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ACADEMIC FREEDOM IN RELIGIOUS COLLEGES AND UNIVERSITIES

MICHAEL W. McCONNELL*

I

INTRODUCTION

Standard principles of academic freedom forbid most interference with the right of faculty members to write, teach, or speak within the limits of their professional discipline in accordance with their own opinions, no matter how pernicious or erroneous those opinions appear to others to be. It is widely assumed that extension of these principles to religious colleges and universities would advance the cause of scholarly inquiry. This would prevent religious institutions from maintaining any vestige of creedal orthodoxy through the hiring, firing, rewarding, or disciplining of faculty. The long-standing position of the American Association of University Professors (“AAUP”) and the Association of American Colleges (“AAC”) is that religious schools are entitled to depart from these principles so long as they clearly announce their intention to do so in advance. However, this position is now widely regarded as an unprincipled and undesirable exception and may well be abandoned.

The thesis of this article is that the underlying purposes of academic freedom would not be advanced by its indiscriminate extension to religious colleges and universities and that, insofar as state action is involved in enforcing the norms of academic freedom, such extension would be unconstitutional. The effect of forcing religious schools to disregard religion in the hiring, tenuring, and disciplining of faculty would be to destroy the distinctive character of these intellectual communities. If we assume that sectarian ideas and approaches to knowledge are worth preserving (if only as a challenge to predominant secular ideology), it is a mistake to destroy the very institutions responsible for developing, preserving, and presenting those ideas.

Academic freedom, as understood in the modern secular university, is predicated on the view that knowledge is advanced only through the

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1. Of course, disciplinary norms are themselves contested, as current disputes over the evaluation of feminist, racial minority, and critical legal studies scholarship indicate. For the effect of professional norms on religion, see notes 34-37 and accompanying text.
unfettered exercise of individual human reason in a posture of analytical skepticism and criticism. In some religious traditions, however, reason is understood to require reference to authority, community, and faith, and not just to individualized and rationalistic processes of thought. If religious ideas and approaches have anything positive to contribute to the sum of human knowledge, we should recognize that secular methodology cannot be universalized. To impose the secular norm of academic freedom on unwilling religious colleges and universities would increase the homogeneity—and decrease the vitality—of American intellectual life.

Moreover, imposition of the secular norm of academic freedom would pose a serious threat to the ability of nonmainstream religions to maintain their identity and proclaim their vision in secular America. Even if the accommodation of religious approaches to knowledge were not valuable to the advancement of knowledge itself, a modification of academic freedom principles would nonetheless be justified because of its importance to religious freedom.

Before entering the argument, I wish to offer two qualifications. First, it is not my position that in all cultures under all circumstances the extension of secular norms of academic freedom to religious institutions would be unwise. My position is that it would be unwise in modern America, where religion is highly pluralistic, academia is overwhelmingly secular, and the number of institutions of higher learning is sufficiently large to permit genuine diversity. Where the church is established by the state, the religious world is monolithic, the number of institutions is small, or the secular world is vulnerable, my assessment would likely be different. Second, it is not my position that religious colleges and universities should reject or modify academic freedom principles. Some religious groups will conclude that secular methodologies are appropriate to the development of religious knowledge within their traditions, and some will be sufficiently aligned with majoritarian culture that they will not feel the need to maintain a separate intellectual identity. My point is that religious bodies should be free to decide this question for themselves, on religious or other grounds, free from pressure from organized academia or the government. It is sufficient for these purposes to show that a departure from secular academic freedom norms might reasonably be seen as promoting the advancement of knowledge within some religious traditions. It is not for the rest of us to attempt to determine which ones they are.

2. During the past year, a number of religiously affiliated colleges and universities changed their relationships with their respective religious denominations, some in the direction of greater, and some of lesser, denominational control. For examples of the former, see note 16. For an example of the latter, see Conversation with the President: "We Will Remain a Texas Baptist Institution," 52 The Baylor Line 8-9, 47 (November 1990) (interview with the President of Baylor University discussing the university trustees' decision to amend the university charter to gain autonomy from the Baptist General Convention of Texas and thereby avert what they saw as an impending "fundamentalist" takeover). Nothing in my argument here should be interpreted as endorsing or disapproving such developments, in either direction.
I will proceed in three stages. The first section will review the authoritative definition of secular academic freedom as espoused by the AAUP and the AAC and the history of its application to religious institutions. The second section will present reasons why that understanding of academic freedom should not be imposed on unwilling religious colleges and universities. The third section will discuss three issues of particular concern: academic freedom in seminaries and theological schools, behavioral restrictions on faculty in religious colleges and universities, and application of laws against discrimination on the basis of religion.

II

THE EVOLVING STATUS OF SECULAR ACADEMIC FREEDOM AS APPLIED TO RELIGIOUS INSTITUTIONS

A. The Two Faces of Academic Freedom

The term "academic freedom" is used to express two different concepts, which are sometimes in harmony and sometimes in discord. The term refers both to the freedom of the individual scholar to teach and research without interference (except for the requirement of adherence to professional norms, which is judged by fellow scholars in the discipline) and to the freedom of the academic institution from outside control. Academic freedom thus has two faces: one individual, the other institutional. Outside interference with a scholar's work (as, for example, by legislators during the McCarthy period) violates both principles: it takes away the scholar's freedom of research or teaching, and it also takes away the institution's exclusive authority to govern academic matters within its walls. In such a case, the two aspects of academic freedom are in harmony. Internal interference with a scholar's work (by faculty peers, departments, or administration), however, can generate conflict between the two faces of academic freedom. If the scholar calls upon the assistance of extramural authorities (as, for example, by filing a lawsuit challenging a denial of tenure), the institution's own autonomy may be threatened.3

For obvious reasons, the AAUP has tended to emphasize individual academic freedom in its pronouncements. The Supreme Court, however, has tended to emphasize institutional academic freedom. In its most famous formulation, first offered by Justice Felix Frankfurter, who as a Harvard professor had been involved in several important academic freedom controversies,4 academic freedom encompasses "the four essential freedoms of a university—to determine for itself on academic grounds who may teach,


4. See Finkin, 61 Tex L Rev at 846 n118, 847 n121 (cited in note 3).
what may be taught, how it shall be taught, and who may be admitted to study.”

The controversy with regard to religious colleges and universities presents the conflict between individual and institutional academic freedom at its most extreme. The question is whether a religious institution should have the authority to ensure that its faculty (particularly in theological disciplines) teach and research within the parameters of the religious tradition. In this context, the scholar may invoke the individual face of academic freedom, while the college may invoke the institutional face to defend its desire to determine for itself who may teach, what may be taught, and how it shall be taught.

For the most part, references to “academic freedom” in this article are to individual academic freedom, though for reasons that will become apparent I believe that institutional academic freedom should be the dominant conception within religious institutions.

B. The Position of the AAUP

Through the middle of the 19th century, an essentially religious, or dogmatic, understanding of truth pervaded higher education in America, especially at such elite institutions as Harvard, Yale, Amherst, and Princeton. Colleges existed to impart knowledge; the test of knowledge was its conformity to the revealed truths of scripture, religious traditions, and authorities; the advancement of knowledge therefore required that the work of teachers and scholars be tested against the truths of religion. The modern university was born in a conscious attempt to free scholarly investigation from the strictures of this single, constrained understanding of the advancement of knowledge. Academic freedom became the central operating tenet of the modern secular university. Under this modern view, colleges and universities exist to advance the frontiers of knowledge; the test of knowledge is its ability to withstand the rigors of debate and disputation; the advancement of knowledge requires that the work of teachers and scholars be free from all constraints other than those of the academic discipline.

It was not long before the modern secular university came to dominate American higher education, and this secular, noninstitutional understanding of academic freedom became part of the higher law of American higher education. This understanding assumed its canonical form in the 1940 Statement of Principles on Academic Freedom and Tenure, jointly issued by the AAUP and the AAC. While the 1940 Statement technically has no legal force in its own right (though its extralegal authority is considerable), it has been adopted by most accrediting agencies, whose determinations do have


legal effect. For example, the two agencies that are responsible for accreditation of law schools—the American Bar Association ("ABA") and the Association of American Law Schools ("AALS")—both use the 1940 Statement as their standard for academic freedom.

As set forth in the 1940 Statement, academic freedom has three aspects: (1) the teachers' "full freedom in research and in the publication of the results"; (2) their "freedom in the classroom in discussing their subject"; and (3) their freedom "from institutional censorship and discipline" when they "speak or write as citizens." These few words have given rise to an elaborate "common law" of academic freedom through the written opinions of the AAUP's Committee A on Academic Freedom and Tenure, which investigates and issues reports on alleged violations. The 1940 Statement contains no acknowledgement of the institutional dimension of academic freedom.

The 1940 Statement, however, did not require religious institutions to adopt this particular conception of academic freedom. Recognizing that the older tradition of the pursuit of knowledge through fealty to religious authority was still common, the 1940 Statement said that "[limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment." This statement was ambiguous, presumably deliberately so. It did not explicitly authorize or condone limitations on academic freedom; but it assumed they would exist and regulated them through the requirement of open disclosure. In practice, the limitations clause was taken to mean that religious colleges and universities were free to adopt their own principles of academic freedom.

7. A significant exception is the accreditation standards of the American Association of Theological Schools ("AATS"), which do not follow the 1940 Statement. See AATS, Bulletin 9, 11, Pt 3 (1972) (Standards for Accrediting); id at 3-8, Pt 5 (Academic Freedom and Tenure).

8. ABA Standard 405(d) provides: "The law school shall have an established and announced policy with respect to academic freedom and tenure of which Annex I herein is an example but is not obligatory." ABA, Standards for Approval of Law Schools, § 405(d) (1987). Annex I, in turn, follows the text of the 1940 Statement, including the limitations clause. Id at Annex I.

Bylaw 6-8(d) of the AALS provides: "A faculty member shall have academic freedom and tenure in accordance with the principles of the American Association of University Professors." AALS, Association Handbook 24 (1990) (Bylaws of the Association of American Law Schools, Inc.). It is noteworthy that this refers to the "principles" of the AAUP and not to the 1940 Statement as such, apparently indicating that the AALS standards on academic freedom are set by the AAUP and will change as the AAUP's "principles" change. The Regulations of the AALS Executive Committee clarify the bylaw as follows:

Those principles are defined by the American Association of University Professors' 1940 Statement on Academic Freedom and Tenure and the Interpretive Comments adopted in 1970. Specifically, the Association of American Law Schools adopts the position of the 1970 Interpretive Comments that: "most church-related institutions no longer need or desire the departure from the principles of academic freedom implied in the 1940 Statement, and we do not now endorse such a departure."

Id at 38 (Association of American Law Schools Executive Committee Regulations, Regulation 6.16). For a discussion of the 1970 Interpretive Comments, see notes 13-16 and accompanying text.

9. AAUP, Policy Documents at 3, 76 Academe at 37, Appendix B at 407 (cited in note 6). Although the words of the limitation apply to all aspects of academic freedom, the limitations clause appears only in the paragraph of the 1940 Statement pertaining to academic freedom in the classroom.
without interference or censure by the academic community, so long as those principles were clearly announced in advance.

For example, in a leading case in 1965 involving Gonzaga University, a Jesuit institution, Committee A opined that "satisfactory conditions of academic freedom and tenure now prevail at Gonzaga University," even though the university required each faculty member to "be careful not to introduce into his teaching controversial matter which . . . is contrary to the specified aims of the institution" and reserved the right to dismiss nontenured faculty for "inculcation of viewpoints which contradict explicit principles of Catholic faith and morals."

Thus secular and religious universities could coexist, each operating within its own understanding of the principles needed for the advancement of knowledge. Many religiously affiliated schools freely adopted the academic freedom norms of the secular universities. A very small number maintained the older dogmatic approach within the entire institution, requiring faculty and sometimes students to abide by religious codes of conduct and faith. A larger number adopted various compromises with the secular position, embracing academic freedom in its essentials but taking certain steps to preserve the religious identity of the school. Many of these institutions confined religious constraints to those disciplines, such as theology, where religious norms were most directly relevant. The organized academic community did not attempt to interfere with these choices under the 1940 Statement, so long as they were clearly stated in writing.

After World War II, the secular vision of knowledge gained in power, and many religious colleges and universities came to accept the rationalist methodology that underlies the prevailing modern understanding of academic freedom. Opposition to any limitation on the scope of secular academic freedom mounted within academic institutions. The coexistence of different approaches to academic inquiry came to be seen as anachronistic and intolerable. In 1970, a committee of the AAUP issued an "Interpretive Comment" to the 1940 Statement, stating that "[m]ost church-related institutions no longer need or desire the departure from the principle of academic freedom implied in the 1940 Statement, and we do not now endorse such a departure."

This Interpretive Comment was of uncertain authority. How could a mere committee alter the terms of a fundamental charter that had been unanimously endorsed by 120 educational and disciplinary organizations?14

10. Academic Freedom and Tenure: Gonzaga University, 51 AAUP Bull 8, 17 (Spring 1965).
11. Id at 17.
12. Id at 19. While "commending" the University for its revised statement of policy and making no objection to the policies quoted in the text, Committee A criticized the procedural aspects of the Gonzaga policy in some detail. Id at 17-20.
13. AAUP, Policy Documents at 5 (cited in note 6).
14. See The "Limitations" Clause in the 1940 Statement of Principles, 74 Academe 52, 56 (September-October 1988). Moreover, it should be noted that the Interpretive Comment was not adopted by the AAC.
More importantly, it seemed to link the status of the exception for religious institutions to the current demands of "most" of such institutions, rather than to a principled determination of whether any such institutions should have the option to depart from the prevailing understandings of academic freedom. Developments since 1970, especially within the Roman Catholic Church and some evangelical denominations, cast doubt on the empirical basis for this Interpretive Comment. It is evident today that a significant (though of course numerically small) number of church-related institutions do in fact need or desire to depart from the vision of secular academic freedom embodied in the 1940 Statement. Accordingly, the AAUP has been forced to confront the normative question more directly.

In 1988, a subcommittee of the AAUP’s Committee A on Academic Freedom and Tenure issued a report recommending that the limitation in the 1940 Statement be interpreted as disapproving any departure from the Statement’s position on academic freedom. The subcommittee stated that the "necessary consequence" of the decision by religious institutions to invoke the exception in the 1940 Statement is that they forfeit "the moral right to proclaim themselves as authentic seats of higher learning." According to the subcommittee, "[a]n institution has no 'right' under the 1940 Statement simultaneously to invoke the Limitations Clause and to claim that it is an institution of learning to be classed with institutions that impose no such restriction."
Significantly, the subcommittee refused to countenance any distinction between secular disciplines and theological disciplines, even including programs of professional instruction for clergy. "[I]f theology is an academic discipline," the subcommittee opined, "it must be treated as any other discipline. Higher education is not catechesis, and this is no less true for professional clerical education than for any other professional calling." Moreover, the subcommittee concluded that what it called a "free university" may not include within itself a component, such as a seminary, that "requires creedal orthodoxy as a consequence of its singular religious mission." Not only is such a seminary deprived of its status as an "authentic seat of higher learning," but the university of which it is a part shares in the opprobrium. Inclusion of such a component, according to the subcommittee, would be "wrong" because of its effect on the scholars in the seminary itself, on their colleagues in other disciplines—whose academic freedom would not be "secure"—and on the institution as a whole, which would "labor under a cloud of suspicion that the teachings and writings of its faculty may not be truly free."

After publishing the subcommittee report for comment, the full Committee A adopted the following, somewhat ambiguous, restatement of its position:

Committee A considered the report of the subcommittee on "The 'Limitations' Clause in the 1940 Statement of Principles" and the published and unpublished commentary on it. The committee declined to accept the subcommittee's invitation to hold that the invocation of the clause exempts an institution from the universe of higher education, in part due to the belief that it is not appropriate for the Association to decide what is and what is not an authentic institution in higher education. The committee did conclude, however, that invocation of the clause does not relieve an institution of its obligation to afford academic freedom as called for in the 1940 Statement.

Unfortunately, not even the members of Committee A know what this statement means. The chair of the committee has written that he thought that the restatement "would have put the issue to rest, that in Committee A's
judgment a church-related institution must afford the same academic freedom that all other accredited degree-granting institutions must observe."\textsuperscript{22} He went on to note that "[a]t our June meeting, however, I was badly disabused of this simplistic, or perhaps simpleminded notion," finding that a "majority of the committee now consider the last sentence to be no more than a truism that begs the question of what obligation a church-related institution has to afford academic freedom." He concluded that "[t]hat question will apparently continue to vex us."\textsuperscript{23}

Undoubtedly that question will continue to vex church-related institutions as well. They will continue to operate in the dark about what obligations the AAUP considers them to bear and when to expect a judgment of censure for their practices. Three of the cases discussed in the same report resulted in formal censure of church-related institutions, in one case a distinguished university, for actions designed to ensure that doctrinal instruction in their seminaries of theology schools was in accordance with the institution's doctrine.\textsuperscript{24} The full reports in those cases suggest that Committee A has repudiated the limitations clause of the 1940 Statement de facto, even if it continues to wallow in standardless ambiguity de jure. One would think that the affected institutions are as entitled to a clear statement of the rules said to govern their conduct as the AAUP's 1940 Statement insists their faculty must receive.

III

WHY PROTECT THE INSTITUTIONAL ACADEMIC FREEDOM OF RELIGIOUS INSTITUTIONS?

Even while adhering to the limitations clause accommodating religious colleges and universities, organized academia never articulated any principled justification for doing so. An AAC report in 1922 characterized limitations on teachers' freedoms as "concessions to weakness,"\textsuperscript{25} perhaps owing to the fact that "such a large percentage of institutions were then under denominational control."\textsuperscript{26} If the latter is the explanation, this implies that the current move to eliminate the accommodation is attributable to the fact that affected institutions are now so badly outnumbered. But the small number of exceptional institutions remaining argues for, not against, their accommodation. When the vast majority of academic institutions are

\begin{itemize}
  \item \textsuperscript{22} Id.
  \item \textsuperscript{23} Id.
  \item \textsuperscript{24} See id at 49-50 (Southeastern Baptist Theological Seminary (North Carolina)); id at 51-52 (Concordia Theological Seminary (Indiana)); id at 54 (Catholic University of America, Washington, D.C.). Although mentioned in the 1988-89 Report, the formal resolution of censure against Catholic University occurred the following year.
  \item \textsuperscript{25} The 1922 AAC Committee proposed certain "temporary conventions," which were precursors of the 1940 Statement. See The "Limitations" Clause, 74 Academe at 52 (cited in note 14), referring to Report of the Association of American Colleges Commission on Academic Freedom and Academic Tenure, 8 AAUP Bull 543 (1922).
  \item \textsuperscript{26} The "Limitations" Clause, 74 Academe at 53 (cited in note 14).
\end{itemize}
committed to the view of knowledge reflected in the principle of secular academic freedom, there is little to be gained and much to be lost from quelling the few dissenting institutional voices. As religious institutions, such schools are more valuable as exemplars of an alternative understanding of knowledge than they could ever be as (in many cases, unexceptional) secular colleges.

As an alternative rationale for the religious accommodation, the 1988 subcommittee mentioned (without repudiating or endorsing) the argument that "many of these institutions usefully function as 'decompression chambers' that ease the passage into the larger world for the religiously provincial." 27 The condescension—indeed bigotry—of this suggestion seems to have passed unnoticed.

The AAUP's experts on academic freedom have confessed themselves unable to "discern a principled reason" why religious colleges and universities should not be required to conform to the same standards of academic freedom appropriate to secular institutions. 28 I would suggest three reasons: (1) religiously distinctive colleges and universities make important contributions to the intellectual life of their faculty, their students, and the nation, and secular academic freedom in its unmodified form would lead quickly to the extinction of these institutions; (2) the insistence on a single model of truth-seeking is inconsistent with the antidogmatic principles on which the case for academic freedom rests; and (3) even if the extension of secular academic freedom to religious institutions were desirable on intellectual grounds, it would subvert the ability of religious communities to maintain and transmit their beliefs, and thus undermine religious freedom.

A. The Value of Religious Colleges and Universities

Few observers would doubt that religious scholars and institutions have made significant contributions to the ethical, cultural, and intellectual life of our nation. Religious notions of the pursuit of knowledge might well be intolerable for a modern scientific, pluralistic nation if universally imposed; but, as adopted voluntarily by a limited number of institutions, they enrich our intellectual life by contributing to the diversity of thought and preserving important alternatives to post-Enlightenment secular orthodoxy. Their very distinctiveness makes them better able to resist the popular currents of majoritarian culture and thus to preserve the seeds of dissent and alternative understandings that may later be welcomed by the wider society.

But though few openly challenge the worth of religious colleges and universities, many are indifferent or even hostile to the practices that may be necessary for their preservation. 29 Principal among these practices is a

28. Id.
29. In a recent article, for example, a professor of religious studies concluded a call for extending secular academic freedom to religious institutions with the remarkable assertion that "[a]ll closed systems threaten the critical mind and the open society, especially those systems of thought
vigilance to preserve a distinctive character in the face of the pervasively secular academic culture. One of the primary tenets of secular academic freedom is that scholars must be appointed and retained without regard to their creedal or philosophical commitments, other than to the established norms of their professional disciplines. At best, the effect of this application of academic freedom is to randomize every faculty with respect to creed and philosophy. This increases diversity within each faculty, but it eliminates diversity among faculties. Every faculty will tend to resemble every other faculty, subject only to statistical deviations from the mean. Under such a system, religiously distinctive institutions necessarily will cease to exist. The faculty manage the institution; if they are hired and retained without regard to their religious commitments, only a small minority will hold to the tenets of the institution, and the institution will inevitably lose its essential character.\footnote{30}

Extension of the secular understanding of academic freedom would effectively expel religiously distinctive colleges from American intellectual life, either putting them out of business or, which is much the same thing, forcing them to adopt the intellectual mores of secular academia. The desirability of that extension must be judged according to the desirability of that consequence.

B. Consistency with the Purposes of Academic Freedom

As a normative principle, academic freedom is justified primarily in terms of its necessity for the advancement of "learning and scholarship."\footnote{31} Scholars are not accorded this extraordinary degree of autonomy as a privilege, but because we understand the clash of competitive ideas to be the method by which truth is best discovered. But this idea, too, must be subject to testing and falsification. It contradicts the premises of academic freedom to state that one idea—the idea of academic freedom—must be given a privileged status and imposed universally by coercive means.

The older religious, or dogmatic, tradition also had its theory of knowledge. It held to certain propositions: (1) truth is unchanging and exists prior to and independent of the process of discovery; (2) truth is only partially discernible through human efforts; indeed, the products of human effort,
being a manifestation of a fallen nature, should always be tested against divine authority; (3) truth is imparted to humanity, at least in part, through divine agency, whether this is the Holy Bible, the tradition and teaching authority of the church, or the unaided inner light of conscience; (4) departures from established understandings are as likely to result in error as in advancement of truth; and (5) the consequences of the spread of error are serious and eternal. It is easy to see why an adherent to these propositions would be unwilling to accept secular academic freedom, which assumes that truth is always in the process of discovery through human reason, and that error must be tolerated (perhaps even welcomed) as necessary to the discovery of truth.

It would be a mistake to dismiss the religious understanding as mere obscurantism. Its presuppositions regarding the pursuit of knowledge differ substantially from those most of us in modern academia share, but they have an integrity and a coherence. Whether they are right or wrong is not susceptible to proof; this is ultimately a proposition of faith. But the same must be said of the scientific method that underlies academic freedom. Neither religious nor rationalist methodology can be "proven" from an objective standpoint. Both systems of thought claim to be self-validating, in that practitioners of both believe that their results are so compelling that one who engages in them will be compelled to assent to their validity.32

For a limited number of institutions to adhere to the older norm is therefore not antithetical to but rather consistent with the purposes behind the institution of academic freedom. It will increase diversity in the culture as a whole and enable the competition of ideas to continue. As Douglas Laycock and Susan Waelbroeck observed in a recent article, “from a societal perspective, pluralism and the search for truth may be more helped than hindered by distinctive institutions forcefully representing each of the country's many religious traditions.”33 It is important that a principle born of opposition to dogmatism not itself become dogmatic and authoritarian.

Moreover, extension of secular principles of academic freedom could be particularly self-defeating under current circumstances in academia. As noted above, the freedom of the individual scholar under standard principles of academic freedom is limited by the professional norms of the scholar's discipline. A Ptolemaist in an astronomy department would not last long. Recent disputes over the evaluation of the work of scholars writing from the perspectives of racial minorities or of feminism have highlighted the

32. A Catholic philosopher put the point in this way:

The truth of faith makes an incontrovertible demand upon the intellect of the believer, a demand no more open to denial than that made by facts of experience or evident logical truths. The unbeliever is unaware of this demand, not because of any greater freedom on his part, but rather because of incapacity—as the blind man is unaware of the demand that visible evidence makes upon the minds of those who can see.


subjectivity of these professional norms, which many now see as mere screens for the dominant ideology. 34

Whatever the merits of the argument in those contexts, it can scarcely be doubted that religious perspectives are systematically suppressed and silenced in the modern academy under the banner of “objective” professional or disciplinary norms. There are courses in Feminist Jurisprudence at most major secular law schools; I am not aware of any such course in Christian (or other religious) Jurisprudence. 35 Would such a course be approved? If approved by the authorities, how would it be greeted by the students? If offered, would the professor feel free to “proselytize” for his or her position, in the way the professor of a course in Feminist Jurisprudence would feel free to “proselytize”? I suspect that any hint of a religious approach to the subject matter would be deemed academically inappropriate. 36 Is there any major intellectual or ideological perspective so “invisible” in the modern academy as the religious? Given the antireligious 37 character of modern academic culture, serious religious scholarship would be in danger of extinction if it were not for particular institutions in which it is valued and protected. It is no coincidence that the rise in religious particularism has occurred most prominently in institutions connected with perspectives (evangelical and fundamentalist Protestantism, conservative Catholicism) that consider themselves most ruthlessly suppressed in the secular academy.

C. Religiously Distinctive Institutions of Higher Education Are Necessary for Religious Freedom

Even if the survival of religiously distinctive colleges and universities could not be defended on academic grounds, our society’s commitment to freedom of religion would demand some accommodation of the need of religious colleges and universities to modify the secular principles of academic


36. A tenured professor at the University of Alabama, for example, was recently instructed to refrain from making occasional references in the classroom to his religious views, clearly labelled as personal opinion, or from offering an optional after-class session on the Christian implications of the subject matter. The University explicitly permits the expression of personal opinions and the holdings of after-class meetings with students if discussions are not from a religious perspective. Challenged on free speech, free exercise, and academic freedom grounds, this directive was upheld by the Eleventh Circuit. Bishop v. Aronov, No 90-7239, 1991 WL 23706 (March 15, 1991).

37. By “antireligious,” I do not mean that most modern academics oppose the private practice of religion. What they oppose is the application of religious thought to “real” subjects.
freedom. These institutions are an important means by which religious faiths can preserve and transmit their teachings from one generation to the next, particularly for nonmainstream religions whose differences from the predominant academic culture are so substantial that they risk annihilation if they cannot retain a degree of separation. The right to develop and pass on religious teachings is at the very heart of the first amendment, and there should be no doubt that these concerns override whatever exiguous benefit to society might be achieved by forcing religiously distinctive institutions to conform to secular academic freedom.

Constitutional principles serve as a legal limit only on actors who exercise governmental power, such as accrediting agencies, regulatory bodies, and courts. Others have made the case that the first amendment protects religious institutions, especially their theology schools and seminaries, from regulation designed to enforce secular academic freedom, and I will not repeat their arguments. One point must be addressed, however: the impact of Employment Division v. Smith, the recent decision that held that the free exercise clause does not require exemptions from neutral laws of general applicability. Upon cursory examination, the Court’s opinion might be thought to allow enforcement of uniform academic freedom principles against religious institutions. However, the Smith opinion recognized a number of exceptions to its rule of facial neutrality, three of which are relevant to this context: (1) “hybrid” claims, in which free exercise is combined with other constitutional claims, including the freedoms of speech and association, (2) the right of parents to control the education of their children, and (3) the right of religious institutions to control their internal governance in cases such as property disputes. Any or all of these exceptions should apply here, and should prevent state actors from interfering with the ability of religious institutions to require doctrinal fidelity of their faculties.

Beyond the legal limits of the Constitution, however, private actors such as the AAUP should uphold the free exercise rights of religious institutions and

38. If religion is viewed primarily as an ideological commitment, it would follow that other ideological positions are similarly entitled to establish colleges and universities with specific creedal limitations. But religions are more than an ideological commitment. They are also communities of believers with mutual ties of loyalty and common purpose. Religious colleges and universities do more than transmit creeds; they also raise up leaders and members in the tradition and communion of the faith. As such, the function of religious institutions may resemble that of traditional black colleges more closely than that of an ideological academy. This additional function of religious institutions probably accounts for the fact that religiously distinctive colleges and universities have met with a degree of acceptance that would not have been accorded to ideological institutions.

39. Accrediting agencies are generally private organizations, but for these purposes they wield state power. For example, in most states only a graduate of an accredited law school can stand for the bar examination, and thus obtain a license to practice law.


42. For a critique of the case, see Michael W. McConnell, Free Exercise Revisionism and the Smith Decision, 57 U Chi L Rev 1109 (1990).

43. 110 S Ct at 1601-02.
need not be limited to the narrow conception of these rights expressed in Smith. The AAUP purports to speak in the name of the academy, and not as a mere partisan for a particular faction or point of view. Its pronouncements regarding academic freedom carry weight among academics and the public in large part because it is seen as objective. Such an association has a moral responsibility to respect the rights of religious bodies, even if those bodies entertain an understanding of knowledge contrary to that of the majority of the AAUP.

Even so, the pronouncements of the AAUP would be of no concern if they confined themselves to assuring that prospective faculty appointees and possibly others are not misled into assuming that a religious school complies with the usual secular norms of academic freedom—what might be called a "truth in advertising" function. In 1939, on the eve of promulgation of the 1940 Statement, Committee A reported:

[T]his Association would not deny to a group which desires to do so the right to support an institution for propagating its views. It merely insists that such an institution ought not to be represented to the public as a college or university for the promotion of the liberal arts and sciences, in which scholars and teachers are free to seek and impart truth in all its aspects.\(^4\)

If truth in advertising were the purpose of Committee A's activities, there would be no reason to object to its standards. Religious colleges and universities should not be shy to admit that their understanding of academic freedom differs from that of the AAUP, and a clear declaration to that effect should serve to prevent misunderstanding. Margarine is not the same thing as butter, and margarine producers can have no legitimate objection to a requirement that they designate their product as such.

The actions and statements of Committee A demonstrate, however, that its purpose goes far beyond mere truth in advertising. When issuing a report, the committee does not state that "Institution X abides by standards of academic freedom different from those required of secular institutions." Rather, it "censures" the institution for violating academic freedom. The 1988 subcommittee proposal would purport to drum offending institutions out of the universe of "authentic seat[s] of higher learning"—a position the full committee recognized as presumptuous, but which continues to animate its decisions.\(^45\) There can be no doubt that the purpose of the enterprise is to

\(^{44}\) Report of Committee A for 1939, 26 AAUP Bull 45 (1940) (excerpted in The "Limitations" Clause, 74 Academe at 54 (cited in note 14)). Note the unfair twist on the word "truth" in this statement. A religious college does believe that its "teachers are free to seek and impart truth in all its aspects." What they object to is the teaching of error. To ask a religious institution to advertise itself in this way is to ask it to affirm that what it deems error is in fact "truth." It would be more in keeping with the methodological assumptions of secular academic freedom to affirm that "teachers are free to seek and impart what they consider to be truth in all of its aspects."

\(^{45}\) For example, Committee A stated that it "questions" whether "[Concordia Theological Seminary] can be said to function as truly an institution of higher learning." Concordia Theological Seminary, 75 Academe at 65 (cited in note 16). It is difficult to reconcile this with Committee A's statement in the 1988-89 Report "that it is not appropriate for the Association to decide what is and what is not an authentic institution in higher education." Committee A Report, 75 Academe at 54 (cited in note 21).
pressure the offending institutions to conform to the AAUP's position or, in the alternative, to ostracize them. Margarine must not only be clearly labelled; it must also be driven from the market. This is inconsistent with a commitment to religious freedom, which the AAUP ought to value even though it is not legally obliged to do so.

IV
SPECIFIC APPLICATIONS TO THEOLOGY SCHOOLS, MORALS REGULATION, AND DISCRIMINATION ON THE BASIS OF RELIGION

While the rights of religious colleges and universities should not be limited to these contexts, a large majority of academic freedom disputes arise in connection with doctrinal limitations on faculty teaching in theological disciplines, behavioral restrictions in conformity with the moral tenets of the religious tradition, and enforcement of antidiscrimination laws.

A. Theology Schools

Application of secular norms of academic freedom to seminaries and schools of theology is particularly inappropriate. Yet this has long been the goal of a segment within organized academia. The AAUP's influential 1915 Declaration of Principles stated:

Finally, in the spiritual life, and in the interpretation of the general meaning and ends of human existence and its relation to the universe, we are still far from a comprehension of the final truths, and from a universal agreement among all sincere and earnest men. In all of these domains of knowledge, the first condition of progress is complete and unlimited freedom to pursue inquiry and publish its results. Such freedom is the breath in the nostrils of all scientific activity.

Anyone with a passing familiarity with religious history will recognize the narrowness and sectarianism of this declaration. It is a statement that virtually no orthodox Christian of any denomination could accept. Its very choice of words suggests a hostility toward revealed religion. The assertion that "[s]uch freedom is the breath in the nostrils of all scientific activity" takes its image from Genesis 2:7, which states that God "breathed into [Adam's] nostrils the breath of life." The 1915 Declaration thus suggests metaphorically that, in the modern academy, academic freedom has taken the place formerly


47. Even those Christian theologians who place a high value on academic freedom would surely insist that the "first condition of progress" is an openness to the leading of the Holy Spirit. The noted Protestant theologian Karl Barth, for example, insisted that "reason, if left entirely without grace, is incurably sick and incapable of any serious theological activity" and can produce statements of truth "[o]nly when it has been illumined, or at least provisionally shone upon by faith." Peter Fraenkel, trans, Natural Theology: Comprising "Nature and Grace" by Professor Dr. Emil Brunner and the Reply "No!" by Dr. Karl Barth (1946), quoted in Mensch & Freeman, 25 Ga L Rev (forthcoming 1991) (cited in note 35). This, according to Barth, is one of the points Catholicism and Protestantism have in common.
occupied by God. For the dominant forces of secular academia to attempt to impose dogmas of this sort even in the spiritual realm was an ironic reversal of roles; only a few generations earlier, the dominant forces of religious academia had successfully imposed the opposite dogmas on the sciences.

The assumption that theology should be conducted according to the epistemological principles of science is ill-considered. Unlike the scientific disciplines, in which individual inquiry is the chosen path to discovery and truth is understood to be independent of the ideas and beliefs of others, the theological disciplines are communitarian by their very nature. Catholic theology is not the same as Islamic theology. An atheist, however brilliant, is likely to be a deficient theologian and poor mentor for aspiring clergy. The theologian is engaged in working out the ramifications of common beliefs that unite large numbers of people, and the present with the past. The advancement of knowledge within a theological tradition occurs principally through thought and discussion based on shared principles. While comparative religion (like comparative law) is a valuable supplementary perspective, it makes no more sense for the Catholic theologian to be allowed to expound non-Catholic doctrine in the name of the Church than it would for an American torts professor to teach Chinese tort law as if it were American law.

Doctrinal limitations are therefore necessary to the theological disciplines in a way that they are not for the scientific disciplines. It is nothing short of destructive for the organized forces of academia to attempt to coerce seminaries and schools of theology into ceasing to enforce their doctrinal boundaries or adopting the scientific method for the pursuit of spiritual understanding.

In recent years, Committee A has articulated greater awareness of the inherent conflict between the purposes of theological education and the methods of academic freedom. In a recent report, the committee quoted a statement on academic freedom by the Association of Theological Schools ("ATS") that theological schools may require "confessional adherence" but at the same time must "practice the highest ideals of academic freedom." The

48. Even in secular disciplines, it is questionable that the pursuit of knowledge is best advanced through randomizing faculties as to point of view. It is no secret that some departments have a disproportionate concentration of faculty from a particular school of thought within the discipline. This presumably is evidence of a departure, conscious or unconscious, from the pure theory of academic freedom; but it is probably a good thing, at least when different institutions "specialize" in different schools of thought, thus preserving an overall diversity within academia. This specialization enables scholars with similar presuppositions to advance the boundaries of knowledge within their school of thought rather than to divert their energies into disputations over issues so fundamental that they are unlikely to result in a change of position.

49. Father Charles Curran, who was dismissed from his position as a professor of Catholic theology at Catholic University, is one of the foremost proponents of increasing the degree of individual academic freedom in theology schools. Yet even he concedes that "a Catholic theologian [must] theologize within the sources and parameters of the Catholic faith" and that a Catholic theologian "who does not believe in Jesus or does not accept a role for the pope in the Church" could be dismissed for incompetence. Charles E. Curran, Academic Freedom and Catholic Universities, 66 Tex L. Rev. 1441, 1453-54 (1988).
committee observed that "one may question whether an institution can do both at the same time." 50 Notwithstanding this recognition of the contradiction, the committee continues to engage in the intrusive process of attempting, as secular outsiders, to determine what degree of doctrinal fidelity is necessary within the seminary or theological faculty—in the committee's words, "how far an institution may go in announcing and implementing limitations on academic freedom without effectively negating any meaningful presence of academic freedom at that institution." 51

Thus, the attempted resolution of the contradiction seems to be to steer a middle course: to allow theological schools to maintain some degree of creedal orthodoxy, but to require them to permit a considerable degree of freedom within those constraints. As stated by the ATS, "[s]o long as the teacher remains within the accepted constitutional and confessional basis of his school, he should be free to teach, carry on research, and to publish, subject to his adequate performance of his academic duties as agreed upon with the school." 52

While this may well be an appropriate statement of academic freedom within a religious institution for intramural purposes, there are two serious problems with any attempt by secular outsiders to enforce it. First, the degree of doctrinal freedom consistent with religious orthodoxy varies markedly from one religious tradition to another and is often a matter of internal controversy. The determination of how much latitude should exist cannot be made on a doctrinally neutral basis. Rigid adherence to particular beliefs is the defining characteristic of some religious traditions, while theological flexibility and latitudinarianism are the hallmarks of others. To insist on the maximum degree of academic freedom possible within the tradition is to press systematically in the direction of latitudinarianism.

For example, in the past decade the Southern Baptist Convention has been convulsed by an intense doctrinal battle between the so-called "fundamentalists" and the so-called "moderates." One of the key defining issues in the controversy is the degree of doctrinal flexibility permitted in the reading of the Holy Bible, and among the key positions of influence within the denomination are its seminaries. When the AAUP investigated alleged academic freedom violations at fundamentalist-controlled Southeastern Baptist Theological Seminary in Wake Forest, North Carolina, it was put in the position of adjudicating the merits of these doctrinal positions—though the committee apparently did not recognize this. Is a strict view of Biblical inerrancy necessary in order to remain "within the accepted constitutional and confessional basis" of the Baptist faith? Or is a more "moderate" hermeneutic theologically acceptable? The permissible degree of departure from secular academic freedom depends upon the answer to these questions. While the report of the committee censuring the Southeastern Baptist

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50. Concordia Theological Seminary, 75 Academe at 64 (cited in note 16).
51. Id at 63.
52. Id at 64.
Seminary for its "academic freedom violations" may have been a victory for those who share the "moderate viewpoint" in the doctrinal battle, why should anyone believe that a committee of the AAUP is competent to decide such questions? In such a case, the interpretation of academic freedom is not, and cannot be, anything other than a doctrinal and ecclesiological judgment.

Second, even if the standard were not itself loaded in favor of more latitudinarian doctrinal positions, investigations by secular outsiders are likely, consciously or unconsciously, to result in doctrinal judgments. One assumes that Committee A investigations are the fairest and most scrupulously neutral one could reasonably hope for, but their reports on alleged academic freedom violations in religious settings are highly insensitive to the need for outsiders to refrain from taking sides in intradenominational religious disputes or from second-guessing the judgments of religious authorities regarding religious matters.

In an analogous context, the Supreme Court insists that civil courts must not apply their own criteria to the resolution of intrachurch property disputes, even when the defeated faction was treated unfairly, because of the danger that such decisions would touch upon disputed doctrinal issues. Instead, the courts must apply neutral principles of property law to the formal legal documents of the church, or defer to the church authorities. The AAUP would be wise to adopt a similar policy. Its attempt to strike a middle ground between complete imposition of secular academic freedom and complete recognition of institutional autonomy embroils the organization in doctrinal disputes in which it has no competence. At least in the context of seminaries and theological schools, the AAUP should formally abandon any attempt to second-guess the regulation of doctrinal purity and academic freedom.

53. For example, Committee A's report on Southeastern Baptist Theological Seminary (North Carolina) reported the "sense of grievance and persecution" felt by "[s]tudents" at the school (not some students, but "students"), and equated "student" opinion with the views of "the moderate Southern Baptist Alliance." Academic Freedom and Tenure: Southeastern Baptist Theological Seminary (North Carolina), 75 Academe 35, 44 (May-June 1989). Yet the report mentions the existence of another student organization evidently aligned with the administration, only to criticize members of this organization for their alleged "rude and sententious questioning and confrontation in classes." Id. Why does one faction receive the mantle of speaking for "students"? Is it because one is more numerous? Is it because one is more polite? Is it because one takes a position in the dispute that AAUP committee members find more congenial?

54. For example, after its investigation of the Catholic University of Puerto Rico, Committee A reported that the university's statutes had been revised in 1981 "to reflect the views of the Conference of Bishops of Puerto Rico on the norms of morality that should guide the conduct of Catholics," including civil divorce and remarriage, but that the new interpretation would not be applied retroactively to canonically invalid marriages performed before the statement. Academic Freedom and Tenure: The Catholic University of Puerto Rico, 73 Academe 33, 36 (May-June 1987). The AAUP committee commented: "Prearranged sin, it seems, is preferable to impulsive iniquity." Id. The AAUP committee may have jurisdiction to opine that a university's disciplinary regulations are unjustified, but it has no competence to evaluate the validity of Catholic moral teachings. That it would make sarcastic remarks about them says much about the nature of the process.

55. See Jones v Wolf, 443 US 595, 603 (1979); Serbian Eastern Orthodox Diocese v Milivojevich, 426 US 696 (1976); Presbyterian Church v Mary Elizabeth Blue Hull Presbyterian Church, 393 US 440 (1969); Kedroff v St Nicholas Cathedral, 344 US 94 (1953).
B. Behavioral Regulation

Some religious colleges and universities require their faculty and students to adhere to certain standards of conduct, such as not drinking or smoking, or not (for some Catholic institutions) remarrying following a divorce. The theory behind these regulations is that the institution is attempting to communicate a particular way of life to its students and that violation by the faculty of those precepts would undermine the moral teaching. Behavioral regulation can be no less important than doctrinal standards to a religious institution, for actions often speak louder than words.

A particularly egregious example of interference with the rightful authority of a religious institution occurred recently in the Louisiana state courts. In Babcock v. New Orleans Baptist Theological Seminary, the court ordered a seminary to grant a Master of Divinity degree in marriage and family counseling to a student despite a determination by the institution that he was "unfit for spiritual, moral, mental, or other reasons" stemming from alleged physical abuse of his wife. The court held that the student's conduct did not "touch upon theological or ecclesiastical matters" and that the seminary, an arm of the Southern Baptist Convention, does not "have any power to determine a student's fitness for ministry." Such a judgment mocks the first amendment's insistence that civil authorities not meddle with religious decisions and leave determinations regarding the spiritual qualifications of clergy to the religious bodies themselves.

Moreover, the countervailing concerns for academic freedom are far less powerful in cases of behavioral regulation than in cases involving creedral limitations. Restrictions on behavior are not restrictions on thought; indeed, the connection to academic freedom is rather attenuated. To tell a professor he may not smoke does not limit the professor's freedom to teach, research, or write in accordance with his scholarly judgment. Presumably, the only reasons moral regulation is deemed to raise an academic freedom problem are that it has an indirect effect on the pool of faculty (to restrict the faculty to nondrinkers, for example, might tend to produce a faculty with certain attitudes of mind) and that it creates opportunities for hiding improper disciplinary actions. Tenure systems are easier to police if the grounds for dismissal are few and extreme. These reasons may be sufficient to treat moral regulation as an academic freedom problem in the usual case, but they are not sufficient to overcome the institution's interest in communicating through deed as well as word. The AAUP should formally declare that it will no longer interfere with behavioral regulation within religious institutions, where the

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56. See, for example, Catholic University of Puerto Rico, 73 Academe 33 (cited in note 54). The case involved the dismissal of a Catholic faculty member for a canonically invalid marriage.
57. 554 S2d 90 (La App 1989), cert denied, 111 S Ct 214 (1990) (Justice Blackmun dissented from the Court's denial of certiorari).
58. 554 S2d at 96.
59. Id at 97.
C. Antidiscrimination Claims

Sometimes the objection to creedal limitations on faculty or students is described in terms of discrimination rather than academic freedom. The problem, it is said, is that faculty or students are being discriminated against based on their religion.  

In the context of federal employment discrimination laws, Congress passed legislation exempting religious institutions from any prohibition on discriminating in favor of members of their own denomination, and the Supreme Court unanimously upheld the law. Justice Brennan explained that religious organizations must be “able to condition employment in certain activities on subscription to particular religious tenets” because “we deem it vital that, if certain activities constitute part of a religious community’s practice, then a religious organization should be able to require that only members of its community perform those activities.”

A similar principle should be applied to claims of discrimination in admissions or other academic decision-making. If the need for religious discrimination is legitimate in the case of janitors in a church-owned gymnasium, as the Court held, it is even more legitimate in the case of those appointed to teach in institutions responsible for education within the tradition of the faith. For the same reasons that secular academic freedom norms should be accommodated to the needs of religious institutions, accommodations should be made to the prohibition of discrimination on the basis of religion.

V

Conclusion

Academic freedom is central to the conception and function of a secular university, where the clash of ideas and the process of unfettered investigation lie at the heart of teaching and research. But that does not mean that the same norms of academic freedom must or should be applied indiscriminately to institutions with a different conception and function. Secular academic freedom could be as destructive of religious education, in some traditions at least, as the earlier dogmatic approach to knowledge would be of secular education.

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61. Discrimination on the basis of gender (or, much more rarely, race) can also give rise to free exercise problems in religious institutions. These problems are not related to academic freedom and are beyond the scope of this article. For analyses of the problem, see Bruce N. Bagni, Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations, 79 Colum L Rev 1514 (1979); Douglas Laycock, Tax Exemptions for Racially Discriminatory Schools, 60 Tex L Rev 259 (1982); Ira C. Lupu, Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination, 67 BU L Rev 391 (1987).


64. Id at 342-43 (concurring opinion).
research universities. Most observers readily concede the value of religiously distinctive institutions, especially in the theological disciplines, within a pluralistic system of American higher education. But many, including the dominant forces within organized academia, are unwilling to accept that the preservation of these distinctive institutions requires some accommodation of the principle of secular academic freedom, and that the degree of accommodation depends crucially on the doctrinal position of the individual institution. The result has been a series of unhappy incursions into the religious field that have left both defenders of religious autonomy and advocates of secular academic freedom dissatisfied with the determinations.

It would be far better for the secular academic world to return to the letter of the 1940 Statement, which allowed religious institutions to determine for themselves what "limitations" on secular academic freedom are necessary to maintain their own sense of mission, subject only to the requirement that these be stated clearly in advance. If it did so, secular and religious higher education would again be able to coexist in fruitful exchange, without intrusion or interference.

65. Even the requirement of advance notice should not be interpreted to preclude a religious institution from making good faith changes in its internal rules of religious governance, but only to require the institution to reveal its rules to faculty and prospective faculty. Religious freedom includes the right to change belief as well as to stick by it. As long ago as 1929, the Supreme Court held that it would be unconstitutional for civil authorities to interfere in the decisions of church tribunals on ecclesiastical affairs, even when changes in doctrine affected private rights. Gonzalez v Roman Catholic Archbishop of Manila, 280 US 1 (1929).