of its educational program;
3. the precise nature of the ABA/AALS concern about the quality of education that is not wholly "secular" (whatever that means)¹⁷² in content;
4. the ABA/AALS rationale for its apparent lack of concern for religious diversity in *non*-religiously affiliated law schools.

170. ABA STANDARDS, *supra* note 6, Standard 211.

171. ABA Standard 211 requires that:

The policies may provide a preference for persons adhering to the religious affiliation and purpose of the law school, but shall not be applied to preclude a diverse student body in terms of race, color, religion, national origin, or sex. This Standard permits religious policies as to admission and employment only to the extent that they are protected by the United States Constitution.

Id.

172. The courts have had a difficult time developing a definition of the term "religion." See generally JOHN T. NOONAN, JR., *THE BELIEVER AND THE POWERS THAT ARE* chs. 11-12 (1987). They have not even attempted to define an even more critical term: "secular." See *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (establishing the three-pronged test requiring "secular purpose"). See also Steven D. Smith, *Separation and the "Secular": Reconstructing the Disestablishment Decision*, 67 *TEX. L. REV.* 955 (1989).

These are questions we need not and cannot answer here, but they can and should be answered by the ABA and AALS.

For present purposes, I will assume, as Standard 211 and ECR 6.17 appear to require, that religion is such a powerful influence on the intellect, or upon the give-and-take of academic exchange, that it can eclipse other factors relevant to diversity such as race, sex, national origin, socio-economic status, and geographical distribution. Given that assumption, and this country's long and unfortunate history of discrimination on the basis of religion, one might expect to find precisely the kinds of rules the ABA and AALS have adopted: those that view overt religiousness as a threat to the culture of a good law school.¹⁷³

If we are to accept as true the assumption that religion has the power to inhibit intellectual exchange, might it not also be prudent to speculate concerning the need for rules governing the use (and abuse) of *any* scheme of "diversity management" that utilizes factors possibly having a similar impact on the academic experience? Race consciousness can affect both the tenor and direction of a discussion, as can the injection of any other factor that can be described as socially constructed. Also suspect would be that cultural factors which can be viewed as proxies for religion or race.

But this is not what the ABA, the AALS, or the AAUP have done. Even though every institution is required to have (and implement) affirmative action policies,¹⁷⁴ and many institutions have actually practiced illegal discrimination (*i.e.*, unjustifiable admission and hiring preferences) in the course of administering their policies,¹⁷⁵ only religiously affiliated law schools must give advance notice of the nature and extent of their policies.

The justification for the discrepancy is simply not known, but if there is a true commitment to the principles embodied in both the First Amendment and the Equal Protection Clause, the rationale should be both clearly articulated and clearly related to a compelling educational

173. See, e.g., Rhys Isaac, *Evangelical Revolt: The Nature of the Baptists' Challenge to the Traditional Order in Virginia, 1765 to 1775*, 31 WM. & MARY Q. 345 (1974). Professor Isaac's article notes the important cultural components of the Virginia experience, and their relationship to "assumptions concerning the nature of community religious corporateness that underlay aggressive defense against the Baptists." *Id.* at 368. Cf. Crampton, *supra* note 93, at 250.

174. ABA STANDARDS, *supra* note 6, Standard 212.

175. See generally *Hopwood v. State of Texas*, 861 F. Supp. 55 (W.D. Texas, 1994); *infra* note 184 and accompanying text. Michael S. Paulsen, *Reverse Discrimination and Law School Faculty Hiring: The Undiscovered Opinion*, 71 TEX. L. REV. 993 (1993); Norman Redich, *Law School Faculty Hiring Under Title VII: How a Jungle Might Decide a Disparate Impact Case*, 41 J. LEGAL ED. 135 (1991).

or societal interest.¹⁷⁶ The benefit of the self-study model is that it provides a forum in which those compelling educational or societal interests can be identified and discussed.

If the concern is for the sensibilities of students, faculty, or staff who may find that they were admitted to law schools on the basis of factors other than their LSAT score or their academic and personal record, a disclosure requirement binding only religiously affiliated law schools is underinclusive.¹⁷⁷ If the distinction rests on an invidious or hostile view of either religion or religiously based institutions, the Constitution presumes that rules based on them are unconstitutional.¹⁷⁸ The Code of Judicial Responsibility holds them to be unethical as well.¹⁷⁹

There are two further possibilities. The first is that the ABA and AALS formulations simply reflect an unthinking adoption of an AAUP guideline that is discriminatory on its face, hostile to religious institutions in its intent, and internally inconsistent given the nature of affirmative action policies and practices since *Bakke*.¹⁸⁰ Though the possibility that neither the ABA nor the AALS did their homework before adopting the AAUP standard is embarrassing for legal groups that claim that improving the law is their intended purpose,¹⁸¹ it is certainly understandable given the history of religious discrimination in the legal profession. The ABA and AALS, like all professional organizations, are creatures of the culture that created and sustains them.¹⁸²

The other possibility is that there is, in fact, a difference in the way the governing bodies of the ABA and AALS and the governing bodies of some religiously affiliated law schools define morality and the common good. The tensions that have arisen over the addition of sexual orientation to the list of prohibited grounds for discrimination under AALS Bylaw 6-4(a) highlights how differences of opinion concerning

176. See *Church of the Lukumi Babalú Aye, Inc. v. City of Hialeah*, ___ U.S. ___, 113 S. Ct. 2217 (1993); *Employment Div. v. Smith*, 494 U.S. 872 (1991).

177. Cf. MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 (1992); CANONS OF JUDICIAL ETHICS, Canon 3 (1981) (stating that the judge must not tolerate or practice discriminatory behavior because it would call the impartiality of the judicial office into question).

178. *Lukumi Babalú Aye*, ___ U.S. ___, 113 S. Ct. 2217.

179. CODE OF JUDICIAL ETHICS, Canons 2-3.

180. 438 U.S. 265.

181. See *supra* note 36 and accompanying text; MODEL RULES OF PROFESSIONAL CONDUCT Preamble Rules 1.3, 5.5, 6.1, 8.1, 8.4 (1992).

182. The ABA's internal controversies over abortion and other issues indicate that there are a number of important cultural battles going on within the organization that mirror those taking place in the larger society.

the proper role of religion in a law school setting may reflect differences of opinion on issues of personal and social morality.¹⁸³

2. The AALS and the Principle of Non-Discrimination on the Basis of Sexual Orientation

When the AALS Executive Committee undertook to implement By-law 6-4(a) by amending AALS Executive Committee Regulation 6.17, it did so with the recognition that there was a serious potential for open confrontation with some of its religiously affiliated law school members. The problem, for most of the objecting institutions at least, was not the ban on discrimination on the basis of sexual orientation, but on the actual definition of the term "sexual orientation."¹⁸⁴

183. The ABA is also about to wade into this field. By memorandum dated February 17, 1994, the Deans of ABA Approved Law Schools were informed that the Council of the Section of Legal Education and Admissions to the Bar had amended the language of Standard 211 and adopted a motion to recommend to the ABA House of Delegates that sexual orientation be added to the list of characteristics that are not to be used in making employment and admissions decisions. SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, A.B.A., MEMORANDUM D9394-54 FROM JAMES P. WHITE TO DEANS OF A.B.A. APPROVED LAW SCHOOLS (1994). See also Laura Duncan, *ABA Accrediting Process Gets Less Than an A*, CHI. DAILY L. BULL., Dec. 3, 1993, at 3.

184. For example, the new Catechism of the Roman Catholic Church distinguishes between "homosexuality" and "sexual orientation." Section 2357 of the Catechism provides that "[h]omosexuality refers to relations between men or between women who experience an exclusive or predominant sexual attraction toward persons of the same sex." The focus on behavior is unmistakable. Libreria Editrice Vaticana, CATECHISM OF THE CATHOLIC CHURCH 566, § 2357 (Luuori, Mo: Liuori Publications, 1994). It goes on to provide that:

"Sacred Scripture, which presents homosexual acts as acts of grave depravity, tradition has always declared that 'homosexual acts are intrinsically disordered.' They are contrary to the natural law. They close the sexual act to the gift of life. They do not proceed from a genuine affective and sexual complementarity. Under no circumstances can they be approved."

United States Catholic Conference, Inc.—Liberia *Id.*

The subsequent section, 2358, condemns "unjust discrimination" on the basis of homosexual orientation:

The number of men and women who have deep-seated homosexual tendencies is not negligible. They do not choose their homosexual condition; for most of them it is a trial. They must be accepted with respect, compassion and sensitivity. Every sign of unjust undiscrimination in their regard should be avoided. These persons are called to fulfill God's will in their lives and, if they are Christians, to unite to the sacrifice of the Lord's Cross the difficulties they may encounter from their condition.

Id. § 2358. Thereafter, section 2359 makes it clear that the distinction is one which is based in a religious understanding of human behavior; "Homosexual persons are called to chastity. By the virtues of self-mastery that reach them inner freedom, at times by the support of disinterested friendship, by prayer and sacramental grace, they can and should gradually and resolutely approach Christian perfection." *Id.* § 2359 (citations omitted).

At this point it is worthwhile to remember that religious communities and their institutions of higher learning are governed by community standards that reflect their religious beliefs and traditions. Accrediting agencies have their own community standards. Tensions arise when the standards of communities, as defined by faith and tradition, conflict with those set by the governing bodies of various professions. Tension and conflict are inevitable when an accrediting agency devises a new community standard—in this case one that forbids discrimination on the basis of sexual orientation—and defines that standard in a way that inhibits the ability of religiously affiliated institutions to convey the religiously based norms of conduct that define it as a community of faith.¹⁸⁵ At its core, the tension arises from an apparent true conflict between the norms of conduct governing students, faculty, and staff who live and work in two distinct communities: the member schools of the AALS and the law school communities that define themselves and their respective missions by specific religious beliefs.

To its credit, the AALS Executive Committee eventually created a "Working Group" to explore whether a flat sexual orientation discrimination ban "might not be sufficiently textured to guide a member school in the specific instances where the principles of religious liberty and non-discrimination seemed to clash."¹⁸⁶ The result, however, was virtually identical in letter and spirit to that reached by the ABA in the *Oral Roberts University* case.¹⁸⁷ By permitting religiously affiliated law schools to regulate "conduct when that conduct is directly incompatible with the essential religious tenets and values of a member school,"¹⁸⁸ the Interpretive Principles produced by the AALS Working Group undertakes the Herculean philosophical task of "seek[ing] to strike a fair and sensitive balance between the values of religious liberty and nondiscrimination based upon sexual orientation."¹⁸⁹

The "directly incompatible with the essential religious tenets and values"¹⁹⁰ standard adopted by the Working Group illustrates why the in-

185. Cf. *Gay Rights Coalition v. Georgetown Univ.*, 536 A.2d 1 (D.C. App. 1987) (en banc), *rev'g*, 496 A.2d 587 (1985).

186. AALS, Memorandum 93-50; Final Report of the ECR 6.17 Working Group (Sept. 14, 1993).

187. No. 81-C3171 (N.D. Ill. July 22, 1981).

188. Final Report of the ECR 6.17 Working Group, *supra* note 186, at 5.

189. *Id.* For reasons that will become apparent below, I do not believe it is possible for secular organizations to strike fair and sensitive balances of this sort. Experience shows, in fact, that they rarely do. See, e.g., *Lyng v. Northwest Indian Cemetery Protective Ass'n.*, 485 U.S. 439 (1988).

190. *Id.*

quiry is problematic *ab initio*. It adds nothing of substance to our current understanding of the applicable rules. In fact, it leaves the *really* hard questions either untouched in their entirety or assumes that they will be left for another day, and preferably, another forum.

Just as in the case of the ABA, there remains the possibility that the AALS will either refuse to admit or move to sanction a religiously affiliated institution because it has taken action inconsistent with the AALS rules and regulations.¹⁹¹ It can do so under existing rules if the AALS believes that the action taken by the school for religious reasons is not directly required by the school's essential religious tenets or values.¹⁹²

I believe, however, that neither the ABA nor the AALS are foolish enough to allow themselves to become embroiled in a battle with a religious institution over which religious tenets or values are essential or what they directly require. Though the First Amendment does not apply to either organization directly, the ABA has expressly adopted the First Amendment as the standard that will guide its deliberations,¹⁹³ and the Supreme Court, construing the First Amendment, has made it clear that religious questions are to be resolved by religious authorities.¹⁹⁴

The more likely scenario is that an accreditation committee may, at some point in the future, conclude simply that the professional community's standards¹⁹⁵ must take precedence over the sensibilities of a particular religious community,¹⁹⁶ "essential religious tenets or values" to the

191. Sanctions are governed by Article 7 of the AALS Bylaws, and include censure, probationary status, suspension, or exclusion from membership. AALS Bylaw, *supra* note 38, § 7-1.

192. *Id.*

193. ABA STANDARDS, *supra* note 6, Standard 211(d).

194. See, e.g., *Jones v. Wolf*, 443 U.S. 595 (1979), *cert. denied*, 444 U.S. 1080 (1980); *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976), *cert. denied*, 443 U.S. 904 (1979); *Presbyterian Church v. Mary Elizabeth Blue Hull Mem. Presbyterian Church*, 393 U.S. 440 (1969); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952), *cert. denied*, 396 U.S. 1041 (1970). The Court continues to debate whether the centrality of a given belief is critical to its treatment under the First Amendment. See *Employment Division v. Smith*, 494 U.S. 872 (1990).

195. The "Additional Statement of Barbara Cox, Arthur Leonard, and Robert Wasson" appended to the Final Report of the AALS Working Group, *supra* note 188, makes it very clear that they not only have reservations about the accommodation crafted for religious institutions, they "hope . . . that the time will come when religiously-affiliated institutions will revise their policies to provide *appropriate respect* for the privacy of their community members." *Id.* at 8 (emphasis added).

196. See, e.g., *Gay Rights Coalition v. Georgetown Univ.*, 536 A.2d 1 (D.C. 1987) (en banc), *rev'g* 496 A.2d 587 (1985). Cf. *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

contrary notwithstanding.¹⁹⁷ The Court's jurisprudence under the Free Exercise Clause (if one can call it that) rests on precisely such a calculus.¹⁹⁸ Writing in *The Late Corporation of the Church of Jesus Christ of Latter Day Saints v. United States*,¹⁹⁹ Justice Bradley made the point rather bluntly: "The State has a perfect right to prohibit . . . all . . . open offenses against the enlightened sentiment of mankind, notwithstanding the pretense of religious conviction by which they may be advocated and practiced."²⁰⁰ The standard is not that much different today.²⁰¹

Though I do not agree with either the breadth or the substance of Justice Bradley's comments, especially in the context of education, his statement does underscore the reason why such balances are hard to strike. It is, in the end, a community standard that is at issue, and the question for regulators is: Which community's standard shall prevail? To the extent that these community standards reflect differences in basic conceptions of morality, very substantial questions would arise under the Establishment, Free Exercise, Speech, and Press Clauses if accreditation standards are to be used as a means of limiting the impact of disfavored religious influences in legal education.

Thankfully, however, such a discussion is beyond the scope of this paper. We have, however, reached the point where we can discern the

197. This is, essentially, the argument made by Michael Rosenfeld in *AFFIRMATIVE ACTION AND JUSTICE: A PHILOSOPHICAL AND CONSTITUTIONAL INQUIRY* 254 (1991) (rejecting religion-based arguments that are incompatible with his view of equality).

198. This has been the rather consistent teaching of the case law since the Polygamy Cases. See *Reynolds v. United States*, 98 U.S. 145 (1878); *Davis v. Beason*, 133 U.S. 333 (1890).

199. 136 U.S. 1 (1890).

200. *Id.* at 50.

201. Even when it seemed that the Court had liberalized the rules governing free exercise cases, compare *Sherbert v. Verner*, 374 U.S. 398 (1963) with *Wisconsin v. Yoder*, 406 U.S. 205 (1972), most free exercise claims for exemptions from statutes of general applicability were actually rejected by the courts. Judge John Noonan of the United States Court of Appeals for the Ninth Circuit has provided a useful list of free exercise cases and their outcomes in the Supreme Court and the federal courts of appeal, which is current to September 1988. *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 622-25 (9th Cir. 1988) (Noonan, J. dissenting) *cert. denied*, 489 U.S. 1077 (1989).

The Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), simply confirms long-standing practice. Congress has recently attempted to change free exercise standards of review by adopting the Religious Freedom Restoration Act. Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. § 2000bb, *et seq.*). Its effectiveness and constitutionality have yet to be tested, but early indications are not positive. See, e.g., Susan Hogan/Albach, *Suit Focuses on Tithing, Bankruptcy*, DALLAS MORNING NEWS, Jan. 21, 1995, at 1G. See also Brief for Intervenor The United States, Christians v. Crystal Evang. Free Church, No. 93-667 (8th Cir. 1993) (copy on file with author).

questions that should be addressed by accrediting agencies that are serious about the benefits of self-study and the periodic reevaluation of their accreditation programs.

V. QUESTIONS FOR THE SELF-STUDY?

Put bluntly, the questions that must be asked and answered in any self-study of the accreditation process are:

- What are the goals of American legal education?
- How are those goals furthered and fostered by the accreditation standards, considered individually and collectively?
- What is the ABA and AALS “as applied” definition of “competence” in legal education?
- What is the relationship between competence in legal education (as so understood) and the ABA’s and AALS’ “as applied” understanding of the concept of diversity?
- How does that understanding of diversity relate to other iterations of the concept, namely intellectual, cultural, and demographic diversity?
- How do the characters and cultures of specific law schools relate to the goals of the Bar and the needs of our system of justice?
- To what extent should the powers vested in accrediting agencies be utilized to set and enforce a fixed set of aspirational standards relating to:
 1. program content,
 2. pedagogical style,
 3. the intellectual, cultural, and demographic character of specific law school communities, or
 4. the relationships law schools have with the larger communities they serve?
- To what extent does the quality of education differ, either for better, for worse, or not at all, in a religiously affiliated institution?
- To what extent do religiously affiliated institutions contribute to the task of educating good lawyers (as Tom Shaffer would use the term²⁰²), and what contributions do these lawyers make to improving the law and the communities in which they live and work?

202. Thomas L. Shaffer, *Legal Ethics and the Good Client*, 36 CATH. U. L. REV. 319 (1989).

- In the final analysis, what justification(s) exist(s) for an accrediting agency to have rules that single out religiously affiliated law schools for special treatment?

VI. CONCLUSION

The ABA and AALS, respectively, have embarked upon the task of diversifying “American legal education” and, through it, the Bar itself. This is a difficult task because there is no real agreement on the meaning of the term “diversity,”²⁰³ and even less agreement on how it should be “managed” (assuming, of course, that it should be “managed” at all).²⁰⁴ The question for accrediting and regulatory agencies to consider is whether their zeal to prohibit discrimination, to open up the profession by breaking the hegemony of white males, and to further their own particular vision of intellectual and cultural diversity leads them to exert a firm and constant pressure on religiously affiliated institutions to conform to a relatively shapeless, but thoroughly secular, model of legal education.²⁰⁵ If that is the case (and I think it is), such treatment is not

203. See, e.g., Ruth Bader Ginsburg, *Interpretations of the Equal Protection Clause*, 9 HARV. J. L. & PUB. POL’Y 1; Lois Weis & Michelle Fine, *Constructing Race at an Urban High School: In Their Minds, Their Mouths, Their Hearts*, in CLASS, RACE, AND GENDER IN UNITED STATES SCHOOLS. (State Univ. of N.Y. Press, 1993); HAROLD E. CHEATHAM & ASSOC., CULTURAL PLURALISM ON CAMPUS (American College Personnel Assoc., 1991); Ling Chi Wang, *Meritocracy and Diversity in Higher Education: Discrimination Against Asian Americans in the Post-Bakke Era*, THE URB. REV. (Agathon Press, 1988); Neil J. Smelser, *The Politics of Ambivalence: Diversity in the Research Universities*, DAEDALUS (Fall 1993); Robert C. Pace, *The Demise of Diversity?: A Comparative Profile of Eight Types of Institutions* (The Carnegie Foundation for the Advancement of Teaching, 1974); Lani Guinier, *The Tyranny of the Majority: Fundamental Fairness in Representative Democracy*, (The Free Press, 1994). Susan E. Brown, & Eduardo Marengo, Jr., LAW SCHOOL ADMISSIONS STUDY (MALDEF, San Francisco, 1980) (arguing that intellectual diversity could be obtained by using noncognitive factors).

204. The literature on campus diversity is overwhelming and would be a good place to start if one knew for what to look. The problem is that very little of it deals with the kinds of diversity questions most clearly related to education and culture: religion, national origin, and intellectual diversity. What it does do is focus the reader on the goal, of mission, of the institution seeking to diversify. See, e.g., *United States v. Board of Educ. of Piscataway*, 832 F.Supp. 836 (D.N.J. 1993); Ana Puga, *Affirmative Action Reversal; Patrick has Justice Department Switch Sides in N.J. School Case*, BOSTON GLOBE, Oct. 23, 1994, at 26. See generally Davydd J. Greenwood, *Cultural Identities And Global Political Economy From An Anthropological Vantage Point*, in Symposium: *The Globalization of Law, Politics, and Markets: Implications for Domestic Law Reform*, 1 IND. J. GLOBAL LEGAL STUD. 101 (1993).

205. If accreditation agencies or the Department of Education’s Office for Civil Rights forced all law schools to explain their affirmative action programs and diversity targets in detail, most would find the answers to be more revealing than they had expected. My own *alma mater*, the University of California’s Boalt Hall, recently went through that unenviable experience. Its report of the experience should be required reading for all who profess to be

only unconstitutional in purpose and effect, but also seriously at odds with the professed duties that accrediting agencies have undertaken on behalf of the profession.

Assuming for present purposes that the legitimacy of attempts to diversify the profession are just as legitimate as rules or programs that prohibit or remedy discrimination, the questions for an accrediting agency are: How should this diversification be accomplished, and what, if any, contribution to this process is made by institutions defined by their religious or cultural (e.g., "historically black") commitments?

Religiously affiliated institutions believe (and it is a belief I obviously share) that they have an important and unique contribution to make to each of the goals set forth in the ABA and AALS mission statements. To the extent that their religious character is lost, their contributions would cease to be unique, and the diversity of American legal education would suffer.

The *MacCrate Report* reminds us that there is renewed emphasis at the highest levels of the ABA on the promotion of ethical practice, justice, fairness, and morality.²⁰⁶ It might be a good idea to reflect on what those terms mean, or should mean, before undertaking the task of reshaping legal education in no particular ethical, demographic, or cultural mold.

This conference was a useful exercise because it gave both the regulators and the regulated a friendly forum to begin a frank discussion of the role religiously affiliated law schools can play in the future of legal education. Hopefully, the discussion will continue. It is long overdue.

concerned about diversity management in higher education. See University of California, Berkeley, Boalt Hall School of Law, *Statement of Faculty Policy Governing Admission to Boalt Hall and Report of the Admissions Policy Task Force 1993* (Rachel F. Moran, Chair). (In addition to Professor Moran, the faculty members of the committee were Einer Elhauge, Reeve Siegel, and Jan Vetter. Alumni members were Justices Allen Broussard and Harry Low, Noel Nellis, and Mary Jo Shartsis. Student members were Fabio Arcila, Daina Chiu, Kelly Dermody, and Trina Parker.)

The problems faced by Boalt Hall when the AALS inquired into its hiring and tenure practices are recounted in an informative series of articles. See Marjorie M. Shultz, *Accreditation And The AALS: Debating P.C. on "PC,"* 41 J. LEGAL EDUC. 387 (Sept./Dec. 1991); Paul D. Carrington, *Accreditation And The AALS: Response to Levin and Shultz,* 41 J. LEGAL EDUC. 393 (1991).

206. See generally THE MACCRATE REPORT, *supra* note 7, pt. II.

