

## TEXAS REGULATION OF RELIGIOUS HIGHER EDUCATION

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**The Legal Rights and Responsibilities of the  
First Amendment's Religious Liberty Clauses**

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## CHAPTER 10

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# TEXAS REGULATION OF RELIGIOUS HIGHER EDUCATION\*

## I. INTRODUCTION

The Texas Education Code empowers the Higher Education Coordinating Board to regulate the state's private and religious postsecondary educational institutions. Before an educational institution can grant religious degrees, it must meet twenty-one standards, written in broad and discretionary terms, that intrude into every aspect of a school's operation, and it must progress toward accreditation by a state-approved accrediting agency.

## II. AMERICAN TRADITIONS IN HIGHER EDUCATION

*"It is, Sir, as I have said, a small college. And yet there are those who love it."*<sup>1</sup>

### A. America has a unique tradition of governmental noninterference with higher education.

The United States has a long and unique tradition of autonomy in higher education. American col-

leges and universities have enjoyed "greater freedom from government supervision than higher education enjoys in any other major country of the world."<sup>2</sup> This tradition "grew out of deep-rooted values in the native culture: a distrust of government and an abiding faith in competition."<sup>3</sup> Indeed, early in the nation's history, Congress rejected proposals by Presidents Washington, Jefferson, Madison, and John Quincy Adams to establish a national university.<sup>4</sup>

The Supreme Court reinforced the institutional autonomy of the nation's colleges and seminaries in the landmark 1819 case of *Trustees of Dartmouth College v. Woodward*.<sup>5</sup> The case concerned Dartmouth College, founded in 1769 by Reverend Eleazar Wheelock "for the instruction of [Native Americans] in the Christian religion."<sup>6</sup> In 1816, the New Hampshire legislature, asserting a prerogative to "extend[] the opportunities and advantages of education," passed a law deprivatizing the college, giving the governor the power to appoint the college's trustees, and guaranteeing "perfect freedom of religious opinion . . . by all the officers and students of the university."<sup>7</sup> Recognizing that Dartmouth College had been established by private individuals who had "bestowed their funds for the propagation of the Christian religion among the [Native Americans], and for the promotion of piety and learning generally,"<sup>8</sup> the Supreme Court held that the legislature had no right to interfere with the management of the school.<sup>9</sup> In the absence of any constitutional provision limiting state governmental encroachments on free exercise, the Supreme Court held that New Hampshire's act unconstitutionally interfered with Dartmouth College's rights under the Contract Clause.<sup>10</sup>

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\* This article draws from two amicus curiae briefs submitted in the pending Texas Supreme Court case of *HEB Ministries, Inc. v. Texas Higher Education Coordinating Board*, No. 30-0995 (Tex. argued Jan. 5, 2005). *Brief of Baptist Joint Committee on Public Affairs and Christian Legal Society*, available at <http://www.cernyar.com/CLS-Brief.pdf> (co-authored by Eric Cernyar and Professor Douglas Laycock); *Amicus Curiae Brief of the Independent Baptist College and International Bible Center*, available at <http://www.cernyar.com/TJF-Brief.pdf> (authored with Cam Barker's help by Allan Parker of the Texas Justice Foundation). The Petitioners' and Respondent's Brief, as well as other amicus briefs, are available at the Texas Supreme Court's website, <http://www.supreme.courts.state.tx.us/ebriefs/files/20030995.htm>. A transcript of the oral argument is available at <http://www.supreme.courts.state.tx.us/oralarguments/2003/03-995.mp3>.

1. Daniel Webster, representing Dartmouth College in *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819), where it successfully challenged a New Hampshire law that asserted control over a private religious college.

2. DEREK BOK, HIGHER LEARNING 14 (1986).

3. *Id.* at 10.

4. See 1 AMERICAN HIGHER EDUCATION: A DOCUMENTARY HISTORY 157 (Richard Hofstadter & Wilson Smith eds., 1961); see also Edward H. Reisner, *Antecedents to the Federal Act Concerning Education*, 11 EDUCATION RECORD 196, 197 (1930) (noting the "gale of laughter" that greeted John Quincy Adams's proposal).

5. 17 U.S. 518 (1819).

6. *Id.* at 631, 639–40.

7. *Id.* at 539–44.

8. *Id.* at 633.

9. *Id.* at 634–35.

10. *Id.* at 650.

The Supreme Court reaffirmed this tradition of academic freedom in *Sweezy v. New Hampshire*,<sup>11</sup> when it held that a university lecturer could not be compelled to answer a state attorney general's questions about the content of his lectures.<sup>12</sup> Justice Frankfurter, in concurrence, cited "four essential freedoms" of a university — to determine for itself on academic grounds *who may teach, what may be taught, how it shall be taught, and who may be admitted to study.*<sup>13</sup> The Supreme Court later embraced Frankfurter's dicta as one of many rationales for permitting the University of California to factor race into its admissions decisions.<sup>14</sup>

This tradition of academic independence has served the country well. The United States boasts most of the world's leading universities and attracts hundreds of thousands of foreign students to its universities.<sup>15</sup> Many people credit the preeminence of American higher education in the world to the United States' tradition of governmental noninterference.

#### **B. That tradition enabled the development of America's "Bible college" movement.**

The tradition of governmental noninterference also permitted the emergence in America of a vast "Bible college" movement—a movement which was not duplicated in Europe—beginning in the late 1800s and continuing to this day.

Before the Civil War, churches founded most colleges, ministers led them, and religion and theology were central to the curriculum.<sup>16</sup> But religious dominance gradually declined after the Civil War as the emergence of new disciplines and research-based edu-

ational models led to the modern secular research university.<sup>17</sup>

These developments challenged traditional approaches to theological education. The mainline Protestant seminaries responded by assimilating the methods, assumptions, research emphasis, and scholarly apparatus of the secular university into the teaching of theology.<sup>18</sup>

But this new approach to theology inspired dissenters to found their own Bible schools and colleges.<sup>19</sup> Thus "[t]he Bible college movement emerged in the later nineteenth century as a protest against secularization in higher education and as an educational center for lay workers and full-time Bible teachers, evangelists, and pastors."<sup>20</sup> The Bible college movement rejected the more skeptical approaches associated with "higher criticism." They instead emphasized close study of the Scripture, often in the original languages, and a firm commitment to orthodox Christian doctrine.<sup>21</sup>

Bible colleges flourished in the absence of governmental interference. Between 1882 and 1920, forty Bible schools were founded in the United States and Canada's western provinces.<sup>22</sup> Another fifty-six Bible schools were started in the 1920s and 1930s.<sup>23</sup> The movement peaked in the 1940s, when sixty-six Bible schools were established.<sup>24</sup> During that time, most of these schools evolved from two-year "training schools" to three-year "Bible institutes" to four-year "Bible colleges."<sup>25</sup> The Bible college movement, in turn, enabled Protestant fundamentalism to survive.<sup>26</sup> The deeply religious character of many Americans today, as compared with their European brethren, is due

17. See generally THE SECULARIZATION OF THE ACADEMY (George M. Marsden & Bradley J. Longfield eds., 1992); MCKINNEY, *supra* note 16, at 39–57.

18. See DAVID H. KELSEY, BETWEEN ATHENS AND BERLIN: THE THEOLOGICAL EDUCATION DEBATE 12–27, 49–93 (1993); see also SYDNEY E. AHLSTROM, A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE 774–79 (1972).

19. See MCKINNEY, *supra* note 16, at 59–77.

20. *Id.* at 104.

21. *Id.* at 29–31, 101–115.

22. *Id.* at 70.

23. *Id.* at 148.

24. *Id.* at 171.

25. *Id.* at 173–74.

26. *Id.* at 149–50.

11. 354 U.S. 234 (1957).

12. *Id.* at 254–55.

13. *Id.* at 263 (emphasis added).

14. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978).

15. HENRY ROZOVSKY, THE UNIVERSITY: AN OWNER'S MANUAL 29 (1990).

16. See CHRISTOPHER JENCKS & DAVID RIESMAN, THE ACADEMIC REVOLUTION 312–28 (1968); LARRY J. MCKINNEY, EQUIPPING FOR SERVICE: A HISTORICAL ACCOUNT OF THE BIBLE COLLEGE MOVEMENT IN NORTH AMERICA 40–45 (1997).

in no small part to the freedom given to Bible college movement to flourish.

### III. THE ROLE OF VOLUNTARY PRIVATE ACCREDITATION

#### A. For the past century, private accreditation agencies in the United States have assumed the central role in establishing standards for higher education.

In the late nineteenth century, many colleges and universities organized to form voluntary, nonprofit organizations to establish minimum standards for admissions and course equivalencies. Over time, six of these organizations evolved into regional accreditation bodies that establish minimum standards for almost all of the nation's public, and many of its private, colleges and universities. In 1936, several mainline Protestant seminaries formed their own accrediting body, the Association of Theological Schools (ATS). In 1947, several Bible colleges also formed an accrediting body called the Accrediting Association of Bible Colleges (AABC).<sup>27</sup>

#### B. Accreditation is a demanding and intrusive process.

Accrediting agency leaders describe accreditation as “a demanding experience” that “requires considerable work and investment of resources.”<sup>28</sup> Evaluation committees interview individuals and groups and examine institutional records, course syllabi, faculty publications, and student theses and dissertations.<sup>29</sup> “[R]eviewers are expected to make judgments about virtually every aspect of a given institution's assets and operations.”<sup>30</sup> And the intrusiveness

of the accreditation process is intensifying. Already, reviewers sometimes “‘audit’ selected courses in considerable detail (including the processes used in their design and review) and . . . look at pedagogy directly through mechanisms like the peer review of teaching.”<sup>31</sup> Recent proposals would make this level of scrutiny more common.

Even respected secular institutions perceive the accreditation renewal review as burdensome, intrusive, and hectoring. For example, the University of Texas at Arlington was placed on accreditation probation in 2003.<sup>32</sup> Nationally ranked units of The University of Texas at Austin are routinely threatened with loss of accreditation in periodic inspections for renewal, although none of these threats have been carried so far as a public probation.

#### C. Accreditation imposes requirements that are theologically objectionable or financially impossible for many schools.

Many religious schools object to the accreditation process because it opens up their mission, management structure, educational programs, curriculum, and theological course content to outside reviewers who do not share their doctrinal beliefs. The process of obtaining and renewing accreditation frequently causes a slow transformation of Bible colleges away from their organizing purpose.

Critics object to the incentives created by emphasizing academic achievement defined in secular terms, which draws professors and institutions away from the needs of the church and towards secular goals and values. One commentator observed that “theological schools have more and more tended to make academic quality the central element in their reputations . . . This commitment to having a first rate academic faculty draws schools into the ethos of American higher education.”<sup>33</sup> Another lamented: “The requirements of accreditation and certification (ordination) move ever higher in terms of academic achievement and away from effective ministry experience. . . .

27. On June 1, 2004, AABC changed its name to the Association for Biblical Higher Education (ABHE). In the interests of brevity and clarity, this paper will continue to use the old acronym AABC.

28. Judith S. Eaton, *Letter from the President: The Value of Accreditation: Four Pivotal Roles*, at [http://www.chea.org/pdf/pres\\_ltr\\_value\\_acrd\\_5-03.pdf](http://www.chea.org/pdf/pres_ltr_value_acrd_5-03.pdf).

29. See Association of Theological Schools, *Handbook on Accreditation* § 4 at 9–10.

30. See Peter Ewell, *Examining a Brave New World*, at [http://www.chea.org/Events/Usefulness/98May/98\\_05Ewell.html](http://www.chea.org/Events/Usefulness/98May/98_05Ewell.html).

31. *Id.*

32. See *On Probation?!*, Fort-Worth Star-Telegram 10 (Dec. 11, 2003), at 2003 Westlaw 68768204.

33. See, e.g., Edward Farley, *Why Seminaries Don't Change: A Reflection on Faculty Specialization*, 114 CHRISTIAN CENTURY 133, 133 (Feb. 5–12, 1997).

The rally cry for experience rings hollow if not defined in terms of meeting the basic purposes of the church.”<sup>34</sup>

Some religious colleges simply cannot, for theological reasons, meet certain accreditation requirements that many of the most prominent accrediting agencies impose. For example, the regional accrediting agency for Texas, the Commission on Colleges, Southern Association of Colleges and Schools (SACS), requires a school’s governing board to be “free from undue influence from . . . religious . . . bodies . . . .” This excludes seminaries that refuse to reject the influence of their sponsoring church.

Many religious institutions also object to the standards of the state-approved religious accrediting bodies. ATS’s accreditation standards promote the research-intensive, scientifically-minded, and philosophically-inclusive model of theological education favored by elite mainline seminaries. ATS Standard 6.1.2 provides that “faculty members shall be free to seek knowledge and communicate their findings.”<sup>35</sup> Standard 3.2.2.0 stresses that “freedom of inquiry is indispensable for good theological education.”<sup>36</sup> Standard 6.1.3 provides that faculty should “exemplify various methods and points of view.”<sup>37</sup> Standard 3.2.3.2 requires that “[l]ibrary collections, courses, and degree programs should represent the historical breadth, cultural difference, confessional diversity, and global scope of Christian life and thought.”<sup>38</sup> These standards tend to subvert any form of religious orthodoxy.

Some evangelical schools also object to the AABC’s standards, even though they emphasize the study of Scripture. In order to obtain recognition from state regulators and the Department of Education, the AABC has adopted a number of secular standards. Criterion D.1.2 requires a minimum of 36 semester hours of general studies, including “at least one course from each of the following areas: the humanities or fine arts, the social or behavioral sciences, the natural

sciences or mathematics.” The practical effect is that no Bible college can be accredited by AABC unless it is willing and financially able to run a small liberal arts college offering a menu of secular courses.

#### IV. SURVEY OF STATE LAWS REGULATING RELIGIOUS HIGHER EDUCATION

##### A. In the past half-century, all fifty states have passed laws requiring degree-granting institutions to obtain state approval or accreditation.

Higher education, and especially publicly-funded higher education, has assumed an ever increasing role in the American economy and society over the past half-century. Not surprisingly, increasing state and federal oversight of higher education has accompanied these developments.

In 1940, only 4.6% of Americans age 25 years or older had four or more years of college education. That percentage slowly climbed to 7.7% by 1960. It rapidly grew thereafter, to 11.0%, 17.0%, 21.3%, and 25.6% in each succeeding decade.<sup>39</sup>

Since 1940, all fifty states have passed laws or regulations forbidding institutions from granting secular degrees without first obtaining state approval or accreditation from a recognized accrediting agency.

##### B. Thirty-one states permit religious postsecondary institutions to issue religious degrees without accreditation or state approval.

Most states at least partially exempt religious schools that grant only religious degrees from the normal accreditation and state approval requirements. Thirty-one states—including most states outside the so-called “Bible Belt”—permit religious postsecondary institutions to issue religious degrees without accreditation or state certification. These states typically require that degree titles clearly represent the religious nature of the degree; that schools disclose their non-state-approved status on degree transcripts, catalogs, and other publications of the school; that individuals not engage in degree fraud; or some combination of the

34. Edgar J. Elliston, *Designing Leadership Education*, 16 *MISSIOLOGY* 203, 204 (1988).

35. ATS Standard 6.1.2, available at <http://www.ats.edu/accredit/stantoc.htm>.

36. ATS Standard 3.2.2.0, available at <http://www.ats.edu/accredit/stantoc.htm>.

37. ATS Standard 6.1.3, available at <http://www.ats.edu/accredit/stantoc.htm>.

38. ATS Standard 3.2.3.2, available at <http://www.ats.edu/accredit/stantoc.htm>.

39. See *Years of School Completed by People 25 Years and Over, by Age and Sex: Selected Years 1940 to 2003* (Feb. 6, 2005), available at <http://www.census.gov/population/socdemo/education/tabA-1.xls>.

above. The regulations of these thirty-one states are listed in the following table:

**Table 10-1: States that Permit Religious Postsecondary Institutions to Issue Religious Degrees Without Accreditation or State Approval**

State	Citation	Comments
Alabama	ALA. CODE § 16-46-3(a)(1) (2004)	Exempts nonprofit religious postsecondary schools that offer exclusively “courses or programs of study in the performance of or preparation for the ministry of [an] established church, denomination, or religion”
Arizona	ARIZ. REV. STAT. § 32-3022(e) (2004); ARIZ. ADMIN. CODE § R4-39-304 (2004)	Allows religious degrees used solely for religious purposes within a tax-exempt religious organization. Bars misleading advertising about the institution, personnel, the faculty, courses, services, or occupational opportunities for a graduate.
Arkansas	ARK. CODE ANN. § 6-51-603 (2003); Ark. Reg. 008 00 001, Rule 8 (2003)	Exempts schools “operated solely to provide programs of study in theology, divinity, religious education, and ministerial training,” as long as degree titles communicate religious purpose and are distinct from degree titles approved by the State Board of Higher Education
California	CAL. EDUC. CODE § 94739(b)(6) (2004)	Exempts nonprofit religious postsecondary schools from state approval requirements if the education and degrees offered are limited to the principles, beliefs, and practices of the religion and if a school’s degree titles reflect its religious nature, e.g., “bachelor of religious studies,” “master of divinity,” or “doctor of divinity.”
Colorado	COLO. REV. STAT. ANN. §§ 23-2-102(4), 23-2-103 (1998)	Colorado exempts religious postsecondary schools from state minimum standards for degree-granting institutions.
Delaware	DEL. CODE ANN. tit. 13, § 8501(1) (2003)	Degree-granting prohibitions limited to educational institutions that offer “business or trade and industrial courses.”
Florida	FLA. STAT. ANN. § 1005.06(f) (2004); FLA. STAT. § 817.566 (Supp. 2004)	Exempts religious-titled degrees from exclusively religious postsecondary schools from state licensure requirements. Requires graduates of unlicensed religious postsecondary schools to “disclose the religious nature of the degree” in any “presentation” of the degree.
Georgia	GA. CODE ANN. §§ 20-3-250.3(a)(6), 20-3-250.7(b) (2004)	Exempts private, nonprofit, solely religious postsecondary schools from state certification and minimum-standards requirements.
Hawaii	HAW. REV. STAT. ANN. § 446E-1.6(9) (2003)	Exempts religious postsecondary schools that a religious organization conducts “solely for the religious instruction” of its members.
Illinois	ILL. ADMIN. CODE §§ 1030.10, 1030.20 (2004)	Allows religious degrees that signify completion of a “program which is devoted entirely to religion or theology” as long as they are not labeled as an “associate degree, a bachelor’s degree, a master’s degree, a doctor’s degree, a professional degree or a certificate of advanced study.”
Indiana	IND. CODE ANN. 20-1-19-1(1) (1994); 1975 Op. Ind. Att’y Gen. 22, <i>cited in</i> IND. CODE ANN. § 20-1-19-1.5 n.1 (1994)	Accreditation only required for schools that offer “technical, professional, mechanical, business, or industrial occupation training.” Attorney general opinion states that private Bible colleges are not subject to state accreditation requirements.
Iowa	IOWA CODE § 261B.11(8) (2003)	Exempts religious postsecondary schools that are conducted “solely for the religious instruction of members of that religious organization.”
Kansas	KAN. STAT. ANN. §§ 72-4920, 72-4924(a) (2003)	Exempts nonprofit, tax-exempt religious schools from the definition of proprietary school.
Kentucky	KY. REV. STAT. ANN. § 165A.320 (1999)	Exempts tax-exempt religious institutions from certificate of approval requirements.
Louisiana	LA. REV. STAT. ANN. § 1808(J)(2) (2001)	Exempts primarily-religious and primarily-theological institutions; requires that degrees indicate their religious nature.

State	Citation	Comments
Maryland	MD. CODE ANN., EDUC. §§ 11-202(c)(2), (c)(3), (d) (2004)	Exempts purely-religious postsecondary educational institutions from state certification requirements. Requires the school to demonstrate to the state that it qualifies for the religious exemption. Maryland also requires the school to disclose the religious nature of its degree on the degree or diploma.
Minnesota	MINN. STAT. § 136A.657 (2004)	Exempts a church- or religion-operated postsecondary school whose primary focus is teaching the beliefs of that religion or preparing students for a religion-related job or lifestyle; disclosure is required in the school's representations to students.
Missouri	MO. STAT. ANN. § 173.616.2(1) (2000)	Exempts religious degrees from solely religious postsecondary schools from state regulation.
New Jersey	N.J. ADMIN. CODE. tit. 9A, § 1-1.2 (2004);  N.J. STAT. ANN. § 18A:68-2 (1999)	Exempts "institutions whose major mission is to prepare individuals for religious vocations" from the definition of "college," "institution," and "institution of higher education"—the bodies to which the state's licensing regulations apply.  Allows seminaries and schools of theology to award the degrees of "bachelor of divinity or theology" and "bachelor, master or doctor of sacred theology."
New Mexico	N.M. STAT. ANN. § 21-23-4(H) (2004)	Exempts religious institutions whose "sole purpose is to train students in religious disciplines" for "a vocational objective relating primarily to religion"
North Carolina	N.C. GEN. STAT. § 116-15(d) (2004); N.C. GEN. STAT. § 14-122.1 (2004)	Exempts religious degree-granting institutions from state licensure and minimum-standards requirements. Prohibits resume fraud.
Oklahoma	Okla. Att'y Gen. Op. 82-53, at *4 (May 4, 1982);  Oklahoma State Regents for Higher Education, Policy and Procedures Manual pt. II, ch. 2, § 1(I)(B) (Oct. 26, 2001)	States that private denominational institutions engaged in solely religious activity, as contrasted with awarding academic and professional degrees, do not need to be accredited. Thus the granting of non-academic religious degrees is permitted. Unaccredited institutions must disclose their status in its publications and marketing materials.
Oregon	OR. REV. STAT. § 348.594(2)(d) (2003); OR. ADMIN. R. 583-030-0010(2) (2004); OR. ADMIN. R. 583-030-0042, 583-030-0046 (2004)	Exempts religious-titled degrees awarded by institutions offering only degrees in theology and religious occupations from most state authorization and career-school-licensing requirements. Institutions awarding such degrees still must register with the state and pay authorization application fees.
South Carolina	S.C. CODE ANN. § 59-58-30(4) (2003)	Exempts any solely religious or solely theological postsecondary educational institutions from state licensure requirements; requires degree designations to be religious.
South Dakota	S.D. CODIFIED LAWS § 13-49-27.1 (2004)	Exempts religious institutions offering solely religious degrees from accreditation requirements.
Utah	UTAH CODE ANN. § 13-34-105(d) (Supp. 2003)	Exempts any property-tax-exempt postsecondary school that is controlled by a church or religious denomination from state approval requirements, even if it awards degrees in secular disciplines.
Virginia	VA. CODE ANN. § 23-276.2(C) (2004); 8 VA. ADMIN. CODE § 40-30-50 (West 2004)	Exempts primarily religious postsecondary schools from state approval and accreditation requirements. Regulations specify certain allowed and disallowed degree titles. School must disclose its religious nature and its non-state-approved status on degree and diploma titles, catalogs, and other publications of the school.
Washington	WASH. REV. CODE § 28B.85.040(3)(c) (1997)	Exempts the exclusively religious educational programs of religious postsecondary schools from state authorization requirements.
West Virginia	W. VA. CODE ST. R. §§ 133-20-6(1),(2), 133-20-7(3), 133-20-8 (2002)	Exempts seminaries and Bible colleges from state authorization requirements; requires them to register and demonstrate that their education and degree titles are exclusively religious.

State	Citation	Comments
Wisconsin	WIS. STAT. § 45.54(1)(e)(3) (2003)	Excludes denominational religious schools whose courses pertain to that denomination from the definition of “school,” to which state’s examination and approval requirements apply.
Wyoming	WYO. STAT. ANN. § 21-2-406(a)(i)(B) (2004)	Exempts postsecondary religious schools whose programs and degrees “are limited to instruction in the principles of that church, religious denomination or religious organization”; marketing materials and degrees must indicate the school’s religious nature.

California’s statute explains the rationale behind its exemption of religious institutions that offer only religious degrees:

The enactment of this paragraph expresses the legislative intent that **the state shall not involve itself in the content of degree programs awarded by any institution operating under this paragraph**, as long as the institution awards degrees and diplomas only in the beliefs and practices of the church, religious denomination, or religious organization.<sup>40</sup>

Of the remaining nineteen states, six exempt religious postsecondary institutions from regional and national accreditation requirements, but they still require state approval.<sup>41</sup> Five states do not provide any

40. CAL. EDUC. CODE § 94739(b)(6) (2004) (emphasis added).

41. These states include at least Connecticut, Maine, Massachusetts, Michigan, Pennsylvania, and Vermont. *See* CONN. AGENCIES REGS. §§ 10a-34-11 to 10a-34-24 (2004) (providing the standards for the licensure and state accreditation of postsecondary educational institutions); CODE ME. R. 05-071 ch. 170, § 1 (2004) (not requiring regional or national accreditation, and providing criteria likely flexible enough to accommodate purely religious schools); MASS. REGS. CODE tit. 610, § 2.07 (2004) (not requiring accreditation but requiring disclosure of the accreditation status of the educational institution); MICH. ADMIN. CODE rr. 390.561–390.566 (2004) (not requiring accreditation of or the offering of specific nonsectarian courses by proprietary schools); Michigan Department of Career Development, Policies And Procedures On The Establishment And Approval Of Non-public Colleges And Universities In Michigan (2000) (not requiring accreditation of or the offering of specific nonsectarian courses by private colleges and universities), *at* [http://www.michigan.gov/documents/pol&procdoccomplete\\_4535\\_7.doc](http://www.michigan.gov/documents/pol&procdoccomplete_4535_7.doc); 22 PA. CODE §§ 31.2, 31.52(c) (2004) (exempting seminaries—schools that offer “professional programs to candidates for priesthood, ministry, or rabbinate”—from the requirement of accreditation-agency approval, but still requiring state evaluation of the seminary every five

exemption, but they do allow schools accredited by *any* of the United States Department of Education-recognized regional or national accrediting agencies to grant degrees.<sup>42</sup> Three at least expressly recognize unaccredited religious postsecondary institutions’ right to issue educational credentials and credits, if not “degrees.”<sup>43</sup> But four states, including Texas, severely

years); VT. CODE R. 2241.3 (2003); VT. CODE R. 2243.5 (2003) (setting forth non-onerous criteria for obtaining a certificate of authority indexed to the institution’s purpose—no explicit requirement of any secular courses or resources).

42. These states include at least Connecticut, New Hampshire, Nevada, New York, and Tennessee. *See* CONN. GEN. STAT. § 10a-34(d) (2002) (allowing any nationally-recognized accrediting agency to show satisfaction of the requirements for state licensing and accreditation); N.H. CODE ADMIN. R. ANN. POS 1002.04(a) (2004) (referencing agencies “listed by the United States Secretary of Education for its accreditation of college degree granting programs or curriculum offered by an institution of higher education”); NEV. REV. STAT. § 394.630 (2004) (requiring any educational institution that awards a “degree” to either be accredited or have the presidents of two accredited schools vouch for it); N.Y. EDUC. LAW § 224(1),(3) (2000) (recognizing any accrediting commission recognized by the United States commissioner of education); TENN. CODE ANN. § 49-7-2006(b)(1) (2004) (allows “accreditation by an accrediting agency recognized by the United States Department of Education” to be “accepted by the commission as evidence of compliance with the minimum standards”).

43. These states are Alaska, Ohio, and Vermont. *See* ALASKA ADMIN. CODE tit. 20, § 17.015(a)(6) (2004) (exempting solely religious postsecondary educational institutions from state authorization requirements and providing that the religious education can result in an “educational credential,” but not a “degree”); OHIO REV. CODE ANN. § 1713.02(E) (Supp. 2002) (exempting solely religious postsecondary schools from state certification requirements, subject to the following restrictions: (1) the school name must contain “bible college” or “bible institution”; (2) the school may confer “diplomas and other written evidences of proficiency or achievement” but not “degrees”; (3) the school must disclose its lack of state certification on its diplomas and marketing materials; and (4) diploma titles must clearly

restrict the range of available accrediting agencies, provide no effective accommodation to dissenting religious postsecondary institutions, and monopolize such a broad sweep of language that unapproved non-exempt schools are left with no language that they can safely use without fear of state sanction.<sup>44</sup>

## V. OVERVIEW AND HISTORICAL DEVELOPMENT OF TEXAS'S REGULATION OF RELIGIOUS HIGHER EDUCATION

### A. In 1975, Texas began requiring non-exempt institutions to obtain certificates of authority from the Texas Higher Education Coordinating Board.

In 1965, the Texas Legislature created the Texas Higher Education Coordinating Board (the Board) to provide unified planning and development of the state's public colleges and universities. In 1975, the Legislature gave the Board regulatory oversight

over private institutions of higher education as well.<sup>45</sup> The statute prohibits non-exempt<sup>46</sup> institutions from (1) using the term “college,” “university,” or “seminary” in their name,<sup>47</sup> (2) granting or awarding a “degree,” or (3) representing that credits earned or granted by that institution could be applied toward a “degree,” *unless* it has a “certificate of authority” from the Board to do so.<sup>48</sup>

The law establishes that a “degree” can exist in “any title or designation, mark, abbreviation, appellation, or series of letters or words.”<sup>49</sup> This inclusive definition explicitly embraces words such as “bachelor’s” and “associate” as well as any “equivalents” of such words.<sup>50</sup> To qualify as a “degree” under the law, such a designation need only purport to signify or be generally taken as signifying “satisfactory completion of the requirements of *all or part* of a *program of study*” that leads to the “equivalent” of an associate’s, bachelor’s, master’s, or doctor’s degree.<sup>51</sup> The law also gives the Board unfettered authority to establish minimum standards for obtaining a “certificate of authority.”<sup>52</sup>

The Texas Education Code does not exempt institutions of religious higher education, or any reli-

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signify “the religious nature of the instruction offered by the institution.”); VT. STAT. ANN. tit. 16, § 176(a)(3), (d)(6) (2003) (exempting religious postsecondary schools from state approval requirements provided that they do not give any award designated by the terms “degree,” “associate,” “bachelor,” “baccalaureate,” “masters,” or “doctorate”).

44. The worst offenders, besides Texas, are Idaho, Mississippi, and Rhode Island. *See* IDAHO CODE §§ 33-2401(6), 33-2402(10) (2004) (exempting from state approval and accreditation requirements “[c]ourses offered by a parochial or denominational institution providing instruction or training relating solely to religion and for which degrees are not granted,” but defining “degrees” almost as broadly as Texas does); Authority and Standards of the Mississippi Commission on College Accreditation (1998) (requiring that Bible college seek accreditation by the American Association of Bible Colleges; requiring that theological seminaries seek accreditation by the Association of Theological Schools; specifying resort to a court shut-down order in response to schools not complying with the commission’s accreditation standards), *available at* [http://www.ihl.state.ms.us/Academic\\_Affairs1/MCCASStandards.pdf](http://www.ihl.state.ms.us/Academic_Affairs1/MCCASStandards.pdf); R.I. GEN. LAWS § 16-40-1 to 16-40-4 (2004) (providing no exemptions from state approval standards for degree-granting religious postsecondary educational institutions and requiring them to meet not only the state’s approval standards, but also the accreditation standards of the New England Association of Schools and Colleges (NEASC)).

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45. Act of May 27, 1975, 64th Leg., R.S., ch. 587, § 1, 1975 Tex. Gen. Laws 1867.

46. The law exempts private degree-granting institutions that are fully accredited by a Board-recognized accrediting agency. TEX. EDUC. CODE § 61.303(a) (2005). Originally, the law also exempted institutions that had achieved “candidate” status with a recognized accrediting agency, but the Legislature repealed this exemption in 1985. Act of 1985, 69th Leg., R.S., ch. 76, § 2.

47. The prohibition on the use of “college” or “university” in the name does not apply to postsecondary institutions that were established before September 1, 1975. *See* TEX. EDUC. CODE § 61.313(e) (2005).

48. *Id.* §§ 61.304, 61.313.

49. *Id.* § 61.302(1) (defining “degree” as “any title or designation, mark, abbreviation, appellation, or series of letters or words, including associate, bachelor’s, master’s, doctor’s and their equivalents, which signifies, purports to, or is generally taken to signify satisfactory completion of the requirements of all or part of a program of study leading to an associate, bachelor’s, master’s, or doctor’s degree or its equivalent”).

50. *Id.* The definition also explicitly includes equivalents of “master’s” and “doctor’s.” *Id.*

51. *Id.* (emphasis added).

52. *Id.* §§ 61.306(a), 61.311(a).

religious degrees or credits they wish to offer, from the “certificate of authority” requirements. Thus, since 1975, non-exempt religious institutions of higher education have had to obtain state approval to grant religious degrees or their unspecified “equivalents.”<sup>53</sup>

**B. A certificate of authority requires an application and an on-site visit by a team of Board-appointed evaluators.**

To obtain a certificate of authority, an institution must meet twenty-one “comprehensive and rigorous” standards.<sup>54</sup> An applicant institution initiates the certification process by completing and filing an application detailing its compliance with twenty-one detailed standards, together with a \$3,000 fee and proof that it has enrolled students and conducted classes as a non-degree-granting institution for at least two years.<sup>55</sup>

After it receives the application, the Commissioner of Higher Education appoints an ad hoc team of independent consultants, typically from surrounding accredited colleges and universities, to evaluate the application. Team members conduct a thorough on-site visit of the institution,<sup>56</sup> where they interview and

evaluate the school’s administration, faculty, and students; examine the school’s administrative, faculty, student, and financial records; assess the adequacy of the schools’ library, classroom, dormitory, and other facilities; and inspect and evaluate the structure and content of the course curricula.<sup>57</sup>

Afterwards, the visiting team prepares a written report of its findings. The Board-appointed Certification Advisory Council then reviews the findings, together with the institution’s response, and submits a recommendation, which the Board then acts upon.<sup>58</sup>

If the Board approves the application, a certificate of authority is issued that lasts for two years.<sup>59</sup> If the institution is not accredited by a Board-approved accrediting agency within that time, the institution must start the application process all over again, plus demonstrate a “record of improvement and progress toward accreditation.”<sup>60</sup>

**C. In 1982, Texas began requiring non-exempt institutions to pursue accreditation from one of three state-approved accrediting organizations.**

Originally, non-exempt institutions were permitted to apply for renewal of their certificates of authority every two years, without limitation.<sup>61</sup> The law also required the Board to approve the renewal application if it found that the institution continued to meet all requisite standards and pertinent rules and regulations.<sup>62</sup> So, from 1975 through 1981, the law did not require non-exempt institutions to pursue or make progress toward accreditation.

In 1981, the law was amended to require non-exempt institutions *not only* to obtain certificates of authority from the Board, *but also* to progress toward

granting credits toward degrees effectively puts certification out of reach of religious institutions not generously supported by large denominations, existing universities, or very wealthy benefactors.

57. *Id.* § 7.5(d); see also *Introduction to the Certificate of Authority Process* (Feb. 5, 2005), available at <http://www.Board.state.tx.us/reports/html/0338/317Cert.pdf>.

58. 19 TEX. ADMIN. CODE § 7.5(d).

59. TEX. EDUC. CODE § 61.306(b) (1975).

60. 19 TEX. ADMIN. CODE § 7.6(c)(2).

61. TEX. EDUC. CODE § 61.308(a) (1975).

62. *Id.* § 61.308(c) (1975).

53. The breadth with which the statute defines “degree” leaves non-exempt religious institutions of higher education with no suitable alternative language that they can safely use, without fear of penalty, to describe the nature, style, and academic rigor of their programs of study. See also 19 TEX. ADMIN. CODE § 7.12(a)(2) (2005) (barring non-exempt unapproved institutions from “represent[ing] that credits earned or granted are collegiate in nature, including describing them as ‘college-level,’ or at the level of any protected academic term.”). The statute subjects an institution in violation of the Act a fine of not less than \$1,000 and up to \$5,000 for each “degree” or “equivalent” conferred without a certificate of authority. TEX. EDUC. CODE § 61.316 (2005).

54. 19 TEX. ADMIN. CODE §§ 7.6(f)(2), 7.7 (2005).

55. *Id.* §§ 7.6(a)–(b) (2005); see also *Application for a Certificate of Authority to Grant Degrees in the State of Texas* (Feb. 5, 2005), available at <http://www.Board.state.tx.us/reports/html/0338/317Cert.pdf>.

56. According to the Code, “[a]n institution must be fully operational as of the date of the on-site evaluation; i.e., it must have in-hand or under contract all the human, physical, administrative, and financial resources necessary to demonstrate its capability to meet the standards for nonexempt institutions.” 19 TEX. ADMIN. CODE § 7.6(b)(4). The requirement that institutions have all their faculty, physical, and institutional resources in place before they ever start

accreditation by a Board-approved accrediting agency. The Legislature explained that “it is intended that an institution advance from certification status to fully accredited status in due course” and that “[t]he board rules must recognize that certification by the state is intended to safeguard the public interest until an institution has developed the strength to satisfy appropriate accreditation standards.”<sup>63</sup> The new statutory provision required the Board to establish a limit to the number of successive certificates of authority that an institution could obtain.<sup>64</sup> So in 1982, the Board adopted a rule limiting institutions to “not more than four successive certificates of authority.”<sup>65</sup>

The Board has complete discretion in choosing which accrediting agencies it will recognize.<sup>66</sup> Today, the Board recognizes the six regional accrediting agencies (only one of which—SACS—accredits schools whose sole or home campus is in Texas) and two religious accrediting agencies—ATS and AABC.<sup>67</sup> For unknown reasons, the Board does not recognize the Association of Advanced Rabbinical and Talmudic Schools (AARTS) or the Transnational Association of Christian Colleges and Schools (TRACS), even though both are recognized by the Council for Higher Education and the Department of Education.<sup>68</sup>

The requirement that non-exempt institutions obtain accreditation within eight years, together with a relentless intensification of the Board’s minimum standards, led to the decline and demise of several small Bible colleges in Texas in the late 1980s and early 1990s. It also spawned several administrative appeals and one lawsuit that made it all the way to the Texas Supreme Court, which heard oral argument on January 5, 2005.

**D. The Board has dramatically intensified its minimum standards, and therefore its control over religious higher education, over the years.**

At first, the Board only had thirteen succinct minimum standards, which, through much of the 1970s and 1980s, the Board tended to apply in a relatively accommodating manner to religious higher education institutions.<sup>69</sup> The original standards required that “the quality, content, and sequence of each course, curriculum, or program of the instruction, training, or study” be “appropriate to the purpose of the institution”; that the faculty have “education and experience and character . . . such as may reasonably ensure that the students will receive education consistent with the objectives of the course or program of study”; and that the institution have “adequate space, equipment, instructional materials, and library facilities to provide education of good quality.”<sup>70</sup>

But the Texas Education Code does not limit the manner or extent to which the Board can regulate institutions of religious higher education or their religious degree programs. And the Board’s minimum standards have always been written in broad and discretionary terms, such as “adequate,” “reasonable,” and “sufficient.”

Throughout the 1980s and especially in the early 1990s, the Board dramatically intensified both the express language of the minimum standards and the interpretation of the minimum standards, engendering conflicts with institutions of religious higher education. For example, in 1981, the Board adopted a standard that implicitly required curriculum to include general education courses.<sup>71</sup> In 1984, the Board adopted stricter administrative and library holding requirements.<sup>72</sup> In 1985, the Board adopted a governance rule to ensure “appropriate separation and independence of board, administration, and faculty.”<sup>73</sup> This governance rule significantly impacted church-operated Bible colleges.

The Board completely overhauled its minimum standards in 1993 by adopting, with little modification, the complete accreditation criteria of SACS—the regional accrediting agency that accredits most public

63. *Id.* § 61.308(d) (1981).

64. *Id.*

65. 6 Tex. Reg. 4323–4325 (1981), *adopted* 7 Tex. Reg. 580 (1982).

66. TEX. EDUC. CODE § 61.302(8).

67. 19 TEX. ADMIN. CODE § 7.4(a)(1).

68. *See Recognized Accrediting Organizations* (Feb. 6, 2005), available at [http://www.chea.org/pdf/CHEA\\_USDE\\_AllAccred.pdf](http://www.chea.org/pdf/CHEA_USDE_AllAccred.pdf).

69. Tex. Coordinating Bd., Rule 251.02.20.004 (1975).

70. *Id.*

71. 6 Tex. Reg. 640–41 (1981), *adopted* 6 Tex. Reg. 1609–10 (1981).

72. 9 Tex. Reg. 900–902, *adopted* 9 Tex. Reg. 2706–2708 (1984).

73. *See* 10 Tex. Reg. 3108–3110 (emerg. rule), *proposed* 10 Tex. Reg. 3116, *adopted* 10 Tex. Reg. 4282 (1985) (formerly codified at 19 TEX. ADMIN. CODE § 5.214(18)).

universities in the South, including the University of Texas at Austin.<sup>74</sup> The Board explained that “[i]ncreasingly, institutions are mounting legal challenges to the decisions of the board and these clarifications will help in the defense of their actions.”<sup>75</sup> Making the Board’s minimum standards as difficult as SACS’s own accreditation standards nullified the Legislature’s express intent that the certificate-of-authority process give new and developing institutions an opportunity to grow large and strong enough to obtain accreditation.<sup>76</sup> Now institutions must be strong enough for SACS accreditation before they can obtain their first certificate of authority.

Today, all faculty members must have at least a master’s degree, including at least eighteen graduate semester credit hours in the relevant discipline, from an institution accredited by a Board-recognized accrediting agency.<sup>77</sup> At least 25% of the courses in all baccalaureate *and* associate level majors must be taught by faculty members holding terminal degrees in the relevant discipline from such Board-sanctioned institutions.<sup>78</sup> This prohibits professors who received their credentials from Bob Jones University or seminaries accredited only by TRACS or AARTS from teaching degree courses in Texas.

The institution must also adopt a policy of academic freedom “assuring freedom in teaching, research, and publication.”<sup>79</sup> At least 25% of the total hours required for each associate or bachelor’s degree program must be general education courses drawn from each of the following areas: Humanities and Fine Arts, Social and Behavioral Sciences, Natural Sciences and Mathematics, and basic computer instruction.<sup>80</sup> And the Board has broad discretion to decide whether “[t]he quality, content, and sequence of each course,

curriculum, or program of instruction, training, or study” is “appropriate.”<sup>81</sup>

Today, for a non-exempt institution to have any hope of obtaining a certificate of authority, it must be extremely well-funded.<sup>82</sup> Also, in recent years, the Board has construed its library requirement to require at least 80,000 volumes, a collection that would typically cost more than \$1,000,000 to develop.

Not many years ago, Justice Frankfurter took it for granted that colleges and universities had the right to autonomously choose “who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”<sup>83</sup> Today, the Board asserts a significant degree of control over those choices.

## VI. CONFLICTS BETWEEN THE BOARD AND INSTITUTIONS OF RELIGIOUS HIGHER EDUCATION

*“[T]hey reason that for a college to recognize the Christian faith in its teachings is to commit itself to an implied bondage of opinion, which cannot but constrain the freedom of its spirit, or which must, at least, make it unwisely intolerant. We cannot accept this position . . . .”*<sup>84</sup>

### A. International Bible Center (San Antonio)<sup>85</sup>

International Bible Center (formerly the International Bible College) (hereinafter referred to as “In-

81. *Id.* § 7.7(12).

82. *Id.* § 7.7(5) (“The institution shall have sufficient reserves so that, together with tuition and fees, it would be able to complete its educational obligations to currently enrolled students if it were unable to admit any new students.”).

83. *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957).

84. NOAH PORTER, *THE AMERICAN COLLEGE AND THE AMERICAN PUBLIC* 207 (1870). Noah Porter served as President of Yale University from 1871 through 1886.

85. The facts recited in this and the following subsection (VI.A, VI.B) are set forth, with citations to attached exhibits, in the Amicus Curiae Brief of the Independent Baptist College and International Bible Center in Support of Petitioners in *HEB Ministries, Inc. v. Texas Higher Education Coordinating Board*, No. 03-0995 (Tex. argued Jan. 5, 2005), available at <http://www.cernyar.com/TJF-Brief.pdf> and <http://www.cernyar.com/TJF-BriefExhibits.pdf> [hereinafter Brief Exhibits].

74. 17 Tex. Reg. 6246 (1992), adopted 18 Tex. Reg. 160 (1993) (formerly codified at 19 TEX. ADMIN. CODE § 5.214(18)).

75. 18 Tex. Reg. 160 (1993).

76. See TEX. EDUC. CODE § 61.308(d) (1981) (“[C]ertification by the state is intended to safeguard the public interest *until an institution has developed the strength to satisfy appropriate accreditation standards . . . .*” (emphasis added)).

77. 19 TEX. ADMIN. CODE § 7.7(9)(A).

78. *Id.* § 7.7(9)(B).

79. *Id.* § 7.7(11).

80. *Id.* § 7.7(13).

ternational”) was established in 1944—during the peak of the Bible College Movement—to train Pentecostal and Charismatic ministers, missionaries, and Christian workers to propagate the gospel. Between 1958 and 1992, International offered Theology and Religious Education degrees.

As compelled by law, International began seeking certificates of authority in 1976. And every two years, the Board sent visiting committees, often comprising at least one Board staff person, to San Antonio to evaluate International’s degree programs, faculty, facilities, and resources.

The committees evaluated the structure and content of International’s curricula. One report suggested that International teach foundational courses in psychology, science, and math “*as the means of preparing students for . . . meaningful and responsible roles as leaders in their churches.*”

The committees also did not shy away from evaluating the structure and content of International’s core theology courses. Indeed, the committees’ reports often criticized and suggested changes to International’s theological viewpoints and pedagogical approaches. Cognizant of International’s belief in inerrancy and emphasis on the *original* texts, one report criticized International’s courses for not requiring enough “current journal sources” for research papers and for requiring only “a bare minimum of research writing.” Yet another report said that International’s “*quality and content of the courses in biblical studies . . . are insufficient for the baccalaureate level.*” A Biblical Study degree program, the report explained, must intentionally present “a range of issues, teaching students to think critically and solve problems.”

The committees also hectored International regarding faculty credentials. One report opined that a professor’s Doctor of Ministry credential was inadequate because they were terminal in “practical ministry courses but not in academic subjects such as Bible or Theology where a Doctor of Philosophy (PhD) or Doctor of Theology (ThD) would be terminal.” Another report opined that International faculty members “who completed graduate seminary courses *where the context of the degree is narrowly focused on biblical studies*” were not qualified to teach courses like “Comparative Religions.”

A 1986 report stated that although International’s faculty’s “experience and character is such as to reasonably ensure that students will receive an education consistent with” International’s institutional purposes and degree program objectives, the faculty’s

“education and background is lacking.” The report also found the academic dean’s credentials—which at that time included a graduate degree from Oblate School of Theology—lacking the “exceptional educational qualifications” expected. Another report praised International’s senior administration for bringing a “variety of academic, theological, and professional credentials and experience to the institution.” But the report nevertheless concluded that the administrators did “not have the appropriate educational background, particularly formal education and experience in higher education, to provide adequate control and direction for a new and fledgling institution of higher learning.”

The committees were also indifferent to International’s limited resources, which compelled International to hire administrators who doubled as teachers. One report urged International to hire “an independent and separate Chief Financial Officer and Chief Development Officer, each with appropriate experience and authority for the respective position”—even though the same report concluded that “[t]he size of the staff is adequate to administer the institution effectively.” The report also criticized International for “insufficient distinction among the roles of faculty and administration in policy formation and other traditional roles of faculty in decisions of academic affairs.”

Furthermore, International would frequently satisfy a Board minimum or AABC accreditation standard only to have the same exact standard later reinterpreted in a much less tolerant manner. For example, in 2000, a committee report stated that International’s “statement of academic freedom is clear and appropriate for the nature of the institution.” International’s policy provided that “[t]he teacher has the academic freedom to explore any subject thoroughly, but does not have the right to endorse doctrine contrary and destructive to the statement of faith of the college.”<sup>86</sup> But a 2001 committee’s report decided that this policy—which had not changed—did not provide sufficient academic freedom. The 2001 report stated that the policy provided “no meaningful protections for faculty”

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86. International’s faculty handbook also requires faculty members to indicate agreement with International’s statement of faith by signature, to submit to the authority of the Word in matters of faith and conduct, and to refrain from behavior destructive of International’s witness for Jesus Christ. A faculty member subject to dismissal can appeal his or her case, choose representation of his or her choice, confront any accusers, and present testimony before a panel of at least three impartial faculty members.

because International required certain moral and doctrinal commitments of its faculty.

As another example, a 1989 report of another school deemed a library collection of about 10,000–12,000 volumes to be “adequate.” But a 2000 report deemed International’s 23,487-volume library to be inadequate, falling short of previously uncited “national standards” that called for 85,000–100,000 volumes. The Board’s standards were, in short, a moving target.

The broad and discretionary nature of the Board’s minimum standards gave the Board considerable power to conceal ideological and theological biases behind petty criticisms and discretionary judgments like “adequate” and “sufficient.” International’s President and Academic Dean vividly recall the head of one Board visiting committee ask: “You don’t believe in that tongues business, do you?” And in one unpleasant meeting in 1997, a prominent member of the Board boasted to International’s President that it had shut down over a dozen Bible colleges in Texas and that International should also consider shutting down. With such hostility towards International’s religious practices and beliefs, it is doubtful whether International ever had any realistic hope that it would be favorably evaluated against the State’s vague and discretionary standards.

The Board stripped International of degree-granting authority in 1993, which precipitated a near-fatal drop in International’s student enrollment. After enjoying a fairly steady enrollment of about 130–150 students (full-time equivalent) from the mid-1980s through 1992, International’s enrollment dropped to just 55.6 students (full-time equivalent) in 2000.

## **B. Independent Baptist College (Dallas)**

In 1944, an Independent Baptist Church in Ardmore, Oklahoma, established the Orthodox Baptist Institute to train Independent Baptists to enter the ministry and mission fields. In 1964, the church transferred the school’s assets and students to Trinity Temple Baptist Church of Dallas, which formed a school that soon developed into the Independent Baptist College (IBC). IBC offered degrees in Bible, Theology, Christian Education, Sacred Music, Christian Ministries, Pastoral Studies, Missionary Studies, and Biblical Studies.

IBC had a very small student body—between 50 and 100 students annually in the 1970s and early 1980s—and a dedicated faculty. IBC operated suc-

cessfully for many years, without accreditation and without claims of fraud or misrepresentation, serving its students and institutional mission. Over 100 of the nation’s Independent Baptist churches regularly contributed funds to support IBC’s operations.

As required by law, IBC applied for state certification in 1975 and every two years thereafter. In the early 1980s, IBC also actively pursued accreditation. In an effort to meet those standards, IBC built an impressive new multipurpose building and student dormitories, weeded out and expanded its library collection, restructured and added general education courses to its curricula, developed programs to upgrade faculty credentials, restructured its governing board, distributed institutional surveys for self-evaluation, and generated dozens of detailed institutional reports and procedural manuals.

From 1976 through 1989, the Coordinating Board’s site evaluation committee reports acknowledged IBC’s high standards, the legitimacy of IBC’s programs, and the dedicated efforts of IBC’s faculty. But ultimately, Texas’s regulation of religious higher education—coupled with the insensitivity of the Board and the AABC to IBC’s doctrinal commitments—resulted in IBC’s undoing.

One of the seven core beliefs or “Baptist Distinctives” of Independent Baptists is “the autonomy of the local church.” Independent Baptists believe that God intended for each local church to maintain complete autonomy over its ministries and outreaches, ceding no authority to any external association, convention, or organized fellowship outside of the local church. Accordingly, IBC’s board consisted entirely of members of its sponsoring church, Trinity Temple.

IBC’s doctrinally-compelled board structure conflicted with AABC’s requirement that the board include non-church members.<sup>87</sup> When IBC explained its doctrinal position to AABC, AABC told IBC, in so many words, to change its doctrine. AABC’s consultant wrote, in a 1983 memo, that “[i]t is the opinion of this consultant that not enough objective study has been accomplished to support this conviction.” The consultant admonished IBC that:

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87. AABC’s 1985 Accreditation Manual stated that the college’s board should “be representative of its constituency.” Church-sponsored schools could have “representation of the church board on the college board, but membership should include others . . . . It is desirable that the board include individuals from other churches and geographical areas.”

Unless a concerted effort is made in this area, it will be very difficult for the AABC to examine the college as a viable institution. *By this, it is meant that unless the college is willing to submit itself to a rigorous self-examination concerning these convictions, it can be open to criticism on this vital point.*

IBC attempted to resolve its differences with AABC in a manner faithful to its beliefs. IBC created a nonvoting “Advisory Counsel” comprised of members of other Independent Baptist Churches. IBC also replaced its Board members’ one-year terms with staggered three-year terms and separated the roles of President of the college and chairman of the board of trustees. This did not satisfy the AABC. In 1990, AABC’s director wrote that “[a]s long as the college enrolls students beyond the local church and as long as the institution is unwilling to add Board members from outside the church to represent those students, I fear that we are at an impasse.” As a result, IBC did not achieve AABC accreditation within the timeframe created by the Board’s four-successive-certificates-of-authority limitation.

Before its fourth successive certificate expired, IBC petitioned the Board’s Certification Advisory Committee (CAC) for an extension of eligibility for certification under section 61.308(e) of the Texas Education Code. That section nominally provides religious postsecondary institutions relief if they are denied accreditation due to “policies of the institution based on religious beliefs or other good and sufficient cause as defined by rule of the board.”<sup>88</sup>

In its petition, IBC explained the theological basis of IBC’s doctrinal position on governance. The CAC reacted with bewilderment. One CAC member said that she did not understand why IBC could not

change its structure. Another CAC member noted that Baylor University had no problem complying with the requirement, so neither should IBC. Then, he proclaimed that “*the Church’s rights end where education begins.*” The Board denied the petition.

IBC filed an administrative appeal. The Board took the position that “religious issue or not, the composition of IBC’s Board of trustees was *not important enough* to justify an exception based on religious practices.” But the Hearings Examiner rejected the Board’s position, finding that “in order to comply with a directive that is ultimately endorsed by the state, IBC must break a religious tenet that is *fundamental* to its religious beliefs . . . .” The Examiner praised IBC for its diligent efforts “to work with AABC on all issues, including the governance issue, so that accreditation could be obtained” and held that IBC had sought accreditation with AABC in “good faith.” The Examiner recommended that the Board award IBC at least one more two-year certificate of authority.

Instead of granting IBC another certificate, the Board told IBC to apply for one, which IBC did. In March 1992, the Board sent another visiting committee to IBC. In a sharp departure from the Board’s prior evaluation reports of IBC, the 1992 report was very critical. The Board denied IBC’s certification request, asserting that IBC failed to meet the State’s minimum standards for faculty qualifications, library, and financial stability—standards that the Board had previously found IBC to meet.

IBC lodged another appeal. A few months later, the Board proposed and enacted significantly more stringent minimum standards in order to insulate the Board from further “legal challenges.”<sup>89</sup> The Board modeled this new set of minimum standards after SACS’s accreditation criteria.<sup>90</sup> The Board also adopted the very requirement that prevented IBC from obtaining AABC accreditation—that “[m]embership of the *governing board* shall be comprised of individuals who represent the institution’s constituency.”<sup>91</sup> By

88. TEX. EDUC. CODE § 61.308(e). This provision provides religious postsecondary institutions with *no relief* from the Board’s own twenty-one minimum standards. Indeed, the Board interprets the right to religious exemptions rigidly and narrowly. The Board requires proof that the denial of accreditation was based “*solely* on the basis of religious policies practiced by the institution”; that the institution “*pursued* accreditation in *good faith*”; that the institution “*meets all other standards* at the level of accreditation”; and that the institution “*satisfies all other requirements* of the Board,” including the twenty-one standards of title 19, section 7.7 of the Texas Administrative Code. 19 TEX. ADMIN. CODE § 7.6(c)(5) (emphasis added).

89. 17 Tex. Reg. 6246, 6248–6250 (1992), *adopted* 18 Tex. Reg. 159 (1993).

90. See 20 Tex. Reg. 4191 (1995) (acknowledging that the Board’s minimum standards “correspond[ed]” with the “criterion of the Commission on Colleges of the Southern Association of Colleges and Schools”).

91. 18 Tex. Reg. 159, 160 (1993) (emphasis added). Compare 10 Tex. Reg. 3108, 3109 (emerg. rule) (setting forth previous requirement number eighteen that there merely be “sufficient distinction among the roles and per-

mirroring its minimum standards after SACS's accreditation criteria, the Board effectively nullified the religious policy exemption of section 61.308(e).

By this time, the almost decade-long dispute between IBC and AABC, well known to IBC's student body, had already reduced IBC's enrollment to just over a dozen students. IBC, drained of its resources, dropped its appeal.

### C. Tyndale Theological Seminary (Ft. Worth)

In 1989, Dr. Mal Couch incorporated HEB Ministries, Inc., as a church to operate Tyndale Theological Seminary and Biblical Institute ("Tyndale"). Perceiving a weakening of doctrinal orthodoxy in established evangelical seminaries, Tyndale committed to "one of the most complete and thorough Doctrinal Statements of any seminary."<sup>92</sup> Tyndale affirms the inerrancy of Scripture, salvation only through Christ, and premillennial dispensationalism.<sup>93</sup> Tyndale repudiates "openness of God theory," "Progressive Dispensationalism," and "Lordship Salvation."<sup>94</sup> Tyndale purposes to train students to deliver "strong theological and verse-by-verse exegetical teaching . . . from the pulpit." And Tyndale insists that its faculty members do not "compromise on doctrine."<sup>95</sup>

Tyndale Seminary offers five levels of undergraduate-level programs, four graduate-level programs, and six seminary-level programs.<sup>96</sup> The number of hours required for Tyndale programs generally match those required at comparable accredited programs.<sup>97</sup> And at least twenty colleges and universities in the United States accept and transfer Tyndale course credits.<sup>98</sup>

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sonnel of the governing board of the institution and of the administration and faculty to ensure the appropriate separation and independence of the board, administration, and faculty"), *proposed* 10 Tex. Reg. 3116, *adopted* 10 Tex. Reg. 4282 (1985).

92. TYNDALE THEOLOGICAL SEMINARY AND BIBLICAL INSTITUTE, 2003 CATALOG, at 3, *available at* [http://www.tyndale.edu/files/pdf/Tyndale\\_2003\\_Catalog.pdf](http://www.tyndale.edu/files/pdf/Tyndale_2003_Catalog.pdf).

93. *Id.* at 9–17.

94. *Id.*

95. *Id.* at 3, 8, 65.

96. *Id.* at 18–38.

97. *Id.*

98. Board's Response to HEB's Petition for Review at 7, *HEB Ministries*.

Tyndale's campus includes a library, four or five classrooms, administrative offices, a bookstore, and a computer department. As of 1999, it had between 300 and 350 students, most of them being correspondence students.

Familiar with IBC's bad experiences with the Board and AABC, Tyndale decided early on not to apply for certificate of authority. Instead, Tyndale chose to award "certificates" and "diplomas." In order to communicate the rigor of its programs, Tyndale described its 4-year level diploma programs as "bachelor-level" programs, its masters-level programs as "masters-level" programs, and its doctorate-level programs as "doctorate-level" programs.

In June 1998, Board sent one of its officials to secretly attend Tyndale's graduation ceremony, where Tyndale awarded 34 certificates and diplomas.<sup>99</sup> One month later, and without any prior hearing,<sup>100</sup> the Board fined Tyndale \$3,000 for using the word "seminary" in its name and \$170,000 for issuing 34 diplomas and certificates without a certificate of authority. The 34 certificates and diplomas, each of which was assessed the maximum \$5,000 fine, consisted of the following:

- 2 "Certificates of Biblical Studies"
- 3 "Diplomas of Basic Biblical Studies"
- 2 "Diplomas of Christian Studies"
- 1 "Diploma of Advanced Biblical Studies"
- 1 "Associate of Biblical Studies Diploma"
- 6 "Theological Studies Bachelor Level Diplomas"
- 2 "Biblical Studies Bachelor Level Diplomas"
- 2 "Master of Theology Level Diplomas"
- 9 "Master of Arts Level Diplomas"
- 1 "Doctor of Ministries Level Diploma"
- 2 "Doctor of Theology Level Diplomas"
- 3 "Doctor of Philosophy Level Diplomas"

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99. Candi Cushman, *Caesar's Reach: Should Texas Authorities Tell a Seminary What Kind of Degrees it May Award?*, WORLD MAG., Apr. 7, 2001, *available at* <http://www.worldmag.com/displayarticle.cfm?id=4897>.

100. The Board imposes large penalties without a hearing, effectively treating the accused as guilty until proven innocent. "The Commissioner may assess an administrative penalty," 19 TEX. ADMIN. CODE § 7.14(a) (2004), and then notify the person or institution penalized of the penalty and the right to a hearing. *Id.* § 7.14(b). The burden of requesting a hearing, *id.* § 7.14(c), and of going forward with the pleading and the evidence, is on the person or institution penalized.

HEB Ministries sought a declaratory judgment in Travis County District Court that the applicable statutory provisions were unconstitutional. The district court held that the state's restrictions on the use of the term "seminary" were unconstitutional but upheld the state's restrictions on the use of word "degree" or its equivalents. The Austin Court of Appeals upheld all of the challenged statutory provisions.<sup>101</sup>

First, the court concluded that the State's certificate-of-authority requirements did not violate the Establishment Clause. The court—which did not have the benefit of a record that included the experiences of International and IBC—concluded that "[n]either [Texas Education Code] section 61.304 nor the accompanying regulations mandate 'active involvement of [government] in religious activity.'"<sup>102</sup> And because Tyndale (unlike International and IBC) never applied for a certificate of authority, the court held that "its allegations of excessive entanglement are no more than speculation."<sup>103</sup>

Second, the court rejected Tyndale's free exercise challenge on the grounds that (1) the state's certification and accreditation requirements were "neutral law[s] of general applicability"<sup>104</sup> and (2) that being prohibited from using the word "seminary" and degree-equivalent terms did not burden religious practice.<sup>105</sup>

Third, the court rejected Tyndale's free speech challenge on the ground that the issuance of degrees was merely commercial speech.<sup>106</sup> The court held "that

the statutes and regulations are narrowly tailored to further the substantial state interest in preventing fraudulent or substandard postsecondary institutions from the misleading use of academic terminology."<sup>107</sup> The court likewise concluded that the seminary name regulations were "content-neutral and serve[d] a significant governmental interest."<sup>108</sup>

Throughout its opinion, the court stressed that the regulations liberally allowed Tyndale to seek accreditation, as an alternative to certification, from any of "five approved agencies focusing on religious institutions."<sup>109</sup> And the court criticized Tyndale for not even trying to obtain state-approved accreditation.<sup>110</sup>

But the court was badly mistaken. In fact, the Board approves of only two religious accrediting agencies—AABC, which accredits only undergraduate programs, and ATS, which accredits only graduate programs.<sup>111</sup> Furthermore, AABC and ATS require that a school *already have authority to grant degrees* as a precondition to accreditation. So rather than having several alternatives to choose from, Tyndale had only one religious accrediting agency choice—AABC—for its undergraduate theological programs and only one religious accrediting agency choice—ATS—for its graduate theological programs. Tyndale also had *no alternative* but to *first* obtain a certificate of authority from the Board.

Throughout its opinion, the court also expressed its belief that the Texas Education Code "ac-

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101. *HEB Ministries, Inc. v. Texas Higher Educ. Coordinating Bd.*, 114 S.W.3d 617 (Tex. App.—Austin 2003, pet. pending).

102. *Id.* at 628.

103. *Id.* at 628, 633.

104. *Id.* at 629 (quoting *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 879 (1990)). The court even concluded that the state's "seminary" name regulations were "neutral laws" because "seminary" was not an *exclusively* religious term, even though secular uses of that term are so rare that the Board could identify only one example—a private girls' college *preparatory school* called "Buffalo Seminary" in New York. *Id.* at 633–34, 639 n.10.

105. *Id.* at 631, 635.

106. *Id.* at 631. The "commercial speech" analogy contradicts *Murdock v. Commonwealth of Pennsylvania*, 319 U.S. 105, 111 (1943), where the Supreme Court held that a neutral, generally applicable law that required solicitors to buy a license from the State could not be imposed on religious solicitations. *Id.* at 111. The Court rejected the state's argument that such solicitations were commercial speech:

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[T]he mere fact that the religious literature is 'sold' by itinerant preachers rather than 'donated' does not transform evangelism into a commercial enterprise. If it did, then the passing of the collection plate in church would make the church service a commercial project. The constitutional rights of those spreading their religious beliefs through the spoken and printed word are not to be gauged by standards governing retailers or wholesalers of books.

*Id.* at 111.

107. *HEB Ministries*, 114 S.W.3d at 632.

108. *Id.* at 636.

109. *Id.* at 624, 630, 634.

110. *Id.* at 628, 630, 634.

111. 19 TEX. ADMIN. CODE § 7.4(a)(1). Also, the Board only approves accrediting agencies whose standards are at least as rigorous as the Board's twenty-one minimum standards. *Id.* § 7.5(f)(2).

commodate[s] postsecondary institutions unable to meet the *certification or accreditation* requirements due to their religious policies.”<sup>112</sup> But the court was mistaken on this point as well.

In fact, the Code and regulations provide no accommodation for failure to meet the Board’s *minimum standards* for certification.<sup>113</sup> Furthermore, as shown by IBC’s experience, the Board construes the religious-exception section so narrowly that accreditation through the exception process is practically impossible.<sup>114</sup>

Tyndale appealed to the Texas Supreme Court, which heard oral argument on the petition on January 5, 2005. A decision is expected this year.

## VII. CONSTITUTIONAL ISSUES

*“[N]o sect can consider its hopes worth much without a school to educate and raise up defenders.”*<sup>115</sup>

The religious liberty clauses of the First Amendment prohibit government from making any “law respecting an establishment of religion, or prohibiting the free exercise thereof.”<sup>116</sup> The Board argues that the applicable statutes regulate only what schools may call themselves and their educational offerings, and the Board denies that the statutes dictate the content of religious training. The collective experiences of International, IBC, and Tyndale tell a different story. The State’s accreditation requirements and the Board’s minimum standards are not content or viewpoint neutral. Furthermore, the Board administers those standards in

112. *HEB Ministries*, 114 S.W.3d at 628 (emphasis added).

113. TEX. EDUC. CODE § 61.308(e).

114. Under title 19, section 7.6(c)(5) of the Texas Administrative Code, the religious institution must show that the denial of accreditation was based “solely on the basis of religious policies practiced by the institution.” The Board will not consider a claim that the cumulative burden of accreditation requirements make it impossible for a small seminary to survive. The institution must also show that it has “pursued accreditation in good faith,” “meets all other standards at the level of accreditation,” and “satisfies all other requirements of the Board.” 19. TEX. ADMIN. CODE § 7.6(c)(5).

115. Unsigned article dated 1813, *reprinted in* 1 AMERICAN HIGHER EDUCATION: A DOCUMENTARY HISTORY 180 (Richard Hofstadter & Wilson Smith eds., 1961).

116. U.S. CONST., amend. I.

a manner that intrudes deeply into the religious affairs, dogma, mission, and theological educational philosophy of institutions of religious higher education. As such, Texas’s regulation of religious higher education violates the Constitution’s religious liberty clauses.

### A. The Religious Liberty Clauses forbid governmental licensing of clergy.

Licensing the clergy was one of the core abuses that American guarantees of religious liberty were designed to end. It was Virginia’s punishment of Baptists for preaching without licenses that aroused James Madison’s first recorded protest in favor of religious liberty.<sup>117</sup>

Licensing the training of clergy is no different from licensing the clergy itself. The state cannot require clergy to be educated at all, or to be educated in a particular way. If it cannot prohibit an untrained or inadequately trained person from acting as a minister, then it cannot prohibit a seminary from training ministers in ways that the state considers inadequate.

### B. The Religious Liberty Clauses exclude government from the area of religious instruction.

The most frequently cited case in Establishment Clause jurisprudence is *Lemon v. Kurtzman*.<sup>118</sup> In that case, the Supreme Court articulated its famous three-prong test that a law (1) have a secular purpose, (2) have a principal or primary effect that does not advance or inhibit religion, and (3) not foster excessive entanglement with religion.<sup>119</sup>

But *Lemon* provides more than a simple formula for evaluating establishment clause challenges. *Lemon* provides a factual context—state surveillance of religious education—directly applicable to the statutory scheme reviewed here. *Lemon* involved a Rhode Island statute that offered parochial school teachers a supplement to teach secular courses.<sup>120</sup> In exchange, the Act required such teachers to teach only secular courses and use only public school teaching materials

117. See RALPH KETCHAM, JAMES MADISON: A BIOGRAPHY 57–58 (1971).

118. 403 U.S. 602 (1971).

119. *Id.* at 612–13.

120. *Id.* at 607.

as long they received the supplements.<sup>121</sup> But the Court observed that it would take a “comprehensive, discriminating, and continuing state surveillance . . . to ensure that these restrictions [were] obeyed.”<sup>122</sup> And this surveillance, the Court concluded, would “involve excessive and enduring entanglement between state and church.”<sup>123</sup> Because the statutory scheme was “pregnant with dangers of excessive government direction of church schools and hence of churches,” the Court held that it was unconstitutional.<sup>124</sup>

Toward the end of the opinion, the Court categorically declared that “government is to be *entirely excluded* from the area of religious instruction.”<sup>125</sup> *Lemon*’s edict cuts both ways. Its prohibitions apply equally to statutory schemes that detrimentally interfere with religious instruction as well as to those that fund it.

The Board’s minimum standards make governmental entanglement with religious education even more inevitable than Rhode Island’s struck-down scheme. The Board closely evaluates—and ultimately approves or disapproves—the structure and content of a school’s theological curriculum. International’s experience shows that the Board believes that all “degree” programs—including *theological* degree programs—should encourage uninhibited philosophical inquiry and emphasize current research. Thus, the Board closely examines the pedagogical methodology of the school’s theological programs, singling out for censure Bible-centric theological programs that emphasize deep Biblical exegesis at the expense of philosophical and historical criticism of church doctrine and Biblical authority. The Board also tells religious schools how it may govern itself and by whom it may be governed; who may and may not teach degree courses; what kinds of course must be taught; and what it must include in its library.

**C. The Religious Liberty Clauses exclude government from intruding into the internal affairs of a church.**

Texas’s regulation of religious higher education also conflicts with a line of cases that protect the

right of churches to manage their own internal affairs, free of governmental intrusion. The First Amendment confers “a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.”<sup>126</sup>

In *Serbian Eastern Orthodox Church v. Milivojevich*,<sup>127</sup> the Supreme Court held that a lower court violated the Religious Liberty Clauses by rejecting a hierarchical church tribunal’s decision to defrock a bishop and entering a judgment to reinstate him. The court cautioned that because resolution of such disputes could entangle the State “in essentially religious controversies,”<sup>128</sup> the court’s role in resolving such controversies was limited to enforcing the decision of the church’s tribunal.<sup>129</sup> The state was not permitted to examine the church’s constitution, church dogma, canon law, and traditional practices to second-guess the church tribunal’s decision.<sup>130</sup>

The principle of *Kedroff* and *Serbian*, which is frequently applied as a bar to employment discrimination suits, also applies to seminaries. In *EEOC v. Southwestern Baptist Theological Seminary*,<sup>131</sup> the Fifth Circuit held that from the perspective of the First Amendment, a seminary is a church and its faculty are clergy.<sup>132</sup> The court held that a seminary could not be required to file even informational reports about its faculty. The principles of church autonomy in internal affairs “would be violated by the EEOC’s demand to reveal the details of the employment relationship between a church and its ministers.”<sup>133</sup>

Texas’s regulation of religious higher education intrudes into the right of seminaries, as churches, to manage their own affairs, establish their own governance structures, and choose their religious teachers (i.e., faculty) and how their doctrine will be taught (i.e., curricular structure and content).

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126. *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94, 116 (1952).

127. 426 U.S. 696 (1976).

128. *Id.* at 709.

129. *Id.* at 725.

130. *Id.* at 717–720.

131. 651 F.2d 277 (5th Cir. 1981).

132. *Id.* at 282–285.

133. *Id.* at 282.

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121. *Id.* at 608.

122. *Id.* at 619.

123. *Id.*

124. *Id.* at 620.

125. *Id.* at 625 (emphasis added).

**D. The Free Exercise Clause protects religious claimants from non-neutral laws that burden religion and are not narrowly tailored to advance a compelling state interest.**

In *Employment Division v. Smith*,<sup>134</sup> the Supreme Court held that religious objectors are not exempt from neutral and generally applicable laws that only have an incidental effect of burdening a particular religious practice and which do not violate multiple first amendment freedoms.<sup>135</sup> But in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,<sup>136</sup> the Supreme Court reaffirmed that a law burdening religious freedom that is not neutral and generally applicable “must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest.”<sup>137</sup>

Texas’s regulation of religious higher education is burdensome. It is not neutral. And it is not narrowly tailored.

**1. Texas’s regulation of religious higher education is burdensome.**

As a preliminary matter, the Board strenuously denies that its regulations burden religious exercise. As the Board argued in its Supreme Court brief, Tyndale can use any curriculum, and hire any faculty it wants, and “avoid all state regulation by using terminology that *does not carry the same expectation of high academic achievement*” as the restricted academic terminology.<sup>138</sup>

But segregating state-approved from non-state-approved religious institutions, and stamping the latter with public badges of inferiority, is certainly burdensome. Texas’s highly discretionary system for approving some religious institutions, but not others, already sends a message to unapproved school students, faculty members, and supporters that they are inferior. But Texas’s prohibition on the latter’s use terms that convey “high academic achievement” is even worse—it demands that unapproved schools accept and embrace their government-imposed second-class status.

Texas’s monopolization of academic terminology also leaves no vocabulary for unapproved religious colleges to use. It is unclear what such schools can call themselves, or how they can distinguish the different degrees of training they offer, without using any of the forbidden words or words with a similar meaning. The academic use of the word “degree” is a specific adaptation of the word’s general meaning of a step, stage, or increment; each higher degree in the academic sense recognizes a further degree (in the general sense) of education. Students at International, IBC, and Tyndale proceed through different degrees of learning, and the schools must have a way to describe that. But any word that actually describes it would suggest an equivalent to a degree, or part of a degree.

The Board has failed to designate any words that *may* be used to describe the work of unaccredited religious colleges. Instead, the Board’s rules vaguely prohibit all words “similar to” the words that describe the schools’ understanding of their own programs, make the schools guess what words might be sufficiently dissimilar to be permissible, and then impose crippling fines for guessing wrong.

International and IBC have certainly experienced the burden of the State’s regulation. Until 1992, each was able to grant degrees. The anticipated and actual loss of that ability caused both schools to suffer steep declines in student enrollment. This is not surprising. Today, many religious communities select their leaders on the basis of their religious training. Students who are unable to use words expressive of academic achievement to describe their completion of widely-recognized religious training programs are less likely to find churches willing to accept them.<sup>139</sup>

134. 494 U.S. 872 (1990).

135. *Id.* at 879–882.

136. 508 U.S. 520 (1993).

137. *Id.* at 531–532.

138. Respondent’s Brief on the Merits at 11, *HEB Ministries* (emphasis added).

139. By the same token, were the State to license the use of the terms “minister,” “priest,” “rabbi,” “imam,” and their “equivalents,” it could not be credibly argued that such regulations were not burdensome on the grounds that church leaders can call themselves by other names.

## 2. Texas's regulation of religious higher education is not neutral.

Texas's religious higher education regulations are facially discriminatory. The Board approves three accrediting agencies that accredit Texas-headquartered schools—SACS, ATS and AABC. Each of these has its own favored philosophies of education and governance which are often at odds with the religious dictates of less mainstream sects. In many cases, the non-mainstream sects have formed their own accrediting bodies, not approved by the Board.

For example, International obtained accreditation with the International Christian Accrediting Association (ICAA) in 1990. ICAA is an accrediting body that primarily serves Charismatic and Pentecostal schools. In 1992, IBC sought—and almost achieved—accreditation with TRACS, but the Board's denial of IBC's petition for an extension of certification crippled those efforts. For a time, Tyndale was accredited by the Association of Christian Colleges & Theological Schools (ACCTS), an association whose standards reflect Tyndale's highly specific doctrinal commitments. But the Board does not recognize ICAA, TRACS, or ACCTS. Nor does the Board recognize the accrediting bodies of any non-Christian sects. So even on its face, Texas's regulation of religious higher education is non-neutral.

Furthermore, the Board's minimum standards favor some religious denominations and sects over others. In particular, the standards are much more compatible with mainline seminaries that embrace the secular educational methodologies of the modern university, than they are with conservative evangelical seminaries founded to preserve and perpetuate the orthodox teachings of the church. And the mere cost of compliance with the Board's minimum standards—including millions of dollars worth of library and institutional resources—automatically favor wealthy, long-established sects over newer and poorer sects.

Texas's minimum standards are also not generally applicable. Texas permits approved colleges to award "honorary degrees," the recipients of which are not required to do any academic work whatsoever.<sup>140</sup> The "honorary degree" provision is an "individualized exemption" to the law, further subjecting it to strict scrutiny.

The Free Exercise clause subjects not only *facially* discriminatory laws, but also the covert dis-

criminatory application of facially neutral laws, to strict scrutiny.<sup>141</sup> International's and IBC's experiences show that in actual practice, Texas's regulation of religious higher education is far from neutral regarding the content and theological viewpoint of a school's curriculum. In general, the highly discretionary nature of the Board's minimum standards enable the Board to conceal any theological biases it may harbor behind conclusions that one or more aspects of a school's operation are "inadequate." But the Board's non-neutrality was made plainly evident in its frequent criticisms of International's Bible-centric curriculum.

## 3. Texas's regulation of religious higher education is not narrowly tailored.

The state's legitimate concern is with degree mills and with unaccredited institutions misrepresenting their status or passing themselves off as accredited. The solution to these legitimate secular concerns is secular disclosure requirements, not a sweeping ban on religious institutions describing their religious programs.

The state's legitimate interest in preventing misrepresentation could be fully served—far better and more directly—by requiring unapproved religious institutions to include disclaimers on their diplomas, and conspicuous disclaimers in the documents and sources that prospective students and prospective employers actually use and rely on: the schools' literature, websites, and transcripts. For example, all materials could be required to say: "Not Accredited by an Accrediting Agency Recognized by the Texas Higher Education Coordinating Board." Materials directed to prospective students could be required to go further, and explain, "This seminary is not accredited by the State of Texas, and schools that are accredited may decline to recognize or give credit for credits or degrees earned at this seminary."

The Board could also require disclosure of objective, secular facts about the programs offered by unaccredited seminaries. For example, if the state required each school to prominently disclose the number of credit hours required for a bachelor's, master's, or doctoral level program, degree mills would be instantly

141. See *Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993) ("The Clause 'forbids subtle departures from neutrality,' and 'covert suppression of particular religious beliefs.'") (citations omitted).

140. TEX. EDUC. CODE § 61.312.

exposed by the small or non-existent number of hours required. The state could even require the schools' disclosures to compare this number to a standard representing the minimum (or typical) number of credit-hours required by accredited institutions.

Finally, the Board could require that unaccredited religious institutions name all their degrees with explicitly religious language, such as Biblical Studies, Theology, and so on. An institution that awards secular degrees in secular disciplines is subject to state regulation, and the names of degrees can be required to clearly reflect the difference.

As noted in section IV.B of this article, thirty-one states permit religious postsecondary institutions to issue religious degrees without accreditation or state certification. These states typically require that degree titles clearly represent the religious nature of the degree; that schools disclose their non-state-approved status on degree transcripts, catalogs, and other publications of the school; that individuals not engage in degree fraud; or some combination of these things.

And Texas itself has adopted a disclosure solution in the case of honorary degrees. Texas does not prohibit honorary degrees. It requires only that the diploma clearly state that the degree is honorary.<sup>142</sup> The state has no reason—let alone a compelling interest—for regulating religious institutions so much more heavily than it regulates honorary degrees.

## VIII. CONCLUSION

The state has no power to license seminaries, or to sort them into approved seminaries that are free to operate and disapproved seminaries subject to crippling fines for simply describing their own understanding of their work. Texas's pursuit of this course, and the lower courts' countenance of it, are startling evidence of the triumph of bureaucratic absolutism over the shrinking domain of religious liberty.

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142. TEX. EDUC. CODE § 61.312 (1996).