

# ***Ex Corde Ecclesiae* and American Catholic Higher Education: Dead on Arrival?**

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## *Introduction*

On August 15, 1990, Pope John Paul II, exercising his Magisterial<sup>1</sup> authority in the Roman Catholic Church,<sup>2</sup> promulgated the Apostolic Constitution *Ex Corde Ecclesiae*<sup>3</sup> to revitalize teaching in Catholic colleges and universities.<sup>4</sup> Over several years, controversy relating to the possible implementation of *Ex Corde* in the United States accelerated.<sup>5</sup> The major sticking point in the conflict is over the requirement that professors of theological disciplines<sup>6</sup> obtain a mandatum, fundamentally an acknowledgment by a local bishop, that a Catholic professor is in full communion with the Catholic Church.<sup>7</sup> In the meantime, critics, both inside and outside of the Catholic Church, have raised questions about the potential impact of *Ex Corde* on American Catholic universities.

*Ex Corde*'s potential impact is significant, especially for faculty members at Catholic universities, by far the largest segment of religiously affiliated institutions of higher learning in the United States. This article is divided into four sections. The first part highlights *Ex Corde*'s salient features. The next section examines the current status of the non-implementation of *Ex Corde*. The third part of the article reviews critiques of *Ex Corde*, noting the opposition by university leaders and the reluctance to act on the part of the Bishops.<sup>8</sup> The final section reflects on the status of *Ex Corde* and why a fully implemented *Ex Corde* should play a key role in revivification of religious identity in American Catholic universities.

## *Ex Corde Ecclesiae: An Overview*

According to *Ex Corde Ecclesiae*, "Catholic members of the university are also called to a personal fidelity to the Church with all that this implies. Non-Catholic members are required to respect the Catholic character of the university, and the university, in turn, respect their religious liberty."<sup>9</sup> *Ex Corde* continues: "All teachers and all administrators, at the

appointment, are to be informed of the Catholic identity of the institution and its implications and about the responsibility to promote, or at least respect, that identity.”<sup>10</sup> More specifically, the next section of *Ex Corde* declares that “[i]n particular, Catholic theologians, aware that they fulfill a mandate received from the Church, are to be faithful to the Magisterium of the Church as the authentic interpreter of Sacred Scripture and Sacred Tradition.”<sup>11</sup> This section, consistent with the 1983 Revised Code of Canon Law,<sup>12</sup> which is not quoted in the body of *Ex Corde* itself, is at the heart of the controversy as it calls for theologians to procure a mandatum. *Ex Corde* also notes that “[t]hose university teachers and administrators belonging to other churches, ecclesiastical communities, or religious, as well as those who profess no religious belief, and also all students, are to recognize and respect the distinct Catholic identity of the university.”<sup>13</sup>

*Ex Corde* entitles all faculty members and students to an environment within Catholic universities that is designed to support and invigorate Catholic understandings, and, in turn, is reflected in their teaching, scholarship, and service. Non-Catholic faculty and students are likewise entitled to the Catholic architecture of moral grounding and religious tradition. Catholics are further entitled to a dynamic whereby the number of non-Catholic teachers “should not be allowed to constitute the majority within the institution, which is and must remain Catholic.”<sup>14</sup> All else in the employment relationship of faculty in Catholic schools flows from, and is grounded in, *Ex Corde Ecclesiae*. Despite allegations of some critics, *Ex Corde* is committed to principles of academic freedom.<sup>15</sup> In fact, the fears of critics aside, *Ex Corde* is neither a tool to convert academicians to the Catholic faith or to drive them from campus, nor an instrument designed to return Catholic universities to a pre-Vatican II intellectual ghetto where academic freedom and inquiry were sometimes viewed as suspect. Rather, *Ex Corde Ecclesiae* is concerned that all academicians who work in a Catholic environment, regardless of their faiths and value systems, respect the Church’s teachings and traditions.

*Ex Corde* calls upon Catholic universities to maintain a Catholic majority within their faculty, administration, and trustees. At the same time, *Ex Corde* imposes no such requirement on students, the true beneficiaries of governmental aid, largely in the form of loans that are backed by government guarantees. Moreover, as an aspiration or a goal that has yet to be fully effectuated,<sup>16</sup> *Ex Corde* applies only to Catholics who are required to be committed to the witness of the Catholic faith.<sup>17</sup> In fact, it is important to note that while *Ex Corde* does not apply to non-Catholic faculty members or staff, it does require them to respect Catholic doctrine: “[t]hose university teachers and administrators belonging to other churches, ecclesi-

astical communities, or religious, as well as those who profess no religious belief, and also all students, are to recognize and respect the distinct Catholic identity of the university.”<sup>18</sup>

*Ex Corde*'s norms are direct and straightforward, settling some issues while raising new ones. At the very least, its intent is that each and every department, school, and college within a Catholic university must adopt affirmative steps to ensure a qualitative Catholic environment while each unit should have a Catholic majority in quantitative presence. Unless it is “impossible,”<sup>19</sup> Catholic affirmative action hiring must operate throughout all components in a University's recruiting faculty. Although the requirement in *Ex Corde* that those teaching theology obtain a mandatum from the local Bishop has not been expanded to other faculty or administrators, we fully agree with Richard McBrien's rhetorical query:

And what about Catholic faculty members in other departments of a university? Why are the mandates limited to theologians? If there is an erosion of Catholic identity in our universities today, it is more likely to occur *outside* of departments of theology, not inside . . . . By focusing only on Catholic theologians while leaving Catholic vice presidents, deans, directors, chemists, economists, biologists, philosophers, mathematicians, engineers, lawyers, and accountants completely off the hook, we may be revealing that our vision of this sensitive matter is of tunnel quality. If we are really concerned about the Catholic character of our Catholic universities, we should be concerned about the whole faculty and the whole administration, not just the theology department, the president of the board of trustees.<sup>20</sup>

On other grounds, we markedly disagree with Father McBrien's defiance.<sup>21</sup>

### *The Implementation of Ex Corde Ecclesiae*

Many faculty members and bureaucrats, especially the administrative class, at Catholic universities voiced significant opposition<sup>22</sup> to the adoption of *The Application of Ex Corde Ecclesiae for the United States*,<sup>23</sup> a set of proposed norms to implement *Ex Corde Ecclesiae* for America's 235<sup>24</sup> Catholic universities. Even so, the National Conference of Catholic Bishops (NCCB) overwhelmingly approved the *Application* by a 233 to 31 margin on November 17, 1999.<sup>25</sup> The Vatican's Congregation for Bishops recognized the *Application* on May 3, 2000; the *Application* theoretically takes effect on May 3, 2001.<sup>26</sup>

Following the approval of the *Application*, the NCCB conferred with “learned” societies, most notably the Catholic Theological Society of America,<sup>27</sup> in formulating draft *Guidelines*<sup>28</sup> concerning the academic mandatum. However, despite offers from its President to be of assistance, the NCCB ignored the Fellowship of Catholic Scholars, an interdisciplinary organization that was established in the late 1970s as an alternative response to the Catholic Theological Society of America, to become involved in the process.<sup>29</sup> Insofar as the *Guidelines* do not require the Vatican’s approval, Rome is no longer in the equation and apparently will not intervene in this process.

The *Guidelines* begin by addressing the nature of a mandatum. A mandatum, which is not to be interpreted as an appointment, authorization, and/ or delegation of approbation of one’s teachings, is an acknowledgement by a diocesan bishop where a university is located, whether personally, or through a delegate, that a Catholic professor of a theological discipline is in full communion with the Church.<sup>30</sup> This section also recognizes that a faculty member, who teaches in his or her own name by virtue of baptism, has a commitment and responsibility to teach authentic Catholic doctrine and not to put anything forth that is contrary to the Church’s magisterium. This section creates tension to the extent that while individual theologians speak in their own names, they are also members of a religious tradition who are expected to remain faithful to the Church’s teachings.

The *Guidelines* further specify that all who teach, defined as a regular presentation of academic material, a theological discipline, meaning Sacred Scripture, dogmatic, moral, and/or pastoral theology, canon law, liturgy, and Church history, in a Catholic institution of higher learning must have a mandatum.<sup>31</sup> At the same time, the *Guidelines* clearly note that they do not apply to individuals who lecture occasionally or preach on a campus.

In order to procure a mandatum, a faculty member must make a request in writing to the local bishop including a declaration that he or she will teach in full communion with the Church.<sup>32</sup> A faculty member who is hired by May 1, 2001, the effective date of the *Application*, must obtain a mandatum by June 1, 2002. An individual who is employed after the effective date of the *Guidelines* must obtain a mandatum within the academic year or six months after being hired, whichever is longer. Once granted, a mandatum remains in effect unless or until it is withdrawn. The *Guidelines* note that while there is no need to obtain a new mandatum if an individual moves to another diocese, each bishop has the right to require one. This may make for interesting dilemmas if, for example, a Liberal Theologian in a Diocese headed by a Liberal Bishop obtains a mandatum there but is denied one upon moving to an institution headed by a more conservative Bishop. The

Bishops failed to address how such a contentious matter might be resolved and whether fellow Bishops should extend “full faith and credit” to each others’ decisions. In one of its many gaps, the *Guidelines* indicate that if a faculty member does not obtain a mandatum, then competent ecclesiastical authority should notify university officials, but that bishops have no legal authority to force anyone to do so. According to Archbishop Daniel E. Pilarczyk of Cincinnati, by no means a strong supporter of *Ex Corde*, this means that “bishops have no legal authority to force anyone to seek a mandatum, and that it would be inappropriate to demand that a university fire a theologian who does not have one.”<sup>33</sup> Thus, in one fell swoop, the bishops who are most influential with respect to *Ex Corde* have openly endorsed its effective vitiation and de facto nullification.

The *Guidelines* specify that an individual who meets the requirements to obtain a mandatum must be granted one and that individuals are presumed to be in full communion with the Church until the contrary is proven.<sup>34</sup> Insofar as this is a very low bar, its vitriolic opposition is all the more flabbergasting. If a bishop seeks to withhold or withdraw a mandatum, based on specific and detailed evidence, he must do so in writing and permit the individual who is subject to this action to seek recourse.

Turning to appeals and dispute resolution, the *Guidelines* acknowledge that while both parties have a right to competent canonical counsel, the process of dispute resolution between a theologian and bishop over the denial or revocation of a mandatum should include personal contact.<sup>35</sup> The process itself is governed by an earlier document issued by the NCCB<sup>36</sup> that is incorporated into the *Guidelines* by reference and in accordance with canonical norms.<sup>37</sup> Moreover, the members of the United States Catholic Conference of Bishops along with Catholic Colleges and University Presidents Committee and its staff will serve as a resource for information and guidance concerning the mandatum.<sup>38</sup> Finally, the *Guidelines* will be reviewed after five years by a committee appointed by the President of the NCCB.<sup>39</sup>

The CTS raised at least three points of contention that remain unresolved.<sup>40</sup> First, the Bishops rejected a proposal by the CTS that the mandatum requirement apply only to tenured faculty members. The *Guidelines* define teaching as the “. . . regular presentation of academic material in an academic institution. Occasional lectures as well as preaching . . .”<sup>41</sup> are not covered by the *Guidelines*. On one hand, as it appears to make sense to apply the mandatum requirement to all regular instructors, the bishops should consider tightening up the language so as to make it clear exactly who is covered. Even if students are often unaware of the “niceties” of academic rank, part-time faculty can teach as authoritatively as full-time

faculty members. Moreover, in an overlap with the second concern, such a vague requirement as “regular instructors” may require more work than may be reasonably necessary especially since part-time faculty may not publish in the areas of their teaching expertise. Second, the CTS unsuccessfully lobbied to limit reviews of a theologian’s work to published or taped materials based on the fear that statements in class could be misinterpreted. Although the *Guidelines* simply do not recognize such a distinction, it appears that the CTS has raised a valid point here since students, non-majors who are simply fulfilling degree requirements, may misunderstand nuances of theological arguments or may interpret classroom rhetoric literally. While not necessarily excluding the content of statements made in class from review, the *Guidelines* should address with specificity exactly what materials may be subject to review.

The final unresolved matter involves the Bishops’ unwillingness to create an appeals committee of their own, preferring to follow canon law, providing only for appeals directly to Rome. Clearly, the Catholic Church is not a democracy. However, since the Church over time has eloquently voiced its concerns for the rights of workers and insofar as faculty members in American institutions are accustomed to significant levels of due process, the *Guidelines* should provide alternative means of dispute resolutions and appeals processes for faculty members.

### *Critics of Ex Corde Ecclesiae*

#### *Internal Critics*

*Ex Corde* faces criticism on two fronts: those within the Church who raise arguments based on academic freedom, and secular critics who present legal arguments over the constitutionality of aid to religiously-affiliated educational institutions. The first, and by far more formidable critics, have arisen within the ranks of the Roman Catholic Church. More specifically, even as draft *Guidelines* have been promulgated, a campaign of academic resistance to *Ex Corde* continues.<sup>42</sup> Although only a few prominent theologians have expressed their unwillingness to obtain a *mandatum*,<sup>43</sup> the Bishops appear to be unwilling to pursue the issue.

If the Bishops develop the resolve to enforce *Ex Corde*, they are likely to prevail as case law is in their favor since the courts have long-recognized the rights of religious employers to resolve doctrinal matters free of judicial oversight. For example, in *Corporation of the Presiding Bishop v. Amos*,<sup>44</sup> the Supreme Court recognized the needs of religious employers under Title VII<sup>45</sup> when it unanimously ruled in favor of the Church of the Latter Day Saints as it imposed a requirement of good standing as a Mormon in order to

be employed as a custodian supervisor of a gymnasium operated by the Church.

Lower federal courts have followed a similar trend. For example, in *Pime v. Loyola University*,<sup>46</sup> the Seventh Circuit found in favor of the Jesuit Catholic Loyola University of Chicago's reserving three faculty positions in its Philosophy Department for Jesuit priests. In so doing, the court relied on Title VII in rejecting the claims of a Jewish job applicant who was denied a position due to the University's overt preference for a Jesuit priest who was a member of the religious community. The court reasoned that the University could maintain a preference for Jesuits on the basis that being a Jesuit was a bona fide occupational qualification. In so doing, the court relied on that part of Title VII which reads: "[i]t shall not be an unlawful employment practice for a school, college, university, or other educational institution . . . to hire and employ employees of a particular religion if . . . the curriculum of such school, college, university, or other educational institution . . . is directed toward the propagation of a particular religion."<sup>47</sup>

In *EEOC v. Catholic University of America*,<sup>48</sup> the Circuit Court of Appeals for the District of Columbia upheld the denial of a nun's application for tenure in the Canon Law Department along with her charge of sexual discrimination. The court affirmed that the Free Exercise Clause forbade judicial review of the dispute insofar as her teaching Canon Law had a significant impact on the graduate education of Catholic priests. The court also ruled that the University was entitled to the so-called "ministerial exemption" under Title VII in deciding who was qualified to teach a subject so closely aligned to the preparation of priests and that its intervention would have violated the Establishment Clause.

Most recently, in *McEnroy v. St. Meinrad Sch. of Theology*,<sup>49</sup> an appellate court in Indiana upheld the dismissal of a breach of contract action filed by a professor at a Roman Catholic seminary whose employment was terminated, at least in part, because she signed a petition calling for the ordination of women. The faculty member was dismissed since such public dissent violated canon law and required her removal from the faculty. The court reasoned that since its involvement would clearly and excessively entangle it with religion, it lacked subject matter jurisdiction to resolve the dispute. To the extent that *Ex Corde* might generate litigation, there is no reason to believe that other courts would rule any differently in any of these three cases. In fact, if anything, given *Ex Corde's* goal of maintaining additional institutional control over faculties, it is all the more likely that courts will rule in the Church's favor.

Even as the fight over *Ex Corde* takes shape, an interesting situation is emerging at Duquesne, a Catholic University in Pittsburgh. A tenured fac-

ulty member, and former nun, was suspended with pay and barred from teaching theology courses at the university after she left the Catholic Church and was ordained an Episcopal priest. However, she will be allowed to teach in her specialties of health care ethics, ecological studies, and feminist ethics. Duquesne's President acknowledges that the professor ". . . has every right to become an ordained Episcopal priest. The question is whether we have a right to have someone teaching theology who is in communion with the church."<sup>50</sup> The faculty member indicated that she will not sue the university because she wishes to continue teaching.

### *Secular Critics*

Legal challenges by *Ex Corde's* secular critics<sup>51</sup> who forecast grave Establishment Clause<sup>52</sup> problems are likely to be unsuccessful. There is an abundance of case law from the Supreme Court, both in elementary and secondary schools as well as in higher education, which demonstrate its acceptance of various forms of state aid to students, especially in higher education where it most commonly appears in the form of guaranteed student loans to religiously affiliated universities. Strict separationist critics of *Ex Corde* who voice concerns over Establishment Clause concerns simply wish to prevent Roman Catholic colleges and universities from manifesting their shared Catholic identities in any ways that would be discomforting to the bureaucrats who supervise the regulatory administrative secular state. These critics certainly do not want Catholic colleges and universities to receive any governmental support. Critics would prefer to see the multibillions of dollars spent directly and indirectly (typically through student loans) on, and at, Catholic colleges and universities be instead reserved exclusively for purely secular public colleges and universities.

In light of a significant line of cases in elementary and secondary education over the past decade, the Supreme Court has unequivocally rolled back some of its more onerous prohibitions against state aid to religiously affiliated elementary and secondary schools as well as the students who attend these schools. The Court has found that such assistance is constitutionally acceptable under the auspices of the Child Benefit Test, especially where it is directed at students rather than their schools.

The Court's shift in elementary and secondary educational settings began in *Zobrest v. Catalina Foothills School District*,<sup>53</sup> wherein it permitted the on-site delivery of a sign language interpreter to a student at a Roman Catholic high school in Arizona. The Court reasoned that since the interpreter was a mere conduit of information, the student was entitled to receive the services because he, not the school, was the primary beneficiary of the aid.

Four years later, in *Agostini v. Felton*,<sup>54</sup> the Court further reinvigorated the Child Benefit Test by dissolving an injunction that prohibited the New York City Board of Education from sending public school teachers into religiously affiliated non-public schools to provide remedial education to economically disadvantaged inner city children under Title I of the Elementary and Secondary Education Act. Most recently, in *Mitchell v. Helms*,<sup>55</sup> the Court further expanded the parameters of the Child Benefit Test in upholding the constitutionality of Chapter 2 of Title I of the Elementary and Secondary Education Act of 1965, under which the federal government distributes funds to state and local governments which, in turn, loan educational materials, including computer software and hardware, library materials, and other curricular materials. There is little left of the wall of separation metaphor or reality.

In higher education, it has been clear since the 1970s that the Court is not at all fearful of breaching the wall of separation between Church and State. In *Tilton v. Richardson*,<sup>56</sup> the first case in the so-called *Tilton* trilogy,<sup>57</sup> the Supreme Court upheld the right of four church-related colleges and universities to receive federal aid under Title I of the Higher Education Facilities Act of 1963 which provided construction grants for building and facilities used for secular education purposes. The Court refused to find any Establishment Clause violation where religious indoctrination was not a “substantial purpose” or activity of the schools. In *Hunt v. McNair*,<sup>58</sup> the second case of the trilogy, the Court similarly upheld the constitutionality of financing through issues of revenue bonds in South Carolina to benefit a Baptist college. Relying on the *Lemon* test,<sup>59</sup> the Court was satisfied that the South Carolina statute’s purpose was secular, did not have a principal or primary effect of advancing religion, and did not foster government entanglement with religion. In *Roemer v. Board of Public Works*,<sup>60</sup> the final case in the trilogy, the Court found that a Maryland statute did not violate the Establishment Clause because the aid, in the form of annual non-categorical grants given as subsidies to eligible colleges and universities within the State, neither had the principal or primary effect of advancing religion nor fostering governmental entanglement with religion.

Finally, in *Witters v. Washington Department of Services for the Blind*,<sup>61</sup> the Court held that a vocational rehabilitation program in Washington that provided assistance to a blind student as he studied for the ministry at a Bible college did not violate the Establishment Clause. In serving as a harbinger of change that was evidenced seven years later in *Zobrest*, the Court was satisfied that the program was constitutionally permissible since the student, not his college, was the primary beneficiary of the state aid.

## *Reflections*

If *Ex Corde* is to mean anything substantive as Catholic universities seek to reinvigorate their religious identities, then dedicated Church leaders must devise means to nurture a truly Catholic institutional identity at each Catholic school. Moreover, such an identity must be consistent with “the four distinctive characteristics that are essential for Catholic identity: Christian inspiration in individuals and the university community; Reflection and research on human knowledge in the light of the Catholic faith; Fidelity to the Christian message in conformity with the Magisterium of the Church; Institutional commitment to the service of others.”<sup>62</sup>

Clearly, *Ex Corde* seems to present a paradox for Catholic theologians who, on one hand, seek to remain true to their academic disciplines in a spirit of academic freedom while, on the other hand, must be responsive to the Church. While it is true, and *Ex Corde* reiterates, that theologians teach in their own names rather than that of the Church, they must face the important question of whether they owe any duty to teach in a doctrinally acceptable manner. Even in acknowledging the tension between the need for academic freedom accompanied by legitimate grounds for inquiry and the Church’s right to maintain doctrinal purity at Catholic institutions, the vociferousness of opposition within the Church to the full and authentic implementation of *Ex Corde* is astonishing.

As noted, since secular case law is receptive to the vigorous implementation of *Ex Corde*, if the Bishops develop the commitment to move toward full implementation, then it is likely to survive legal challenges. Paradoxically, then, it is not the secular state that stands in opposition. It is the academic theologians and their administrative allies in the Catholic university bureaucracies who are most obdurate. What is even more disquieting is that American Bishops appear to have largely acquiesced to the critics, thereby effectively rendering *Ex Corde* dead on arrival.

The Bishops mistakenly believe that the Catholic faith will remain vibrant at the grass-roots level among faithful students and faculty, even in the absence of their pastoral leadership and protection. While the Bishops wash their hands and abdicate their responsibility, the faithful are rendered completely exposed and vulnerable to *Ex Corde*’s enemies. Recent developments in Catholic universities give powerful witness to the extent to which the liberal establishment has flexed its muscle in controlling these schools. For example, the Jesuit University of San Francisco, amid considerable controversy, fired the directors of the St. Ignatius Institute, a conservative “great books” program,<sup>63</sup> home to some 150 of the institutions’ 7,000 students. Further, Georgetown University recently announced the appoint-

ment of a new President, a lay bureaucratic minion who has never held academic rank. The new President<sup>64</sup> advanced through the ranks of Leo O'Donovan, S.J.'s administration which was embroiled in the controversy over whether crucifixes should remain in classrooms at Georgetown<sup>65</sup> and having Larry Flynt, notorious *Hustler* magazine publisher, deliver a speech on campus that began with his grabbing his crotch and declaring, "the Catholic Church has had its hand on our crotch for two thousand years."<sup>66</sup>

Meanwhile, mainstream Catholics are woefully catechized. For example, when the second author covers the Roman Catholic Church's social teachings in his Advanced Labor Law course each Spring, most of his Catholic students cannot explain what an encyclical is or define dogma. The students have only vague recollections of the former as some aspect of *Humanae Vitae*, *Human Life*, Pope Paul VI's encyclical most commonly associated with the Church's stance on birth control. The situation worsens as students cannot name more than a few of the Ten Commandments. Students have no understanding of St. Ignatius of Loyola or St. Vincent de Paul even though some of them have graduated from Jesuit or Vincentian (as is St. John's University, the alma mater of the first author and the employer of the second) institutions founded by the orders of the two saints. Ten years earlier, the first author, in teaching undergraduate theology to adult, non-traditional students in evening programs at the same university, found a similar dearth of understanding of Church teachings. The good news, such as it is, is that a few students each year, often non-Catholic and non-Christian, are sufficiently intrigued to learn more about the Church's rich, but largely untapped, reservoir of teachings.

Insofar as the representative vignettes invariably occur each year, educational leaders at Catholic universities, along with local Bishops<sup>67</sup> who are responsible for implementing *Ex Corde*, must take proactive steps insisting on nurturing Catholic identity as pockets of faith and hope remain. Confronted with the malaise that has long infected many Catholic universities, it will take years before *Ex Corde Ecclesiae's* vision is fully achieved. Even so, it is crucial to make immediate good faith efforts toward compliance.

If things continue as they have started, this age will thus be a failed reminder of what might have been. Whether there will be anything authentically Catholic left to revive or rescue will be a good question. In any event, *Ex Corde's* resolute enemies are legion while its champions are few. *Ex Corde* must wait a future day when the innumerable young Catholic lives and vocations which have been left tragically adrift, unfulfilled, and unrealized come to the fore and reinvigorate the Catholic Church's deep and rich intellectual history by seeking the full implementation of *Ex Corde Ecclesiae*.

## Notes

1. The magisterium is the official teaching office and authority of the Catholic Church. See Francis A. Sullivan, *magisterium*, in *Encyclopedia of Catholicism* 805-07 (Richard P. McBrien General ed., 1995).
2. See Alessandra Stanley. 'Pope Tightens Grip by Rome on its Bishops.' *New York Times*. (July 24, 1998): A1-2 (discussing the Pope's efforts to tighten his control of Bishops' conferences around the world).
3. An apostolic constitution is a papal document dealing with a matter that is of importance for the universal church. Richard P. McBrien (Ed). "Apostolic Constitution." *Encyclopedia of Catholicism*. Vol. 76, 1995. "Ex Corde Ecclesiae" are the opening words of the letter in its introduction, "Born From the Heart of the Church." Hereinafter also cited as *Ex Corde*.
4. Unless otherwise noted, this article uses "university" to include colleges and universities. For background on Catholic universities in the United States, see John P. Langan (Ed.). *Catholic Universities in Church and Society: A Dialogue on Ex Corde Ecclesiae*. 1993. David J. O'Brien. *From the Heart of the American Church: Catholic Higher Education and American Culture*. 1994. Theodore M. Hesburgh (Ed.). *The Challenge and Promise of a Catholic University*. 1994.
5. The battle over *Ex Corde Ecclesiae* has been looming for some time. See Beth McMurtrie. 'How Catholic Should Catholic Colleges Be?' *Chronicle of Higher Education*. (Sept. 17, 1999): A16-18. For additional background, see Kit Lively. 'U.S. Bishops Endorse the Vatican's Policy Statement on Catholic Colleges.' *Chronicle of Higher Education*. (November 22, 1996): A 8-9.
6. Section 2.c. of the *Guidelines* specifically identifies Sacred Scripture; dogmatic, moral, and pastoral theology; canon law; liturgy; and Church history. National Conference of Catholic Bishops. "Guidelines Concerning the Academic Mandatum, Draft." November 2000. Available on-line at <http://www.nccbuscc.org/bishops/guidelines.htm>.
7. *Ibid.*, section 1.a.
8. "If the bishops decide to face Rome rather than their people, it may not be all that bad. Trustees, administrators, faculty, and students can find some wiggle room until the document [*Ex Corde*] moves slowly to a back shelf and a new Pope writes something that rescinds it. A few wacky bishops will try to implement the specifics. Most will hope that it just sits on the shelf in the president's office, gathering dust." Tim Unsworth. "Wiggle Room, Common Sense Will Save Church From *Ex Corde Ecclesiae*." *National Catholic Reporter*. (November 5, 1999): 16-17.
9. *Ex Corde Ecclesiae*. Part I, Article 27.

10. *Ex Corde Ecclesiae*. Part II, Article 4, Section 2.
11. *Ex Corde Ecclesiae*. Part II, Article 4, Section 3.
12. According to Code 812, “[i]t is necessary that those who teach theological disciplines in any institute of higher studies have a mandate from the competent ecclesiastical authority.”
13. *Ex Corde Ecclesiae*. Part II, Article 4, Section 4.
14. *Ex Corde Ecclesiae*. Part II, Article 4, Section 4.
15. “It [the Catholic University] possesses that institutional autonomy necessary to perform its functions effectively and guarantee its members academic freedom, so long as the rights of the individual person out of the community are preserved within the confines of the truth and the common good.” *Ex Corde Ecclesiae*. Part I, Article 12. Part I, Article 29 goes on to say that “The Church, accepting ‘the legitimate autonomy of human culture and especially of the sciences,’ recognizes the academic freedom of scholars in each discipline in accordance with its own principles and proper methods, and within the confines of the truth and the common good. Theology has its legitimate place in the university alongside other disciplines. It has proper principles and methods which define it as a branch of knowledge. Theologians enjoy this same freedom so long as they are faithful to these principles and methods.”
16. On June 7, 2000 the National Conference of Catholic Bishops received formal approval for its application of *Ex Corde* to Catholic colleges and universities in the United States. This statement is available on-line at <http://www.nccbuscc.org/comm/archives/00-130.htm>. The *Application* is on-line at <http://www.nccbuscc.org/bishops/exCorde.htm> See Kenneth D. Whitehead. ‘Will *Ex Corde Ecclesiae* Really Be Implemented in the United States?’ *Fellowship of Catholic Scholars Quarterly* 23. (No. 1, Winter 2000): 3.
17. *Ex Corde* declares that “Catholic members of the university are also called to a personal fidelity to the Church with all that this implies. Non-Catholic members are required to respect the Catholic character of the university, and the university, in turn, respect the religious liberty.” *Ex Corde*. Part I, Article 27. *Ex Corde* continues: “All teachers and all administrators, at the time of their appointment are to be informed of the Catholic identity of the institution and its implications, and about the responsibility to promote, or at least respect, that identity.” *Ex Corde*. Part II, Article 4, Section 2.
18. *Ibid.*, Part II, Article 4, Section 4.
19. Article 4 of the November 17, 1999 *Ex Corde Ecclesiae* norms approved by the Bishops states: “. . . the university should strive to recruit and appoint Catholics as professors so that, to the extent possible, those committed to the witness of the faith will constitute a majority of the faculty.”

20. Richard P. McBrien. 'Why I Shall Not Seek a Mandate.' *America*. (February 12, 2000): 14-16. McBrien's was apparently the first public proclamation of non-compliance. In an interview on February 8, 2000, McBrien not only reiterated his intended refusal to seek a mandate, stating that "I'm simply the first one to come out," but also predicted that most of his colleagues would also refuse to do so. "Theologian: Most profs will skirt bishops' edict." *Dayton Daily News*. (February 9, 2000): 3A.
21. For a response to the wide range of *Ex Corde's* critics, including a call for Catholic affirmative action, see David L. Gregory and Charles J. Russo. "Some Proposals to Counter the Continuing Resistance to *Ex Corde Ecclesiae*." *St. John's L. Rev.* 74 (in press).
22. See Peter C. Phan. "To Be Catholic Or Not to Be: Is It Still The Question? Catholic Identity and Religious Education Today." *Horizons* (Vol. 25, 1998): 159 (discussing different perceptions of what it means to have a Catholic identity).
23. The *Application* is available on-line at <http://www.nccbuscc.org/bishops/excorde.htm>.
24. Beth McMurtrie. "Vatican backs Catholic-Colleges Rules That Spur Fears Over Academic Freedom." *Chronicle of Higher Education*. (June 16, 2000): A18.
25. Gustav Niebuhr. "Bishops Vote for Stricter Ties with U.S. Catholic Colleges." *New York Times*. (November 18, 1999): A1. Jerry Filtreau. "U.S. Bishops Address Universities." [*Brooklyn*] *Tablet*. (Nov. 27, 1999): 1, 18. Thomas J. Reese. "The Bishops Mandatum." *America*. (December 4, 1999): 3.
26. National Conference of Catholic Bishops. *Guidelines Concerning the Academic Mandatum*, Draft. November 2000. *Supra* note 6. See also Beth McMurtrie. "Vatican backs Catholic-Colleges Rules That Spur Fears Over Academic Freedom." *Chronicle of Higher Education*. (June 16, 2000): A18.
27. The CTS voiced its concerns about the *Application* in "Theologians, Catholic Higher Education, and the Mandatum: A Report by the Ad Hoc Committee on the Mandatum." September 2000. Available on-line at [http://www.bc.edu/bc\\_org/avp/cas/theo/ctsa/mandatrep.pdf](http://www.bc.edu/bc_org/avp/cas/theo/ctsa/mandatrep.pdf)
28. *Guidelines*, *supra* note 6.
29. See "President's Letter to Most Reverend Daniel Pilarczyk." *Fellowship of Catholic Scholars Quarterly*. (Vol. 23, No. 4, 2000): 23. For an excellent discussion on the implementation of the norms, see *Fellowship of Catholic Scholars Quarterly*. (Vol 24, No. 1, 2001): 3-27 (including a series of reactions by members of the organization's Board of Directors).

30. *Guidelines*, *supra* note 6 at section 1.
31. *Ibid.*, Section 2.
32. *Ibid.*, Sections 3-4. A sample attestation can be found on-line at <http://www.nccbuscc.org/bishops/samplemand.htm>.
33. Beth McMurtrie. "Bishops Release a Draft of Guidelines for Roman Catholic Theologians." *Chronicle of Higher Education*. (June 16, 2000): A18.
34. *Guidelines*, *supra* note 6. Section 5.
35. *Ibid.*, Section 6. This requirement is based on code 1733 § 1.
36. *See* "Doctrinal Responsibilities: Approaches to Promoting Cooperation and Resolving Misunderstandings Between Bishops and Theologians." *Origins* 19. (June 1989): 97, 99-119.
37. *See* "Recourse Against Administrative Decrees." *Code of Canon Law, Canons 1732-1739*.
38. *Guidelines*, *supra* note 6. Section 7.
39. *Ibid.*, Section 8.
40. Beth McMurtrie. "Bishops Release a Draft of Guidelines for Roman Catholic Theologians." *Chronicle of Higher Education*. (June 16, 2000): A18.
41. *Guidelines*, *supra* note 28. 2.b.
42. Our comments are not directed primarily at theologians and other academics and professional organizations, such as the Association of Catholic Colleges and Universities who are engaged in legitimate discourse with the Bishops. While there are significant issues at stake, many theologians, especially those in the religious life who have taken vows of obedience, are going to have to decide whether their loyalty rests with the Church or their academic discipline, especially in light of the draft Guidelines pertaining to the mandatam. *See* Una M. Cadegan, Dennis M. Doyle, Bro. Raymond L. Fitz [President], John O. Geiger [Provost], James L. Heft, & Terrence Tilley. "Dear Bishops: Open letter on *Ex Corde Ecclesiae*." *Commonweal*. (November 5, 1999): 16-18. (Open letter from Faculty and Administration at the University of Dayton urging the bishops to move slowly in implementing *Ex Corde Ecclesiae*); J. Donald Monan and Edward A. Malloy. "*Ex Corde Ecclesiae* Creates an Impasse." *America*. January 30, 1999.
43. *See supra* note 20.
44. 483 U.S. 327 (1987).
45. For a discussion of the application of Title VII, which prohibits employment discrimination based on race, color, religion, sex, and/or national origin, *see* Ralph D. Mawdsely. *Legal Problems of Religious and Private Schools*. 4<sup>th</sup> ed. (2000): 214-227.

46. 803 F.2d 351 (7th Cir. 1986).
47. 42 U.S.C.A. § 2000e-2(e)(2).
48. 83 F.3d 455 (D.C. Cir. 1996). For a discussion of this case and the potential non-ramifications of Title VII on employment decisions in Catholic Colleges and Universities under *Ex Corde Ecclesiae*, see Charles J. Russo, & David L. Gregory. “Some Reflections on the Catholic University’s Tenure Prerogatives.” 43 Loyola [New Orleans] L. Rev. 181 (1997).
49. 713 N.E.2d 334 (Ind. Ct. App. 1999).
50. See Beth McMurtrie. “Duquesne U. Punishes Professor Who Became an Episcopal Priest.” *The Chronicle of Higher Education*. (February 16, 2001): A16.
51. See F. King Alexander and Clinton W. Alexander. “The Reassertion of Church Doctrine in American Higher Education: The Legal and Fiscal Implications of the *Ex Corde Ecclesiae* for Catholic Colleges and Universities in the United States.” *Journal of Law & Education*. (Vol. 29, 2000): 149. For a response to the Alexanders, see Charles J. Russo & David L. Gregory. “The Constitutional Vitality of *Ex Corde Ecclesiae* and A Response to the Alexanders’ Despair.” *Journal of Law and Education*. (Vol. 30, 2001): 307.
52. According to the Establishment Clause, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .”
53. 509 U.S. 1 (1993).
54. 521 U.S. 203 (1997).
55. 120 S. Ct. 2530 (2000).
56. *Tilton v. Richardson*, 403 U.S. 672 (1971).
57. For an extensive discussion of the *Tilton* trilogy, see David L. Gregory. “Where to Pray? A Survey Regarding Prayer Rooms in A.B.A. Accredited, Religiously Affiliated Law Schools.” 1993 B.Y.U. 1287 (concluding that religiously affiliated law schools can construct prayer rooms on-site even if they and their students receive government funds).
58. *Hunt v. McNair*, 413 U.S. 734 (1973).
59. The Court’s reluctance to assist religious schools that coalesced in *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (striking down aid programs in Maryland and Rhode Island on the basis that they violated the Establishment Clause). Chief Justice Burger’s majority opinion in *Lemon* enunciated the test in declaring that every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not

foster “an excessive government entanglement with religion.” *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). (internal citations omitted). For a discussion of the history of and parameters of state aid under *Lemon* and the Child Benefit Test see Charles J. Russo, Gerald M. Cattaro, & Allan G. Osborne. “State Aid to Religiously Affiliated Non-Public Schools: An Emerging Trend or Same Old Same Old?” *Journal of Research in Christian Education*. (Vol. 8, No. 2, 1999): 267.

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

61. 474 U.S. 481 (1986), rehearing denied, *Witters v. Washington Department of Services for the Blind*, 475 U.S. 1091 (1986). In fairness, it is worth noting that on remand, the Supreme Court of Washington, in *Witters v. State Comm’n for the Blind*, 771 P.2d 1119 (Wash. 1989), cert. denied sub nom. *Witters v. Washington Dept. of Services for the Blind*, 493 U.S. 850 (1989) later found that language in the state constitution prohibited the use of public funds for religious instruction.

62. *Ex Corde Ecclesiae*, Part I, Section 13.

63. See Kelly Yamanouchi (Associated Press). “Rift Widens at Catholic University: Conservatives Say They are Silenced.” *Chicago Tribune*. 2001.WL 4056980, March 30, 2001. Kelly Yamanouchi (Associated Press). “Classical Student Protest in San Francisco; Some Oppose USF President’s Decision to Restructure Traditional Program.” *The Washington Post*. (April 1, 2001): A17. Disappointingly, despite an appeal that the Pope intervene, from one of the co-founders of the Institute Joseph D. Fessio, S.J., there was no indication that he would do so. “Vatican Won’t Intervene in San Francisco Controversy.” *America*. (April 16, 2001): 5.

64. “Georgetown University Announces New President.” *U.S. Newswire*. 2001 WL 4140069, Feb. 16, 2001.

65. See also Kit Lively. “A Debate Over Crucifixes Provokes Larger Questions at Georgetown U.” *Chronicle of Higher Education* (discussing the place of crucifixes in the larger context of the University’s Catholic identity).

66. Caryle Murphy. “Archdiocese Blasts Talk By Flynt at Georgetown.” *Washington Post*. (May 1, 1999): B7 (calling Georgetown’s decision to allow Flynt to speak unbelievable and indefinable). Martin Van Der Werf. “Georgetown Growing Pains: Eager Applicants, Troubled Finances,” *Chronicle of Higher Education*. (January 28, 2000): A38-39. (quoting university officials as saying that they would rather have not had Mr. Flynt speak on the campus, but defending his right to be there).

67. For a discussion of the Bishop’s role, at least in a law school setting, see David L. Gregory. “The Bishop’s Role in the Catholic Law School.” 11 *Regent L. Rev.* 23 (1998-1999).