THE GATHERING STORM: FEDERAL LAWS THAT HAVE A SERIOUS POTENTIAL OF INTERFERING WITH THE MISSION AND CHARACTER OF EVANGELICAL CHRISTIAN COLLEGES AND UNIVERSITIES

James A. Davids

ABSTRACT

In the early 1980s, the University of Notre Dame Law School’s Center for Constitutional Studies surveyed 801 religiously affiliated colleges to determine which federal laws and regulations had a “serious potential” of interfering with the character and mission of the schools. From the 226 responses, the Center identified eleven issues, three of which were: (1) Establishment Clause issues (the equitable public funding of religiously affiliated colleges and/or their students without violating the First Amendment’s Establishment Clause); (2) tax exemption issues; and (3) the potential loss of religious hiring preference for faculty and staff. Using historical and legal research methods, this study updated the status of the law on these issues as modified to meet current conditions.

With respect to the Establishment Clause, this study found that the courts since 1982 have viewed public funding of religious schools that integrate faith and learning differently based on whether the funding is given directly to the schools or indirectly. If the funding is indirect (for instance, the government gives educational vouchers to beneficiaries who then use the vouchers at a religious college), the funding is constitutional since the beneficiary is exercising his/her independent choice and there is no governmental endorsement of the school. If there is no independent choice by the beneficiary and the governmental funding is paid...
directly to the school, the funding is generally constitutional if the aid is secular (it is not used for religious purposes like worship), it is distributed on a neutral basis to public and religious schools, and there is no evidence of the school diverting the aid from secular to religious purposes. This study also discusses under what conditions religious colleges and universities can constitutionally obtain low interest construction bonds from state agencies.

Regarding loss of tax exemption, this study found that as the result of concerted efforts to defy court orders to desegregate schools, the U.S. Supreme Court in the 1983 *Bob Jones University* case held that if a charitable organization (like schools) violates a national fundamental public policy, the charity will lose its tax-exempt status. Establishing a national fundamental public policy requires the active participation of all three branches of the federal government spanning over decades. Congress must participate through repeated legislation, the Supreme Court must participate through an unbroken line of near unanimous cases, and presidents must participate through multiple executive orders. Since the *Bob Jones University* case, neither the Internal Revenue Service nor the courts have found discrimination other than racial discrimination in education to be a violation of a national fundamental public policy.

Regarding the First Amendment and statutory rights of religious colleges and universities to discriminate in employment in favor of co-religionists, this study explored the 2012 *Hosanna-Tabor* case and its implications for religious educational institutions. This study further examined the post-1982 cases interpreting the religious exemptions under the Civil Rights Act of 1964, as amended, which declared the exemptions constitutional and applicable to many school employment positions. Finally, this study found the legal principles applicable to the right of religious institutions of higher education to make employment decisions based on religion.