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CURRAN VERSUS CATHOLIC UNIVERSITY OF AMERICA (*)

Introduction. — I. Commentary. — II. Selected sections of the opinion of Judge Weisberg.

Introduction.

America's most celebrated recent episode of ecclesiastical « dissent » reached its legal conclusion in *Curran v. Catholic University of America*. Fr. Curran says he will not pursue appellate review. Consequently, Judge Weisberg's ruling in favor of CUA, plus Fr. Curran's refusal to teach anything but Catholic theology, mean that the « dissenter » will pursue his academic career elsewhere. But, while conclusive, the ruling is hardly the « landmark decision » one Catholic editor termed it (1). For one thing, Judge Weisberg's is a trial court of limited territorial jurisdiction, so the opinion possesses minimal precedential value. It also broke no new legal ground. Indeed, Judge Weisberg scrupulously avoided what he called the « global constitutional issues » of church and state freighting the case. His unmistakable controlling aspiration was to treat the case as a generic employment contract dispute, analytically indistinguishable from (say) a dispute between Harvard and one of its biology professors. He largely succeeded in doing so, which is the remarkable thing about the opinion. His holding was that Fr. Curran effectively *agreed* that he would teach Catholic theology only so long as he possessed a canonical mission. He further agreed that the Holy See's decision withdrawing that mission was both procedurally and substantively correct.

How could a theological and ecclesiological controversy of such magnitude be emptied of its sacred content? How could Judge Weis-

(*) Si tratta di una presentazione del « caso Curran ». Si compone di un commento del prof. Bradley e di un estratto della sentenza a cura dello stesso prof. Bradley.

(1) *Crisis* (April 1989) p. 2.

berg so completely put aside constitutional issues of religious liberty, particularly those grounded in the First Amendment to the United States Constitutions? This commentary suggests that he did so consonant with prevailing, legally authoritative principles, and that those principles defeated « dissent » in this battle but actually work to secure its victory in the war. The pivot of the conflict is « central dogma of modernity »: the « priority of personal autonomy over against moral, religious and to a lesser extent political authorities » (2). Cardinal Ratzinger made a related observation: the modern world is bifurcated into spheres of « action » and « reflection ». In the former, a functionally — grounded authority is commonly (and uncritically) accepted; in the latter, no authority is pertinent (3). J.A. Di Noia, O.P., adds that the debate on « dissent » concentrated by Fr. Curran's difficulties was over the nature of theology itself (4). Judge Weisberg's opinion thus stands squarely astride the most important questions of our time even while it affected a pose of complete « neutrality ». The breadth of the issues alone suggests that « neutrality » might not be an available option. Indeed, his choice of analytical framework, as well as other disparate comments, show that Judge Weisberg was much less sympathetic to CUA than is ordinarily supposed.

I. *Commentary.*

At the most straightforward level *Curran v. CUA* is as unimportant as a case can be, turning entirely upon choices which the parties embodied in an agreement. No one dictated those choices, and the court would no doubt have enforced different ones. Nevertheless *Curran v. CUA* presents a recognizable « type » in American constitutional law, a type commentators most often call « church autonomy », but which judicial opinions more often label the « autonomy » of « religious organizations ». Now, Fr. Curran made no constitutional claims at all, and could not because the Constitution protects believers only against hostile action by government. CUA is not the government. CUA on the other hand repeatedly sought con-

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(2) J.A. Di Noia, O.P., *Authority, Public Dissent and The Nature of Theological Thinking*, 52 *The Thomist*, 185, 189 (1988).

(3) Joseph Cardinal Ratzinger, *The Challenge, 30 Days* (April 1989) p. 25.

(4) Di Noia, supra note 2, at 203.

stitutional shelter from any judicial resolution which abridged its proper « autonomy » (5). (The Court refused CUA that shelter, a point to which we shall return). But *Curran* is in one way atypical of church autonomy cases. The « type » has evolved within and still most often presents disputes over ownership of church property. The cause of such disputes is invariably a schism within a local congregation, or between a branch of a hierarchical church and its stem, over a religious issue. The seminal case of *Watson v. Jones* (6), for example, grew out of a nineteenth century Presbyterian split over slavery. In any event, the local congregation can no longer live together, or it (in its entirety) wants to split from the parent church. Who gets the church building?

These doctrinal disputes have the practical consequence of disquieting property titles. Secular courts have always stood ready to quiet such disputes, but how? Specifically, how while at the same time respecting principles of religious freedom, most specifically the constitutional prohibition of « established » (i.e. state preferred) churches, and of the Free Exercise of religion? (7). *Watson* summarized the dictates of religious freedom: « The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect » (8). To avoid transgressing this cardinal holding by « preferring » one schismatic group over the other, *Watson* proposed the following rule of « deference »: « whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest... church judicator[y] to which the matter has been carried, the [civil] legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them » (9). The ultimate issue in the case could have been so resolved. In footnote 13 Judge Weisberg acknowledged the pedigree of « deference » relative to CUA's « canon law » defense. Simply put, apart from any contractual obligation of Fr. Curran to retain a « canonical mission », once church authorities determined he was « ineligible », civil courts had to defer to that determination. But the court characteristically refused to follow *Watson's* « deference » analysis here.

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(5) *See* notes 10-12 and accompanying text, *infra*.

(6) 80 U.S. 679 (1871).

(7) The full constitutional text is: « Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ».

(8) 80 U.S. at 728.

(9) 80 U.S. at 727.

CUA argued to similarly little effect that « deference » principles governed such questions as whether the Department of Theology had a « unitary » or « binary » faculty (10), whether a canon law requirement had lapsed or fallen into « desuetude » (11) [n7]; and whether a particular reference in *Normae Quaedam* was a reference to a canonical mission (12). In all these instances, Judge Weisberg avoided « deference » by adopting the second, much more recent, strategy for implementing *Watson's* kerygmatic pronouncement. That strategy is the *Jones v. Wolf's* (13) « neutral principles » approach. It would abide *Watson* not by « deference » to ecclesiastical authority but by resolving the case entirely on « neutral », in the specific sense of applicable civil law, principles. Judge Weisberg thus adopted « the law of contracts » as his analytical framework (14). Indeed, late in the opinion he commented: « Like the rest of the plaintiff's case, the question comes down to what the contract says and what the parties to it intended » (15).

Even thought it — like *Watson's* « deference » rule — grew out of and was intended to settle church property disputes, « neutral principles » is not so analytically confined, and Judge Weisberg is beyond legitimate criticism in thinking it available in *Curran v. CUA*. Why? The Supreme Court in *Jones* expressly contemplated its application to church employment decisions (16). Most important, the raison d'etre of « neutral principles » was serviced in *Curran*. That reason is « The peculiar genius of private-law systems in general — flexibility in adapting private rights and obligations to reflect the intentions of the parties » (17). « Intent » of the parties is beyond question the anchor of Judge Weisberg's opinion. « Neutral principles », in *Curran* as well as in other contexts, thus turns out to be the extant legal apparatus to effectuate mutually agreed-upon exchange — a system of « private order ». *Watson's* « neutrality » and « nonentanglement » in doctrinal controversies are « preserved », by overlaying a regime of voluntarism or « autonomy ». It

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(10) Curran v. CUA (slip opinion at 21) (hereafter « Curran »).
(11) *Id.* at 14, n. 7.
(12) *Id.* at 12, n. 6.
(13) 443 U.S. at 595 (1979).
(14) Curran at 5.
(15) *Id.* at 24.
(16) See 443 U.S. at 606.
(17) 443 U.S. at 603.

holds that where there is implementation of agreement, there is « neutrality ».

The Supreme Court invited lower courts to choose between « deference » and « neutral principles », supposing them each consistent with *Watson* (18). But one may allow that each approach is consistent with *Watson* without allowing that they are equally so. Even in church property disputes, « church autonomy » (here defined as « doctrinal » « neutrality ») is better insured by deference on the ownership question. In other words, courts should enforce the decision of church authorities whenever they (the authorities) have taken a discernible position on that issue. Second, the Supreme Court in *Jones* too easily presumed the availability of suitably « neutral » principles. Rules of ecclesiastical governance simply may not translate into civil law terms. Suppose, as one commentator suggests, that a church constitution directs its governing body to order « whatever pertains to the spiritual welfare » of those under its care. Is property management an aspect of « spiritual welfare »? Is that not itself a theological concept? (19). How would « neutral principles » resolve that question?

They cannot. « Neutral principles » is therefore (at best) an incomplete approach in need of complement, probably from « deference ». The *Curran* opinion qualified *its* « neutral principles » with « due regard for the right of the Church... to decide for itself matters of church policy and doctrine » (20). And Judge Weisberg narrowly escaped importing enormous amounts of deference only by Fr. Curran's concession that the withdrawal of his canonical mission was both « substantively and procedurally correct » (21). What if Fr. Curran had contested either, or both? Then the Court would have faced something like this question: who is more « Catholic »: Cardinal Ratzinger or Fr. Curran? « Neutral principles » of civil law cannot resolve that question.

The other complement is the legal fiction of « implied consent ». *Watson* made its rule of deference palatable by observing that « [a]ll who unite themselves to such a [religious] body do so

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(18) 443 U.S. at 602.

(19) See J. GARVEY, *Churches And The Free Exercise of Religion*, forthcoming in *Notre Dame Journal of Law, Ethics and Public Policy*.

(20) Curran at 8-9.

(21) Id. at 19.

with an implied consent to this, and are bound to submit to it » [22]. « Fiction » here means lack of actual consent, but that it is useful to charge individuals with legal responsibility as if they had consented. Judge Weisberg made abundant use of this notion. Indeed, the entire case turned upon this conclusion: « No one — least of all a Catholic priest and a professor of Catholic Theology — could have contracted with CUA without understanding the University's special relationship with the Roman Catholic Church, with all the implications and obligations flowing from that relationship » [23]. After noting that Fr. Curran recognized that relationship, the Court concluded: « he could not reasonably have expected that the University would defy a definitive judgment of the Holy See that he was "unsuitable" and "ineligible" to teach Catholic theology » [24]. The Court did not say that Fr. Curran *actually* agreed to such contractual terms, and Fr. Curran claimed that he did not.

The important point is that « neutral principles » taken by itself is neither « neutral » nor wholly efficacious. That much suggests an uneasy relationship between it and *Watson's* regulating command to respect church autonomy, *and* that *Jones'* anointing of it was too glib. But there are deeper tensions between the « private order » of a hierarchically-organized church and neutral principles of civil law. This tension is best illustrated by the role assigned to « agreement » *now*, to govern situations arising *later*, which is the earmark and purpose of contract law. Contract principles simply do not explain the unity of many churches. Those principles suggest that churches » *are* « religious organizations », aggregates of individuals pursuing in some cooperative manner compatible spiritual goals. This well describes the tradition of American law which has been decisively formed by liberal Protestantism. But it does violence to corporate images which arise from the conviction that Christians share one spiritual substance through Christ. (Examples are the Pauline « Body of Christ » and the Johannine « Vine and Branches »). The « authority » joined to such corporate images is hardly assimilable to « contractual » analysis.

The divide here is thoroughgoing. The *Jones* court frankly aspired to a regime of complete judicial abstention, consummated by

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[22] 80 U.S. at 729.
[23] Curran at 25-26.
[24] *Id.* at 26.

perfect planning *now* for *future* disputes ([25]). This regime of specified mutual expectations subverts Roman Catholic precepts of authority by introducing an « equality » at odds with the distribution of charisms in the church, and by reducing the pastoral office to the task of compiling a list of contingencies. « Authority » in the Roman Catholic Church has correlatives like « obedience » rooted in « kenosis », which have no analogue in contract law. Contract principles *can* be commodius enough to house Catholic practice by, for example, preserving « deference » as described in *Curran*. But this is not always the case. Do professors in Catholic Universities make an « agreement » with the local Ordinary which embodies the relationship between them specified by Canon Law? In America they do not.

It now may reasonably be asked whether the analytical infrastructure of « neutral principles » is truly « neutral » when it comes to the central dogma of modernity: individual autonomy, usually connoting a subjectivist or « emotivist » moral theory. It is not. Even casual re-examination of the *Curran* opinion and its source in *Jones'* commitment to « private ordering » reveals their source in the aminating impulse of contemporary American legal (and cultural) reflection on religious freedom: the autonomous individual's « choice » of belief. « Churches » become « religious organizations » and possess no intrinsic order other than that chosen by freely associating individuals. This presupposition is hardly « neutral » where faith is presumed to include an essential ecclesial dimension. More troubling is the subversion of Christian humility by such radical « autonomy », as Cardinal de Lubac has noted ([26]). The individualist commitments of modernity are reinforced by the American regime's post-World War II « judicialization » of « church and state ». By that is meant the consignment of all questions of the proper relationship between individual religiosity and the political community to judicial resolution. Judicial review in American constitutional law is keyed to individual rights, not individual duties or to group/corporate privileges. All of this merely illustrates the regnant orthodoxy of American culture and public life, the orthodoxy of liberal individualism. Mutual agreement between contracting parties, in the manner of *Curran v. CUA*, which by definition assumes an equality of bargaining power, serves as the religious aspect of this civil theology.

([25]) See 443 U.S. at 604.

([26]) *A Brief Catechism On Nature and Grace*, 59 (1984).

Footnote 18 of the *Curran* opinion suggests Judge Weisberg subscription to this creed. On the central question of constitutional protection of « church autonomy » he makes two arguments which are quintessentially modern. First he suggests (with citation) that only individual persons possess Free Exercise rights. This is clearly inconsistent with the entire *Watson* line of cases, which presupposes that churches do too. Second, he suggests that « neutral principles » — requiring CUA to honor its agreement — might not only *satisfy* constitutional requirements but successfully dissipate the constitutional issue! This too is jurisprudential renvoi. Both instances nevertheless are probative (I submit) of the court's pre-analytical commitments.

A final comment on the unmistakable intention of *Jones* (and *Curran*) to make « church autonomy » a matter of « private order », that is, of mutual agreement. This *presupposes* the absence of any significant *public* interest in the content of that order. Presumably (as in *Curran*) an individual can choose to submit to ecclesial authority, and make an enforceable contract to do so. But contract principles will *not* enforce any term deemed contrary to public policy. Examples include contracts to lend money at a usurious rate of interess or to perform some illegal act. It is true Judge Weisberg found no countervailing public policy in *Curran*, but that was hardly inevitable. There is some (but not decisive) support for a common law right of academic freedom, a claim unsuccessfully litigated (for instance) by Marjorie Reilly Maguire against Marquette University (27). What of a general legal ban on discrimination against homosexuals? That is a « neutral » principle which involves not *inquiry* into « doctrine », just its displacement. Yet it clearly compromises the integrity of Georgetown University to have such a norm imposed upon it (28). *This* is the real challenge to church autonomy in the American regime, and the *Curran* decision provides no defense whatsoever to it. The moral sovereignty of politics, which it would seem the purpose of religious liberty to keep at bay, is instead crowned by the subjectivist underpinnings of modern conceptions of spiritual freedom.

GERARD V. BRADLEY

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(27) Maguire v. Marquette University, 814 F. 2d 1213 (7th Cir. 1987).

(28) *See* Gay Rights Coalition v. Georgetown University, 536 A. 2d 1 (D.C. 1987).

II. *Selected sections of the opinion of Judge Weisberg* (*).

[The events which led to this lawsuit are well known. By letter of July 25, 1986 Joseph Cardinal Ratzinger informed Fr. Curran that he was « not suitable nor eligible to teach Catholic Theology ». By a separate letter of the some date to James Cardinal Hickey, Chancellor of The Catholic University of American, Cardinal Ratzinger advised of his decision and directed the Chancellor to take « appropriate action ».

Upon receipt of that letter, Chancellor Hickey took action which culminated, on April 12, 1988, in the Board of Trustees' withthdrawal of Fr. Curran's canonical mission. Since Fr. Curran refused to teach courses other than Catholic theology, he remained on the CUA faculty but had no teaching assignment.]

At the present time, Professor Curran retains his tenure, but not his right to teach Catholic Theology, which he contends is his only field of professional competence. He maintains this suit for breach of contract, alleging that the University's actions violate his right to academic freedom. He seeks specific performance of what he asserts is his contractual right to teach in the Department of Theology without a canonical mission or, failing that, his right to teach Catholic Theology in another Department within the University.

The University defends on several levels. It contends that while academic freedom exists as an important value at CUA, the Board of Trustees has never adopted a definition of academic freedom for inclusion in the Faculty Handbook, the document that defines the contractual relationship between the faculty member and the University. The University also contends that academic freedom, by any definition, is not absolute. In the context of this case, the University's position is that academic freedom is limited both by the discipline — the teaching of Catholic Theology — and by the nature of the institution in which the discipline is practiced — the Catholic University of America, a pontifical university chartered by Pope Leo XIII in 1889, which has maintained by choice for one hundred years what the University refers to as a « special relationship with

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(*) Cf. Superior Court of the district of Columbia. Charles E. Curran vs. the Catholic University of America. Civil Action n. 1562-87, Judge Weisberg. Editor's note: Numbered footnotes are those appearing in the opinion. Notes marked by an asterisk (*) are the editor's explanatory comments. All citations have been omitted.

the Holy See ». To rule otherwise, according to the University, would be to violate its First Amendment right to the free exercise of its religious beliefs (*). Finally, the University argues that because of its papal charter and its ecclesiastical faculties, it is governed not only by civil law, but also by canon law; and, to the extent that its actions in this case were dictated by authoritative interpretations of canon law, they are unreviewable and are beyond the legitimate exercise of jurisdiction by the civil courts.

(*Omissis*).

[I]t is the law of contracts, which must govern the decision in this case. As in any other contract case, the central issues are: What are the terms of the contract? Did the University breach it? If so, what is the proper remedy? Within those issues, however, are a number of subsidiary questions. Does Curran's contract with CUA include a guarantee of academic freedom? If it does, and if it is not absolute, what are the limits on academic freedom for which the parties bargained? Does Curran's contract with CUA require him to hold a canonical mission in order to teach in the Department of Theology? If it does, and if the canonical mission was properly withdrawn, what further contractual obligation, if any, did CUA owe to Curran? Assuming that the withdrawal of the canonical mission did not, in and of itself, affect Curran's right to teach Catholic Theology in a non-ecclesiastical faculty, did the parties to the contract intend that Curran could continue to teach Catholic Theology in a non-ecclesiastical faculty even if the Holy See, in a definitive judgment, declared that he was no longer « eligible to exercise the function of a Professor of Catholic Theology? » To the extent that the University's actions in the wake of the Holy See's declaration were dictated by canon law, are they immune from judicial scrutiny; and is a remedy barred, even if such actions would constitute a breach of contract as a matter of civil law? Finally, if Curran is entitled to a remedy for breach of contract, is he entitled to specific performance?

(*Omissis*).

(*) The First Amendment to the United States Constitution provides (in pertinent part) that « Congress shall make no law respecting en establishment of religion or prohibiting the free exercise thereof ». On the basis of no longer contested interpretation of this text, CUA properly suggests that court's choice of a rule of decision implicates Free Exercise concerns.

[G]eneral principles of contract interpretation provide the analytical framework in which the court must decide the disputed factual issues presented by this case. In doing so, the court must avoid impermissible entanglement of the « State » in the affairs of the Church. Contract issues are for the civil courts, but they must be resolved according to « neutral principles of law », with due regard for the right of the Church — in this case, the Roman Catholic Church — to decide for itself matters of Church policy and doctrine. *Jones v. Wolf.*

(*Omissis*).

[P]laintiff makes two central arguments. First, he contends that his tenure contract with the University dates from 1970 or 1971, and at that time there was no requirement that he hold a canonical mission to teach in the Department of Theology. Any such requirement that may have been imposed by the 1931 Apostolic Constitution or by the University statutes enacted in 1937 had, he says, long since fallen into « desuetude ». Second, he argues that the University's reintroduction of the requirement of a canonical mission in its 1981 Canonical Statutes can not be applied retroactively to him, because to do so would be in derogation of his contract, by which he was granted tenure without a canonical mission.

The requirement of a canonical mission appears clearly in the University's 1937 statutes, which were enacted by the University pursuant to *Deus Scientiarium Dominus*, the Apostolic Constitution of 1931. The Statutes were reprinted in 1964, but it is unclear how widely the reprinted version was circulated, or to whom. In 1968, in connection with a proposed revision of the 1931 Apostolic Constitution, the Holy See issued experimental norms called *Normae Quaedam*. *Normae Quaedam* did not revoke the 1931 Apostolic Constitution, and it contained language which appears to continue to recognize the canonical mission requirement (6). In 1970, the University's Special Statutes for the Pontifical Schools (including the Department of Theology) were approved by the Holy See. These Spe-

(6) The parties disagree about whether the reference in *Normae Quaedam* to « the mission which [teachers of the sacred disciplines] have received from the magisterium » is in fact a reference to the canonical mission. The University contends that it is and that its interpretation is, in any event, an interpretation of canon law, which the court can not reject in favor of plaintiff's contrary interpretation. In view of the court's disposition of this issue, it is unnecessary to resolve this dispute between the parties.

cial Statutes can also be read to preserve the requirement of a canonical mission, although if there is an explicit reference to the requirement anywhere in the Special Statutes, it has not been pointed out to the court.

The University's position is that the requirement of the canonical mission has never lapsed since its inception at CUA in 1937. It acknowledges that for many years, and perhaps from the beginning, canonical missions were not explicitly conferred by the Chancellor on teachers of the sacred disciplines, but it urges — it says as a matter of canon law — that each professor in the pertinent faculties held a canonical mission « implicitly ». Plaintiff counters that the idea of implicit conferral of the canonical mission is something the University came up with after the fact to get around his argument that requirements recognized for the first time in 1981 can not be applied retroactively to him. He points out that throughout the turmoil of the late sixties — including, among other events, a faculty and student strike in 1967 over the University's threatened non-renewal of Curran's contract, and the Board's partial aceptance of the Marilowe Committee report in 1969 following the public dissent by Curran and others from the papal encyclical *Humanae Vitae* — no one said anything about withdrawing Professor Curran's canonical mission, or even the fact that he had one. He concludes, therefore, that any requirement of a canonical mission dating from the 1930's had surely fallen into desuetude at CUA by 1970 or 1971, if it ever existed in the first place.

The University may be correct that the existence or nonexistence of the requirement of a canonical mission is a question of canon law, and therefore that the court must accept its authoritative interpretation of canon law on that question (7). But the question presented here is not what canon law means on this point, but whether the parties to the contract agreed to be bound by it. Even assuming canon law required Curran to hold a canonical mission in 1970 and 1971 in order to teach in the Department of Theology, that requirement was not sufficiently explicit to be considered a bargained for term of his contract. It is one thing to say that a contract, or part of it, can be based

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(7) The University also contends that the question of whether an obligation imposed by canon law lapsed, or has fallen into desuetude, is not a question of fact for the court but is itself a question of canon law, the answer to which lies with the Church and not with the civil court.

on canon law, if the parties agree to it; it is quite another to say that the contract can be based on secret law, the provisions of which are unknown to one of the parties to the contract. If CUA wanted to make it a condition of Curran's contract that he must maintain his canonical mission, it should have told him so. Having not made the requirement explicit, the University can not now rely on an interpretation of arcane provisions of canon law to read into the contract terms that could not have been understood by the parties, or at least one of the parties, at the time the contract was entered.

(*Omissis*).

It is clear that as of the 1981 Canonical Statutes, professors in the Department of Theology were required to hold a canonical mission (9). The question is whether that requirement can be applied to Professor Curran, who received his contract with tenure in 1970 or 1971.

Ordinarily, of course, the rights and obligations of the parties to a contract are fixed at the time the contract is made, and one party may not thereafter unilaterally change the terms or add new conditions. In the context of a professor's contract with his or her university, however, « [t]he readings of the market place are not invariably apt ». *Greene v. Horward University*. Both parties to the contract understand that from time to time the university may change its bylaws or other governing documents, which may in turn alter the relationship between the university and its faculty, even those with tenure.

(*Omissis*).

[The] doctrine of evolution in the contractual relationship between a tenured faculty member and the university is especially true of the relationship between CUA and its professors in the ecclesiastical faculties. Whether or not the parties specifically intended in 1970 or 1971 that there be a requirement of a canonical mission, certain basic facts were clearly understood and accepted by the parties: they knew that the ecclesiastical faculties are different from the

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(9) Under the 1981 Canonical Statutes, canonical missions are required of Catholics who teach subjects reating to faith or moral in the ecclesiastical faculties. Non-Catholics and those who teach subjects other than those relating to faith or morals must simply have the Chancellor's « permission to teach ».

Professor Curran is a Catholic priest, who taught subjects relating to faith and morals in an ecclesiastical faculty.

rest of the University; that these faculties are authorized by the Holy See to confer special ecclesiastical degrees; that no other Catholic university in the United States has ecclesiastical faculties; that these faculties are governed by an Apostolic Constitution, as implemented by Canonical Statutes, which in turn must be expressly approved by the Holy See; and that the Holy See might change the requirements for these faculties at any time, imposing on the University an obligation to accommodate such changes or risk losing the authority to confer ecclesiastical degrees. Therefore when *Sapientia Christiana*, the Apostolic Constitution of 1979, and the University's Canonical Statutes of 1981, enacted pursuant to *Sapientia Christiana*, introduced or reintroduced the requirement of a canonical mission, it should have come as no surprise to Professor Curran that he was expected to have one [12].

As of 1981 then, if not before, Professor Curran had, and was required by his contract to maintain, a canonical mission [13]. ...Professor Curran maintains the position that he was not required to have a canonical mission, but concedes that the decision to withdraw it was both substantively and procedurally correct — that is, that there were « most serious reasons » for withdrawing the canonical mission and that proper procedures were followed. The withdrawal of the canonical mission was not a breach of Professor Curran's contract with the university.

(*Omissis*).

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[12] [W]hatever he may have understood about the canonical mission requirement, Professor Curran could not have reasonably believed he had a right under his contract to continue to teach in an ecclesiastical faculty if the Holy See declared him ineligible.

[13] If the court had come to the opposite conclusion on this issue, it vould have been squarely presented with a substantial constitutional question. The University has argued, persuasively, that the canonical mission is a papal authorization « to teach in the name of the Church » and, as such, only the Church can decide who may teach in its name. That decision, according to the University, is governed by canon law, and a civil court may not review authoritative interpretations and applications of canon law by the highest authorities in a hierarchical Church like the Roman Catholic Church. The University's argument on this point is supported by more than one hundred years of Supreme Court jurisprudence. *See, e.g., Jones v. Wolf, Serbian Eastern Orthodox Diocese v. Milivojevich, Gonzalez v. Archbishop, Watson v. Jones*. In light of court's conclusion that Professor Curran's contract required him to have a canonical mission as a condition of teaching in the Department of Theology, it is unnecessary to reach the University's « canon law defense ».

For these reasons, reference to the traditional norms of academic tenure is not dispositive of plaintiff's claims, and the court prefers to base its decision on other grounds. Like the rest of plaintiff's case, the question comes down to what the contract says and what the parties to it intended. It is fair to assume that neither party in 1970 or 1971 could have anticipated a judgment by the Holy See that was both as broad and as definitive as the Ratzinger letter. No one sat down and spelled out what the rights and obligations of the parties would be if the Holy See, in absolute and definitive terms, declared Curran « unsuitable » and « ineligible » to teach Catholic Theology. But certain things were unmistakably known and understood by the parties. For example, the parties knew that the University, in addition to its civil charter, had a pontifical charter from Pope Leo XIII in 1889. They knew that the Archbishop of Washington serves as the Chancellor of the University and that, under the Bylaws, the Chancellor acts as the liaison between the University and the National Council of Catholic Bishops and between the University and the Holy See. They knew that, under the Bylaws, the University's Board of Trustees consists of 40 trustees, 20 of whom must be Roman Catholic clerics, of whom 16 must be Bishops, and that the cleric members of the Board will usually include all of the Cardinals who are residential ordinaries in the American Catholic hierarchy. And they knew that all of the University's self-descriptions, in the Faculty Handbook and elsewhere, emphasized its unique realtionship to the Holy See and its concomitant responsibility to the Roman Catholic Church ([15]).

No one — least of all a Catholic priest and a professor of Catholic Theology — could have contracted with CUA without un-

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([15]) These statements appear, among other places in the Faculty Handbook in the sections called « Goals of the Catholic University of America », « Aims of the University » and the « Historical Preface » to the Bylaws. Plaintiff correctly points out that there is also language in both the « Goals » and the « Aims » sections that emphasizes CUA's status as a « modern American University », which fosters an environment of academic freedom. Far from abrogating the University's relationship with the Holy See, however, the juxtaposition of this language only serves to point up the natural tension created by the University's commitment to two sets of norms — academic norms of American universities on the one hand, and the norms established by the Holy See on the other. Nothing in the Faculty Handbook or any other statement adopted by the University's Board of Trustees makes one set of norms paramount or subordinate to the other.

derstanding the University's special relationship with the Roman Catholic Church, with all of the implications and obligations following from that relationship. Indeed, Professor Curran testified that in fact he did understand at all relevant times that this special relationship existed. As much as he may have wished it otherwise, he could not reasonably have expected that the University would defy a definitive judgment of the Holy See that he was « unsuitable » and « ineligible » to teach Catholic Theology. Whether or not the University is correct that it was obligated to accept the declaration of the Holy See as matter of canon law, it was surely bound to do so as a matter of religious conviction and pursuant to its long-standing, unique and freely chosen special relationship to the Holy See. Given the history and content of its relationship to the Holy See, CUA could not have given up its right to accept and act upon definitive judgments of the Holy See in its dealings with Professor Curran unless it did so explicitly, which it certainly did not do. The University did not breach its contract with Professor Curran by requiring him to teach courses other than Catholic Theology or, for that matter, by requiring him to agree to be bound by the declaration of the Holy See.

(*Omissis*).

Even if the court were to find that the University had breached its contract with Professor Curran, it is virtually unthinkable that the court should order specific performance in this case... [S]pecific performance is a singularly inappropriate remedy in the unique circumstances of this case... [T]he University contends that a specific performance decree by this court, enforceable by contempt, ordering the University to permit Professor Curran to teach Catholic Theology would violate the University's rights under the Free Exercise Clause of the First Amendment. Without reaching « these global constitutional » issues ([18]), hower, it is clear to the court, at a

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([18]) The University may be, as defendant asserts, a « Juridic person » under both civil law and canon law, but it is less clear that it is a person for purposes of the Free Exercise Clause. Cf. *First Nat'l. Bank v. Bellotti* (speech otherwise protected under the First Amendment does not lose that protection merely because the « speaker » is a corporation); *United States v. White* (privilege against self-incrimination is personal and can not be exercised by or on behalf of any organization, such as a corporation); *but see Gay Rights Coalition v. Georgetown University*. There is also a question whether this court's decree, requiring nothing more than compliance with its own contract, would constitute sufficient governmental action against the

minimum, that specific performance in a case such as this would be extremely ill-advised and would not be a proper exercise of the court's equitable power.

(*Omissis*).

[I]n adjudicating [this] breach of contract claim he brings to this court, what is good for Catholic University or for the Roman Catholic Church is not a question presented and not one the court has either the right or the competence to decide. The question presented is whether his contract gives him the right to teach Catholic Theology at Catholic University in the face of a definitive judgment by the Holy See that he is ineligible to do so. The court holds today that it does not. Whether that is ultimately good for the University or for the Church is something they have a right to decide for themselves.

University to present an issue under the First Amendment. Cf. *Shelley v. Kraemer*. In any event, for the reasons stated in the text, it is unnecessary and inadvisable to decide these difficult constitutional questions, particularly where the specific performance issue does not even surface unless the court's ruling for defendant on liability were to be set aside.