

THE WALL STREET JOURNAL.

This copy is for your personal, non-commercial use only. To order presentation-ready copies for distribution to your colleagues, clients or customers visit <http://www.djreprints.com>.

<http://www.wsj.com/articles/bending-religious-colleges-to-secular-rules-1468537555>

OPINION | COMMENTARY | HOUSES OF WORSHIP

Bending Religious Colleges to Secular Rules

An antidiscrimination law in California would force judges to discern the nature of faith.



PHOTO: GETTY IMAGES

By **MICHAEL A. HELFAND**

July 14, 2016 7:05 p.m. ET

Faith-based colleges—and religious liberty broadly—face an uncertain future in California. State legislators in Sacramento are considering a bill called the Equity in Higher Education Act, ostensibly to prohibit religious schools from discriminating against students. Yet it would actually create legal ambiguity, forcing judges to wade into the murky waters of theology to disentangle true religious belief from discriminatory animus.

The bill will be put before the California state Assembly Appropriations Committee in August. If enacted, it could spark similar efforts around the country. Yet instead of regulating the internal affairs of religious institutions, California could simply require them to be clear about their rules. This compromise would protect religious liberty, avoid dangerous legal ambiguity and prevent discrimination.

Under current California law, religious colleges that receive state funds can be exempt from antidiscrimination laws. Institutions qualify for exemptions if they are “controlled

by a religious organization” and if application of antidiscrimination laws “would not be consistent with the religious tenets of that organization.” This is what allows faith-based colleges to, for example, enforce a code of conduct that bans same-sex relationships.

In March, legislators sought to limit the religious exemption to a few theological institutions, such as those preparing ministers. Broader faith-based colleges would still be required to accommodate those who disagree with the school’s religious principles. But colleges pushed back.

State Sen. Ricardo Lara, who wrote the bill, followed up in June with a revised proposal. It prohibited all colleges from discriminating on the basis of sexual orientation and gender identity. But the legislation also included an exemption for religious institutions implementing rules “concerning religion.”

Naturally, this only created more confusion. What if a faith-based college requires students to sign a statement affirming a religious belief that marriage is between one man and one women? Would that count as discrimination on the basis of sexual orientation, or would it be exempt as “concerning religion”? What about single-sex bathrooms? How would a court, faced with a lawsuit citing this proposed statute, respond?

Another round of revisions came, but more rhetorical changes won’t help. The bill assumes that courts can neatly divide these cases between discrimination and religiously motivated rules. In practice, this will prove impossible.

The Supreme Court has long recognized an alternative to the subjective decisions this law would create. Consider *Watson v. Jones*. Decided in 1872, the case pitted factions of a Kentucky Presbyterian church against each other in a dispute over who owned the church’s property. Rather than resolving the dispute, the Supreme Court held that people who join together to pursue religious objectives implicitly consent to the institution’s rules, granting it some legal autonomy to set its policies.

Underlying this concept is the belief that citizens should make religious decisions for themselves—free from government compulsion. People who choose to join a religious institution agree to accept the rules that come with membership. The state should recognize that. Conversely, Americans should be skeptical if legislators try to interfere with internal religious rules without an extremely pressing justification, such as protecting the safety of vulnerable citizens.

The

MORE HOUSES OF WORSHIP

- Lutherans Armor Up to Defend Women (<http://www.wsj.com/articles/lutherans-armor-up-to-defend-women-1469141810>) July 21, 2016
- My Muslim Christmas in July (<http://www.wsj.com/articles/my-muslim-christmas-in-july-1467932383>) July 7, 2016
- God and the Fourth of July (<http://www.wsj.com/articles/god-and-the-fourth-of-july-1467328144>) July 1, 2016
- The Book of Job’s Big Question (<http://www.wsj.com/articles/the-book-of-jobs-big-question-1466723058>) June 23, 2016

solution is for states to require religious organizations to be transparent about their

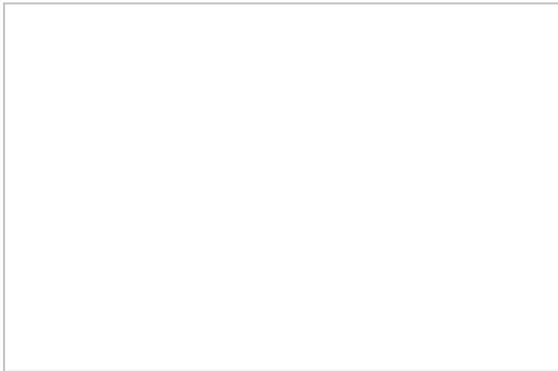
rules and policies. Notions of “implied consent” only make sense when people can join these institutions with their eyes open. Students shouldn’t be placed in situations where they unwittingly join a faith-based college only to learn later that their beliefs and identities aren’t welcome on campus.

In this context, California’s Equity in Higher Education Act isn’t all bad. The bill would require faith-based colleges to prominently disclose any exemptions from antidiscrimination law at the university’s “main administrative building” and in “written materials sent to prospective students.” Such measures bolster the claim that people who attend faith-based colleges do so because they embrace the rules, policies and aspirations of the institution.

The unique features of faith-based colleges—such as their ability to integrate religious commitment, academic inquiry and social justice—are worth preserving. One way is to ensure that prospective students know what will be expected of them on campus. That would do much more to promote individual identity and institutional pluralism than having courts try to determine what’s truly in the hearts of the faithful.

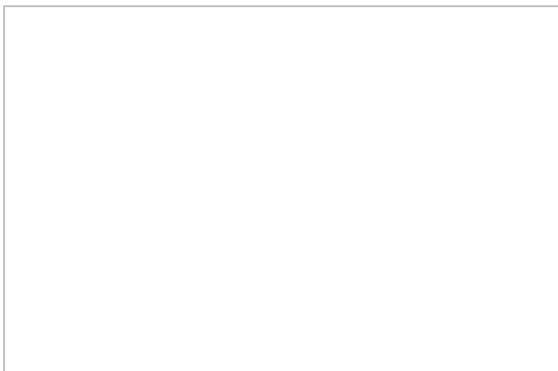
Mr. Helfand, an associate professor at Pepperdine University School of Law, is associate director of the university’s Glazer Institute for Jewish Studies.

What To Read Next...



AUTOS

Elon Musk Unveils Plans for New Tesla Vehicle Types



PERSONAL TECHNOLOGY: JOANNA STERN

This \$50 Smartphone May Be All You